



# First Amendment

Cases, Controversies, and Contexts

First Edition Revised

RUTHANN ROBSON



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# First Amendment: Cases, Controversies, and Contexts

Ruthann Robson

Professor of Law & University Distinguished Professor

City University of New York (CUNY) School of Law

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## About the Author

Ruthann Robson is Professor of Law and University Distinguished Professor at the City University of New York (CUNY) School of Law.

Her books include *DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY* (2013); *SAPPHO GOES TO LAW SCHOOL* (1998); *GAY MEN, LESBIANS, AND THE LAW* (1996); and *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* (1992). She is also the editor of the three volume set, *INTERNATIONAL LIBRARY OF ESSAYS IN SEXUALITY & LAW* (2011).

She is one of two editors of the Constitutional Law Professors Blog and a frequent commentator on constitutional and sexuality issues.

She is one of the 26 professors selected for inclusion in *WHAT THE BEST LAW TEACHERS DO* (Harvard University Press, 2013).

# Notices

This is the first revised edition of this casebook, updated August 2016. Visit <http://elangdell.cali.org/> for the latest version and for revision history.

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# Preface

This Casebook is intended to be used in an upper-division course covering the First Amendment to the United States Constitution.

Its 14 chapters are substantially the same length, with the exception of Chapter One, the introduction, and Chapters Eleven and Twelve which in combination are the usual length. It is intended for 13 or 14 week semester that meets once or twice per week. Each Chapter contains a “Chapter Outline” at the beginning for ease of reference.

The Casebook is organized with the Speech Clauses as Part One and the Religion Clauses as Part Two. Unlike many other courses, there is no accepted organizational scheme within these broad areas. As the Introduction notes, First Amendment doctrine, especially within freedom of speech, presents a varied and haphazard landscape. The Casebook follows a scheme that has proven effective in my years of teaching the course to hundreds of students.

The selection of cases tends toward the most recent and these tend to be less heavily edited. These recent cases often contain extended discussions of earlier cases that are not included in the Casebook.

The excerpted cases and all cases in the Notes contain the official citation. However, within the text of excerpted cases, the full citations of cases are not included: only the case name and year appears the first time the case is cited within the opinion. Moreover, case citations are not always indicated by ellipses. When content is omitted, this is indicated by this symbol: \*\*\*.

This Casebook has been immeasurably improved by comments from my students in First Amendment at CUNY School of Law, especially those in the class in the Spring of 2015 when a “dry run” of the Casebook was used. Their responses to my queries (e.g., “which 5 pages did you find least helpful in this chapter?”), their engagement with the materials and original contributions, as well as their notations of typographical errors, are deeply appreciated.

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# Chapter One: INTRODUCTION TO THE FIRST AMENDMENT

## Chapter Outline

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- VIII. United States Supreme Court Terms: Recent Cases
  - 2014-2015 Term
  - 2013-2014 Term

## I. Text

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government from redress of grievances.*

## II. The Clauses

### A. The Religion Clauses

The religion clauses are two separate but intertwined clauses.

First, the text forbids Congress making laws respecting “an establishment of religion.” The Establishment Clause - - - more properly denominated an anti-Establishment Clause or disestablishment Clause, but routinely called the Establishment Clause - - means at its most basic that there cannot be a government religion. This is distinct from many other nations in which there is a national religion, including Great Britain’s Church of England. More specific meanings of what an “establishment” of religion might mean have been the subject of

numerous cases and controversies. Most vexing have been government support for religious education and for government displays of religiosity.

Second, the text forbids Congress making laws that would prohibit “the free exercise” of religion. This “freedom of religion” clause means at its most basic that government cannot outlaw a religion. Again, the history of England is instructive including criminal trials for heresy. And again, the more specific meanings of “prohibiting” and “free exercise” have been the subject of numerous cases and controversies. The extent to which the government must accommodate religious beliefs and practices has been the most contentious.

(Part Two, Chapters Eleven through Fourteen discuss the Religion Clauses).

## **B. The Free Speech Clause**

The First Amendment’s “freedom of speech” clause is the primary means of protecting expression. It is the clause that most people think of when they think of the First Amendment and it occupies a central place in First Amendment doctrine and theory. Indeed, other First Amendment rights are often grounded in the free speech clause. (Part One treats the extensive doctrine under the Speech Clause).

## **C. The Press Clause**

The text’s “or of the press” language immediately after the prohibition of the abridgement of freedom of speech might seem to guarantee freedom of the press as a separate right. Doctrinally, the “free press” clause is often coextensive with the “free speech” clause. (The Press Clause is further discussed in Chapter Four).

## **D. The Assembly Clause**

The Assembly Clause has not been the source of rights or doctrinal explication. Some of the framers imagined the clause to be superfluous and its interpretation has proven this to be true. (The Assembly Clause is further discussed in Chapter Seven).

## **E. The Petition Clause**

Like the Assembly Clause, the Petition Clause has not been the source of robust rights under the First Amendment. However, in *Borough of Duryea v. Guarnieri*, 564 U.S. \_\_\_ (2011), the Court held that the Petition Clause and the Speech Clause are not necessarily coextensive. In that case, a public employee brought a First Amendment claim that he had been terminated in retaliation for filing a grievance, i.e., a “petition.” The Court held, however, that the Petition Clause should be interpreted in

this case as coextensive with Speech Clause doctrine which would require the employee to be speaking about a matter of public concern. (The First Amendment rights of public employees are discussed in Chapter Five).

## F. Association: The “Missing” Clause

Note that the text of the First Amendment does not contain the word “association” although it is often thought to include it. This right, grounded in the Speech Clause, is often said to begin with the Court’s decision in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (included in Chapter Eight). In addition to the right to anonymity in belonging to an organization as in *NAACP*, other associational First Amendment rights include the ability of organizations to determine their membership in light of anti-discrimination laws. (These cases are included in Chapter Six).

## III. International Perspectives

The rights encompassed in the United States Constitution’s First Amendment are generally included in human rights documents and other national constitutions. The prohibition of government religion, as mentioned above, is less universal.

The Universal Declaration of Human Rights (1947) provides:

**Article 18.**

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

**Article 19.**

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

**Article 20.**

- (1) Everyone has the right to freedom of peaceful assembly and association.
- (2) No one may be compelled to belong to an association.

The International Covenant on Civil and Political Rights (ICCPR) (1966) provides:

**Article 18**

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

**Article 19**

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

**Article 20**

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

**Article 21**

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

**Article 22**

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Note the qualifications and balancing in the ICCPR and the mandate for the prohibition of hate speech. When the United States adopted the ICCPR in 1992, it specifically included a reservation regarding Article 20:

That Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992). The Senate Committee Report additionally implicitly rejected any balancing of free expression rights against other rights even if allowed under the ICCPR in favor of adherence to First Amendment doctrine, Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, 1 (102 nd Sess. 1992).

The Constitution of the Republic of South Africa (1996) is considered among the most progressive in the world. Consider its relevant provisions:

**15. Freedom of religion, belief and opinion**

1. Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
2. Religious observances may be conducted at state or state-aided institutions, provided that
  - a. those observances follow rules made by the appropriate public authorities;
  - b. they are conducted on an equitable basis; and
  - c. attendance at them is free and voluntary.
3.
  - a. This section does not prevent legislation recognising
    - i. marriages concluded under any tradition, or a system of religious, personal or family law; or
    - ii. systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
  - b. Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

**16. Freedom of expression**

1. Everyone has the right to freedom of expression, which includes
  - a. freedom of the press and other media;
  - b. freedom to receive or impart information or ideas;
  - c. freedom of artistic creativity; and
  - d. academic freedom and freedom of scientific research.
2. The right in subsection (1) does not extend to
  - a. propaganda for war;
  - b. incitement of imminent violence; or
  - c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

**17. Assembly, demonstration, picket and petition**

Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

**18. Freedom of association**

Everyone has the right to freedom of association.

**19. Political rights**

1. Every citizen is free to make political choices, which includes the right
  - a. to form a political party;
  - b. to participate in the activities of, or recruit members for, a political party; and

c. to campaign for a political party or cause.  
\*\*\*

## IV. State Action and Incorporation Against the States

The United States Constitution has two important features that are vital in the consideration of its First Amendment.

First, there is the requirement of “state action” as evinced by the opening words of the text: *Congress shall make no law*. Like other constitutional protections (with the notable exception of the Thirteenth Amendment), the First Amendment is a guarantee against infringement by the government rather than private actors.

The First Amendment is notable, however, in that people often invoke it against when they are “silenced” by criticism or even interrupted on a talk show. For example, Dr. Laura Schlessinger, whose racial epithets on her radio show have caused criticism, announced her retirement from the show in 2010 reportedly claiming that she wants “to regain my First Amendment rights.” Sarah Palin also invoked the First Amendment in two tweets defending Schlessinger:

*Dr.Laura: don't retreat...reload! (Steps aside bc her 1st Amend.rights ceased 2exist thx 2activists trying 2silence" isn't American,not fair");*

*Dr.Laura=even more powerful & effective w/out the shackles, so watch out Constitutional obstructionists. And b thankful 4 her voice,America!*

Second, there is the question of federalism. Importantly, while the First Amendment constrains only government, it constrains all governments. Although the text begins “Congress shall make not law,” the provisions of the First Amendment have been applied to the states (and thus their subdivisions) through the process of selective incorporation under the Fourteenth Amendment’s Due Process Clause.

The First Amendment’s Speech Clause is considered the first of the rights in the Bill of Rights to be incorporated against the states, *see Gitlow v. New York*, 268 U.S. 652 (1925). In *Near v. Minnesota*, 283 U.S. 697, 707 (1931), the Court noted discussed the Press Clause and stated it “is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.”

The Religion Clauses were likewise deemed applicable to the states in the Twentieth Century. In *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), the Court held that the “fundamental concept of liberty embodied” in the Due Process Clause of the Fourteenth Amendment “embraces the liberties guaranteed by the First Amendment.” It continued, the “First

Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.” However, because *Cantwell* did not involve the Establishment Clause, the case of *Everson v. Board of Education*, 330 U.S. 1 (1947), decided seven years later, is generally considered authority for the proposition that the Establishment Clause applies with equal force to the states as to the federal government.

There is one current United States Supreme Court Justice who has expressed the opinion that the Establishment Clause is not incorporated against the states. See *Town of Greece v. Galloway*, 572 U.S. \_\_ (2015) (Thomas, J., concurring); *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 49-51 (2004) (Thomas, J., concurring in judgment); *Van Orden v. Perry*, 545 U. S. 677–693 (2005) (Thomas, J., concurring); *Zelman v. Simmons-Harris*, 536 U. S. 639–680 (2002) (Thomas, J., concurring). Justice Thomas has argued that unlike the Free Exercise Clause, which protects an individual right, the “text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments.” *Elk Grove*, 542 U.S. at 49. Under Thomas’s view, states could “establish” a religion, or, at the very least, the actions of states regarding establishment should be analyzed with less rigor. The vast majority of First Amendment practitioners and scholars, as well as judges, consider the Establishment Clause to be applicable to the states and their subdivisions.

## V. History: The Firstness of the First Amendment

It is often argued that the First Amendment contains the “first freedoms” and were so highly valued by the Framers of the Constitution that they were placed first.

However, the history is a bit more nuanced. Consider the original Articles of Amendment to the Constitution:

Congress of the United States begun and held at the City of New-York, on Wednesday the fourth of March, one thousand seven hundred and eighty nine (1789). Articles in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

Original Amendments PASSED by Congress to be ratified by States

Article the first ... After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand

persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

Article the second ... No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

Article the third ... Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Articles/Amendments One and Two are not ratified by the States. Thus, Article/Amendment Third becomes Article/Amendment First: the current First Amendment. (Note that Article/Amendment Two becomes the 27th Amendment in 1992.)

Nevertheless, the Framers of the Constitution were undoubtedly influenced by the history of England and their own experiences regarding both speech and religion. In terms of speech and press, the “licensing” of publications and criminal prosecutions for sedition were important. In terms of religion, the violent history of religious conflicts in Great Britain and the rest of Europe were paramount, especially given that the some of the states were colonies founded on religious motives.

## VI. Theoretical Perspectives

In addition to the usual theoretical perspectives governing constitutional interpretation such as originalism and living constitutionalism, the First Amendment provokes some distinct theoretical perspectives.

The absolutist perspective of the First Amendment gains credence from the language of the Amendment: Congress shall make “no law” as compared to other restraints in the Bill of Rights such as the Fourth Amendment’s language of “unreasonable searches and seizures.” While this absolutist perspective has not prevailed, it is often evoked, explicitly or implicitly, in First Amendment arguments.

The notion of free speech is often premised on a “marketplace of ideas” metaphor that appeared in early cases. This capitalist sentiment conceptualizes a free enterprise competition requiring little, if any, government regulation. Another influential view is that of Alexander Meiklejohn which envisions a more proactive view for government in ensuring democratic processes; this might mean that the government regulates abusive speech, for example, in the interest of democracy. A good discussion comparing these two views is Robert Post, *Reconciling*

*Theory and Doctrine in First Amendment Jurisprudence*, 88 Cal. L. Rev. 2353 (2000). Other views highlight an individualistic understanding of free speech, akin to other rights accorded to autonomous persons.

However, no overarching theoretical perspective explains the disarray of free speech theories and doctrines, especially because the distinctions between theory and doctrine are often blurry. Even the question of whether expression qualifies as speech can be complicated. The categorization of types of expression - - - for example political or commercial - - - is debated. Moreover, the exclusion of some types of speech, for example obscenity, is also fraught. Concepts such as “chilling speech” or “secondary effects” waver between theory and doctrine.

Similarly, the status of religion is not amenable to an overall theoretical perspective. In some senses, the two religion clauses are at odds if each is extended to its logical conclusion. The Establishment Clause, more accurately called the anti-Establishment Clause, generally means that the government should not put its imprimatur on religion. However, the Free Exercise Clause generally means that the government should accommodate religious beliefs. The issue is often when “accommodation,” especially of majority beliefs, becomes an “establishment” of religion objectionable to minority religious believers or nonbelievers.

Additionally, protection of religious expression has been subject to legislative action. These protections have prompted several important and some controversial recent United States Supreme Court cases (included in Chapter Fourteen).

## VII. The Challenges of First Amendment Cases and Controversies

There are several challenges to any study of the First Amendment.

First, many First Amendment cases, especially those involving speech and speech-related issues, evoke numerous doctrines. At times, the issue is what doctrine should apply. As Professor Julie Nice has explained, a typical dispute can involve many of First Amendment doctrines allowing the Court to “choose from among these various doctrines to frame and structure its analysis” with an eye toward the likely result. Julie A. Nice, *How Equality Constitutes Liberty: The Alignment of CLS v. Martinez*, 38 HASTINGS CONST. L.Q. 631, 639-40 (2011).

In her analysis of *Christian Legal Society v. Martinez* (excerpted in Chapter Seven), Professor Nice contends that *Martinez* is a “textbook example” of the problem. In *Martinez*, the Court could have focused on the law school’s policy as content or even viewpoint based OR whether the law school created a public forum OR the public university setting OR the conditions of the benefit of student group recognition OR compelled speech or compelled association OR free exercise of religion OR on the prohibition of establishment of religion. Professor Nice suggests that a fundamental question is whether the Court has been consistent in selecting which doctrine will frame its decision. *Id.*

There is a good argument that the Court has not been consistent in selecting doctrinal frames. *Martinez* may be a “textbook example,” but it is not at all unusual. Many - - - perhaps even the majority - - - of cases involve a choice of doctrine. This makes studying and litigating First Amendment cases challenging.

A second challenge is doctrinal incoherence even within distinct doctrines. This is not to say that there are not settled tests; there are. This makes the First Amendment a consistent choice for those drafting Bar Examination questions! Nevertheless, the Court is often undermining its own previously announced tests.

Third, the sheer number, the often extensive length, and the regularity of fractured and closely divided opinions by the United States Supreme Court can make First Amendment study challenging. Until the First World War, the Court devoted little attention to the First Amendment, but since then it has decided more than 500 cases that discuss the First Amendment. Of course, not all of these cases are landmark cases or rest exclusively on First Amendment grounds. Nevertheless, there is much material.

Fourth and finally, other federal courts as well as state courts routinely decide First Amendment cases, many of which are groundbreaking or involve cutting-edge and unresolved questions of law.

These four challenges implicate this Casebook.

First, because of numerous doctrinal frames within a single case, there is little agreement about organization and placement of cases within that organization. Thus, casebooks and study aids deploy a dizzying array of schemes and references to illustrative cases. Generally speaking, however, there is sharp divide between the Speech and Religion Clauses (although a case may address both of these). Additionally, within speech, there are distinct doctrines governing the press, public employees and public school students, and commercial speech, although these doctrines often overlap with other doctrines. This Casebook deploys an

organization that has worked well in previous years and points to doctrinal selection issues as they occur.

Second, and not unlike other constitutional cases, the Court's articulation of a test in one case may be undermined by later cases. This Casebook clearly identifies the landmark "tests" and then examines their status.

Third, the number and length of the Supreme Court's First Amendment cases makes for difficult editing choices. The major cases are all included or referenced. The Casebook's inclusion preference has generally been toward more recent cases and these cases have been more lightly edited to provide more context for current controversies.

Fourth and finally, the Notes reference lower federal court and state court cases. These cases often provide important context for developing doctrine and issues.

## VIII. United States Supreme Court Terms: Recent Cases

One method of starting to study the First Amendment is to consider the Court's recent cases.

While each of these is discussed or excerpted in the Chapters that follow, a quick overview of the cases can serve as an introduction to current First Amendment cases and controversies that have reached the United States Supreme Court.

### 2015-2016 Term

*Friedrichs v. California Teachers Association* (a 4-4 per curiam affirmance in challenge to public sector mandated union dues)

*Heffernan v. City of Paterson* (an employee political activity case based on employer mistake)

*Zubik v. Burwell* (and consolidated cases) (a challenge to seeking accommodation of religion under RFRA in which the Court remanded for settlement discussions)

## 2014-2015 Term

*Elonis v. United States* (the “facebook threats” case in which the Court opted for a statutory construction and sidestepped the First Amendment issue)

*Reed v. Town of Gilbert, Arizona* (sign ordinance)

*Holt v. Hobbs* (a prisoner’s beard as freedom of religion under RLUIPA)

*Walker v. Texas Division, Sons of Confederate Veterans* (denial of specialty license plate)

*Williams-Yulee v. The Florida Bar* (professional responsibility sanction against judicial candidate who solicited campaign contributions).

## 2013-2014 Term

*Sebelius v. Hobby Lobby Stores* (religious-based statutory challenges to the contraception “mandate” of the Affordable Care Act)

*Harris v. Quinn* (quasi-labor law involving personal care providers and representation for Medicaid reimbursement)

*McCullen v. Coakley* (abortion clinic buffer zone for protest)

*McCutcheon v. Federal Election Commission* (campaign finance)

*Susan B Anthony List v. Driehaus* (election law prohibiting false statements)

*Town of Greece v. Galloway* (prayer at town meeting)

*United States v. Apel* (protest outside military installation)

*Wood v. Moss* (protest zones for anti-Bush and pro-Bush demonstrators)

# Part I: The Speech Clauses

# Chapter Two: PROTECTIONS FOR POLITICAL SPEECH

This chapter considers the foundations of political speech, including the earliest criminalization of speech, how the rhetoric of “clear and present danger” develops into doctrine, the problem of criminalizing “offensive” speech, and distinguishing protected advocacy from speech that can be criminalized. The chapter concludes with the Court’s controversial 2010 opinion in *Holder v. Humanitarian Law Project*.

## Chapter Outline

### I. The Alien and Sedition Acts

The Alien Act: An Act Respecting Alien Enemies

The Sedition Act: An Act in Addition to the Act, Entitled "An Act for the Punishment of Certain Crimes Against the United States"

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### II. Clear and Present Dangers

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Note: Justice Oliver Wendell Holmes

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Notes

#### B. Labor Unrest

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### III. “Offensive” Speech

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Notes

### IV. Distinguishing Protected Advocacy

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Notes

Note: The Heckler’s Veto

### V. “Political” Speech in the Age of “Terrorism”

Holder v. Humanitarian Law Project

Notes

## I. The Alien and Sedition Acts

Signed into law by President John Adams, who reportedly later came to regret it, the “Alien and Sedition Acts” are an example of laws enacted during the “founding generation.”

### *The Alien Act: An Act Respecting Alien Enemies*

APPROVED July 6, 1798

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever there shall be a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion shall be perpetrated, attempted, or threatened against the territory of the United States, by any foreign nation or government, and the President of the United States shall make public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies. And the President of the United States shall be, and he is hereby authorized, in any event, as aforesaid, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, towards the aliens who shall become liable, as aforesaid; the manner and degree of the restraint to which they shall be subject, and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those, who, not being permitted to reside within the United States, shall refuse or neglect to depart therefrom; and to establish any other regulations which shall be found necessary in the premises and for the public safety: Provided, that aliens resident within the United States, who shall become liable as enemies, in the manner aforesaid, and who shall not be chargeable with actual hostility, or other crime against the public safety, shall be allowed, for the recovery, disposal, and removal of their goods and effects, and for their departure, the full time which is, or shall be stipulated by any treaty, where any shall have been between the United States, and the hostile nation or government, of which they shall be natives, citizens, denizens or subjects: and where no such treaty shall have existed, the President of the United States may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality.

SEC. 2. And be it further enacted, That after any proclamation shall be made as aforesaid, it shall be the duty of the several courts of the United States, and of each state, having criminal jurisdiction, and of the several judges and justices of the courts of the United States, and they shall be, and are hereby respectively, authorized upon complaint, against any alien or alien enemies, as aforesaid, who shall be resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such

proclamation, or other regulations which the President of the United States shall and may establish in the premises, to cause such alien or aliens to be duly apprehended and convened before such court, judge or justice; and after a full examination and hearing on such complaint. and sufficient cause therefor appearing, shall and may order such alien or aliens to be removed out of the territory of the United States, or to give sureties of their good behaviour, or to be otherwise restrained, conformably to the proclamation or regulations which shall and may be established as aforesaid, and may imprison, or otherwise secure such alien or aliens, until the order which shall and may be made, as aforesaid, shall be performed.

SEC. 3. And be it further enacted, That it shall be the duty of the marshal of the district in which any alien enemy shall be apprehended, who by the President of the United States, or by order of any court, judge or justice, as aforesaid, shall be required to depart, and to be removed, as aforesaid, to provide therefor, and to execute such order, by himself or his deputy, or other discreet person or persons to be employed by him, by causing a removal of such alien out of the territory of the United States; and for such removal the marshal shall have the warrant of the President of the United States, or of the court, judge or justice ordering the same, as the case may be.

***The Sedition Act: An Act in Addition to the Act, Entitled  
"An Act for the Punishment of Certain Crimes Against the  
United States"***

APPROVED July 14, 1798

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That if any persons shall unlawfully combine or conspire together, with intent to oppose any measure or measures of the government of the United States, which are or shall be directed by proper authority, or to impede the operation of any law of the United States, or to intimidate or prevent any person holding a place or office in or under the government of the United States, from undertaking, performing or executing his trust or duty, and if any person or persons, with intent as aforesaid, shall counsel, advise or attempt to procure any insurrection, riot, unlawful assembly, or combination, whether such conspiracy, threatening, counsel, advice, or attempt shall have the proposed effect or not, he or they shall be deemed guilty of a high misdemeanor, and on conviction, before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding five thousand dollars, and by imprisonment during a term not less than six months nor exceeding five years; and further, at the discretion of the court may be holden to find sureties for his good behaviour in such sum, and for such time, as the said court may direct.

SEC. 2. And be it farther enacted, That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published,

or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

SEC. 3. And be it further enacted and declared, That if any person shall be prosecuted under this act, for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defence, the truth of the matter contained in Republication charged as a libel. And the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

SEC. 4. And be it further enacted, That this act shall continue and be in force until the third day of March, one thousand eight hundred and one, and no longer: Provided, that the expiration of the act shall not prevent or defeat a prosecution and punishment of any offence against the law, during the time it shall be in force.

## Notes

1. Are these Acts consistent with our contemporary ideas of the high regard in which the framers held the First Amendment? How do ideas of criticism of the government and “citizenship” merge in the Acts?
2. Consider 50 USC §§ 21–24 which remains in effect and allows for the “restraint, regulation, and removal” of “aliens” who are “not actually naturalized” in times of war or when the President makes a proclamation.
3. Consider the proposed “Violent Radicalization and Homegrown Terrorism Prevention Act” which would seek to address “Ideologically Based Violence - the use, planned use, or threatened use of force or violence by a group or individual to promote the group or individual's political, religious, or social beliefs.”

## II. Clear and Present Dangers

### A. The Challenge of World War I

#### *Schenck v. United States*

249 U.S. 47 (1919)

MR. JUSTICE HOLMES DELIVERED THE OPINION OF THE COURT.

This is an indictment in three counts. The first charges a conspiracy to violate the Espionage Act of June 15, 1917, c. 30, § 3, 40 Stat. 217, 219, by causing and attempting to cause insubordination, &c., in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire, to-wit, that the defendants willfully conspired to have printed and circulated to men who had been called and accepted for military service under the Act of May 18, 1917, a document set forth and alleged to be calculated to cause such insubordination and obstruction. The count alleges overt acts in pursuance of the conspiracy, ending in the distribution of the document set forth. The second count alleges a conspiracy to commit an offence against the United States, to-wit, to use the mails for the transmission of matter declared to be nonmailable by Title XII, § 2 of the Act of June 15, 1917, to-wit, the above mentioned document, with an averment of the same overt acts. The third count charges an unlawful use of the mails for the transmission of the same matter and otherwise as above. The defendants were found guilty on all the counts. They set up the First Amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech, or of the press, and bringing the case here on that ground have argued some other points also of which we must dispose.

It is argued that the evidence, if admissible, was not sufficient to prove that the defendant Schenck was concerned in sending the documents. According to the testimony, Schenck said he was general secretary of the Socialist party, and had charge of the Socialist headquarters from which the documents were sent. He identified a book found there as the minutes of the Executive Committee of the party. The book showed a resolution of August 13, 1917, that 15,000 leaflets should be printed on the other side of one of them in use, to be mailed to men who had passed exemption boards, and for distribution. Schenck personally attended to the printing. On August 20, the general secretary's report said "Obtained new leaflets from printer and started work addressing envelopes" &c., and there was a resolve that Comrade Schenck be allowed \$125 for sending leaflets through the mail. He said that he had about fifteen or sixteen thousand printed. There were files of the circular in question in the inner office which he said were printed on the other side of the one sided circular, and were there for distribution. Other copies were proved to have been sent through the mails to drafted men. Without going into confirmatory details

that were proved, no reasonable man could doubt that the defendant Schenck was largely instrumental in sending the circulars about.\*\*\*

The document in question, upon its first printed side, recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the Conscription Act, and that a conscript is little better than a convict. In impassioned language, it intimated that conscription was despotism in its worst form, and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said "Do not submit to intimidation," but in form, at least, confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that anyone violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on

If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain.

It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, &c., &c., winding up, "You must do your share to maintain, support and uphold the rights of the people of this country." Of course, the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well known public men. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado* (1907). We admit that, in many places and in ordinary times, the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court

could regard them as protected by any constitutional right. It seems to be admitted that, if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917, in § 4, punishes conspiracies to obstruct, as well as actual obstruction. If the act (speaking, or circulating a paper), its tendency, and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime. Indeed, that case might be said to dispose of the present contention if the precedent covers all *media concludendi*. But, as the right to free speech was not referred to specially, we have thought fit to add a few words.

It was not argued that a conspiracy to obstruct the draft was not within the words of the Act of 1917. The words are "obstruct the recruiting or enlistment service," and it might be suggested that they refer only to making it hard to get volunteers. Recruiting heretofore usually having been accomplished by getting volunteers, the word is apt to call up that method only in our minds. But recruiting is gaining fresh supplies for the forces, as well by draft as otherwise. It is put as an alternative to enlistment or voluntary enrollment in this act. \*\*\*

*Judgments affirmed.*

## ***Abrams v. United States***

250 U.S. 616 (1919)

JUSTICE CLARKE DELIVERED THE OPINION OF THE COURT; JUSTICE HOLMES FILED A DISSENTING OPINION IN WHICH JUSTICE BRANDEIS JOINED.

MR. JUSTICE CLARKE DELIVERED THE OPINION OF THE COURT.

On a single indictment, containing four counts, the five plaintiffs in error, hereinafter designated the defendants, were convicted of conspiring to violate provisions of the Espionage Act of Congress.

Each of the first three counts charged the defendants with conspiring, when the United States was at war with the Imperial Government of Germany, to unlawfully utter, print, write and publish: in the first count, "disloyal, scurrilous and abusive language about the form of Government of the United States;" in the second count, language "intended to bring the form of Government of the United States into contempt, scorn, contumely and disrepute;" and in the third count, language "intended to incite, provoke and encourage resistance to the United States in said war." The charge in the fourth count was that the defendants conspired,

when the United States was at war with the Imperial German Government, unlawfully and willfully, by utterance, writing, printing and publication, to urge, incite and advocate curtailment of production of things and products, to-wit,

ordnance and ammunition, necessary and essential to the prosecution of the war.

The offenses were charged in the language of the act of Congress.

\* \* \* \* [The Court excerpted the leaflets].

These excerpts sufficiently show that, while the immediate occasion for this particular outbreak of lawlessness on the part of the defendant alien anarchists may have been resentment caused by our Government's sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing, and, if possible, defeating the military plans of the Government in Europe. A technical distinction may perhaps be taken between disloyal and abusive language applied to the form of our government or language intended to bring the form of our government into contempt and disrepute, and language of like character and intended to produce like results directed against the President and Congress, the agencies through which that form of government must function in time of war. But it is not necessary to a decision of this case to consider whether such distinction is vital or merely formal, for the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war, as the third count runs, and the defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war as is charged in the fourth count. Thus, it is clear not only that some evidence, but that much persuasive evidence, was before the jury tending to prove that the defendants were guilty as charged in both the third and fourth counts of the indictment, and, under the long established rule of law hereinbefore stated, the judgment of the District Court must be

*Affirmed.*

MR. JUSTICE HOLMES DISSENTING [MR. JUSTICE BRANDEIS JOINS].

This indictment is founded wholly upon the publication of two leaflets which I shall describe in a moment. The first count charges a conspiracy pending the war with Germany to publish abusive language about the form of government of the United States, laying the preparation and publishing of the first leaflet as overt acts. The second count charges a conspiracy pending the war to publish language intended to bring the form of government into contempt, laying the preparation and publishing of the two leaflets as overt acts. The third count alleges a conspiracy to encourage resistance to the United States in the same war, and to attempt to effectuate the purpose by publishing the same leaflets. The fourth count lays a conspiracy to incite curtailment of production of things necessary to the prosecution of the war and to attempt to accomplish it by publishing the second leaflet, to which I have referred.

The first of these leaflets says that the President's cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington. It intimates that "German militarism combined with allied capitalism to crush the Russian evolution " -- goes on that the tyrants of the world fight each other until they see a common enemy -- working class enlightenment, when they combine to crush it, and that now militarism and capitalism combined, though not openly, to crush the Russian revolution. It says that there is only one enemy of the workers of the world, and that is capitalism; that it is a crime for workers of America, &c., to fight the workers' republic of Russia, and ends "Awake! Awake, you Workers of the World, Revolutionists!" A note adds

It is absurd to call us pro-German. We hate and despise German militarism more than do you hypocritical tyrants. We have more reasons for denouncing German militarism than has the coward of the White House.

The other leaflet, headed "Workers -- Wake Up," with abusive language says that America together with the Allies will march for Russia to help the Czecho-Slovaks in their struggle against the Bolsheviki, and that this time the hypocrites shall not fool the Russian emigrants and friends of Russia in America. It tells the Russian emigrants that they now must spit in the face of the false military propoganda by which their sympathy and help to the prosecution of the war have been called forth, and says that, with the money they have lent or are going to lend, "they will make bullets not only for the Germans, but also for the Workers Soviets of Russia," and further,

Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom.

It then appeals to the same Russian emigrants at some length not to consent to the "inquisitionary expedition to Russia," and says that the destruction of the Russian revolution is "the politics of the march to Russia." The leaflet winds up by saying "Workers, our reply to this barbaric intervention has to be a general strike!" and, after a few words on the spirit of revolution, exhortations not to be afraid, and some usual tall talk ends, "Woe unto those who will be in the way of progress. Let solidarity live! The Rebels."

No argument seems to me necessary to show that these *pronunciamentos* in no way attack the form of government of the United States, or that they do not support either of the first two counts. What little I have to say about the third count may be postponed until I have considered the fourth. With regard to that, it seems too plain to be denied that the suggestion to workers in the ammunition factories that they are producing bullets to murder their dearest, and the further advocacy of a general strike, both in the second leaflet, do urge curtailment of production of things necessary to the prosecution of the war within the meaning of the Act of May 16, 1918, c. 75, 40 Stat. 553, amending § 3 of the earlier Act of 1917. But to make the conduct criminal, that statute requires that it should be "with intent by such curtailment to cripple or hinder

the United States in the prosecution of the war." It seems to me that no such intent is proved.

I am aware, of course, that the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if, at the time of his act, he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.

It seems to me that this statute must be taken to use its words in a strict and accurate sense. They would be absurd in any other. A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet, even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime. I admit that my illustration does not answer all that might be said, but it is enough to show what I think, and to let me pass to a more important aspect of the case. I refer to the First Amendment to the Constitution, that Congress shall make no law abridging the freedom of speech.

I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck*, *Frohwerk* and *Debs*, were rightly decided. I do not doubt for a moment that, by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace, because war opens dangers that do not exist at other times.

But, as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing, however, might indicate a greater danger, and, at any rate, would

have the quality of an attempt. \* \* \* \* It is necessary where the success of the attempt depends upon others because, if that intent is not present, the actor's aim may be accomplished without bringing about the evils sought to be checked. An intent to prevent interference with the revolution in Russia might have been satisfied without any hindrance to carrying on the war in which we were engaged.

I do not see how anyone can find the intent required by the statute in any of the defendants' words. The second leaflet is the only one that affords even a foundation for the charge, and there, without invoking the hatred of German militarism expressed in the former one, it is evident from the beginning to the end that the only object of the paper is to help Russia and stop American intervention there against the popular government -- not to impede the United States in the war that it was carrying on. To say that two phrases, taken literally, might import a suggestion of conduct that would have interference with the war as an indirect and probably undesired effect seems to me by no means enough to show an attempt to produce that effect.

\* \* \* \* In this case, sentences of twenty years' imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong, and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper, I will add, even if what I think the necessary intent were shown, the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges, but for the creed that they avow -- a creed that I believe to be the creed of ignorance and immaturity when honestly held, as I see no reason to doubt that it was held here, but which, although made the subject of examination at the trial, no one has a right even to consider in dealing with the charges before the Court.

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with

death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States, through many years, had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law . . . abridging the freedom of speech." Of course, I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that, in their conviction upon this indictment, the defendants were deprived of their rights under the Constitution of the United States.

### **Note: Justice Oliver Wendell Holmes**

Justice Holmes wrote the Court's decision in *Schenck v. United States*, decided March 3, 1919. In the next Term, Justice Holmes wrote the now-famous dissent in *Abrams v. United States*, decided November 20, 1919.

Scholars posit various explanations for Holmes' change over the summer. One explanation is Holmes' discussions with his friend Judge Learned Hand. Another view is that Holmes' views did not so much change as become refined; Holmes never repudiated *Schenck*. What do you think of the differences between Holmes' opinions in the two cases?

### **Gitlow v. New York**

268 U.S. 652 (1925)

JUSTICE SANFORD DELIVERED THE OPINION OF THE COURT; JUSTICE HOLMES FILED A DISSENTING OPINION IN WHICH JUSTICE BRANDEIS JOINED.

MR. JUSTICE SANFORD DELIVERED THE OPINION OF THE COURT.

Benjamin Gitlow was indicted in the Supreme Court of New York, with three others, for the statutory crime of criminal anarchy. New York Penal Laws, §§ 160, 161.\*\*\* The contention here is that the statute, by its terms and as applied in this case, is repugnant to the due process clause of the Fourteenth Amendment. Its material provisions are:

§ 160. Criminal anarchy defined. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of

government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

§ 161. Advocacy of criminal anarchy. Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,
2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means

Is guilty of a felony and punishable by imprisonment or fine, or both.

The indictment was in two counts. The first charged that the defendant had advocated, advised and taught the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means, by certain writings therein set forth entitled "The Left Wing Manifesto"; the second, that he had printed, published and knowingly circulated and distributed a certain paper called "The Revolutionary Age," containing the writings set forth in the first count advocating, advising and teaching the doctrine that organized government should be overthrown by force, violence and unlawful means.

The following facts were established on the trial by undisputed evidence and admissions: the defendant is a member of the Left Wing Section of the Socialist Party, a dissenting branch or faction of that party formed in opposition to its dominant policy of "moderate Socialism." Membership in both is open to aliens as well as citizens. The Left Wing Section was organized nationally at a conference in New York City in June, 1919, attended by ninety delegates from twenty different States. The conference elected a National Council, of which the defendant was a member, and left to it the adoption of a "Manifesto." This was published in The Revolutionary Age, the official organ of the Left Wing. The defendant was on the board of managers of the paper, and was its business manager. He arranged for the printing of the paper, and took to the printer the manuscript of the first issue which contained the Left Wing Manifesto, and also a Communist Program and a Program of the Left Wing that had been adopted by the conference. Sixteen thousand copies were printed, which were delivered at the premises in New York City used as the office of the Revolutionary Age and the headquarters of the Left Wing, and occupied by the defendant and other officials. These copies were paid for by the defendant, as business manager of the paper. Employees at this office wrapped and mailed out copies of the paper under the defendant's direction, and copies were sold from this office. It was admitted that the defendant signed a card subscribing to the Manifesto and Program of the Left Wing, which all applicants were required to sign before being admitted to membership; that he went to different parts of the State to speak to branches of the Socialist Party about the principles of the Left Wing and advocated their adoption, and that he was responsible for the Manifesto as

it appeared, that "he knew of the publication, in a general way, and he knew of its publication afterwards, and is responsible for its circulation."

There was no evidence of any effect resulting from the publication and circulation of the Manifesto.

No witnesses were offered in behalf of the defendant.

Coupled with a review of the rise of Socialism, [the Manifesto] condemned the dominant "moderate Socialism" for its recognition of the necessity of the democratic parliamentary state; repudiated its policy of introducing Socialism by legislative measures, and advocated, in plain and unequivocal language, the necessity of accomplishing the "Communist Revolution" by a militant and "revolutionary Socialism", based on "the class struggle" and mobilizing the "power of the proletariat in action," through mass industrial revolts developing into mass political strikes and "revolutionary mass action", for the purpose of conquering and destroying the parliamentary state and establishing in its place, through a "revolutionary dictatorship of the proletariat", the system of Communist Socialism. The then recent strikes in Seattle and Winnipeg were cited as instances of a development already verging on revolutionary action and suggestive of proletarian dictatorship, in which the strike-workers were "trying to usurp the functions of municipal government", and revolutionary Socialism, it was urged, must use these mass industrial revolts to broaden the strike, make it general and militant, and develop it into mass political strikes and revolutionary mass action for the annihilation of the parliamentary state.

\*\*\* [Gitlow was convicted and the convictions upheld by the New York courts.]

The sole contention here is, essentially, that as there was no evidence of any concrete result flowing from the publication of the Manifesto or of circumstances showing the likelihood of such result, the statute as construed and applied by the trial court penalizes the mere utterance, as such, of "doctrine" having no quality of incitement, without regard either to the circumstances of its utterance or to the likelihood of unlawful sequences, and that, as the exercise of the right of free expression with relation to government is only punishable "in circumstances involving likelihood of substantive evil," the statute contravenes the due process clause of the Fourteenth Amendment. The argument in support of this contention rests primarily upon the following propositions: 1st, that the "liberty" protected by the Fourteenth Amendment includes the liberty of speech and of the press, and 2nd, that while liberty of expression "is not absolute," it may be restrained "only in circumstances where its exercise bears a causal relation with some substantive evil, consummated, attempted or likely," and as the statute "takes no account of circumstances," it unduly restrains this liberty and is therefore unconstitutional.

The precise question presented, and the only question which we can consider under this writ of error, then is whether the statute, as construed and applied in this case by the state courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment.

The statute does not penalize the utterance or publication of abstract "doctrine" or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means. These words imply urging to action. Advocacy is defined in the Century Dictionary as: "1. The act of pleading for, supporting, or recommending; active espousal." It is not the abstract "doctrine" of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose. It was so construed and applied by the trial judge, who specifically charged the jury that:

A mere grouping of historical events and a prophetic deduction from them would neither constitute advocacy, advice or teaching of a doctrine for the overthrow of government by force, violence or unlawful means. [And] if it were a mere essay on the subject, as suggested by counsel, based upon deductions from alleged historical events, with no teaching, advice or advocacy of action, it would not constitute a violation of the statute. . . .

The Manifesto, plainly, is neither the statement of abstract doctrine nor, as suggested by counsel, mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and, through political mass strikes and revolutionary mass action, overthrow and destroy organized parliamentary government. It concludes with a call to action in these words:

The proletariat revolution and the Communist reconstruction of society -- the struggle for these -- is now indispensable. . . . The Communist International calls the proletariat of the world to the final struggle!

This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement.

The means advocated for bringing about the destruction of organized parliamentary government, namely, mass industrial revolts usurping the functions of municipal government, political mass strikes directed against the parliamentary state, and revolutionary mass action for its final destruction, necessarily imply the use of force and violence, and, in their essential nature, are inherently unlawful in a constitutional government of law and order. That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence and unlawful means, but action to that end, is clear.

For present purposes, we may and do assume that freedom of speech and of the press which are protected by the First Amendment from abridgment by Congress are among the fundamental personal rights and "liberties" protected

by the due process clause of the Fourteenth Amendment from impairment by the States. \*\*\*

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. 2 STORY ON THE CONSTITUTION, 5th ed., § 1580, p. 634; \*\*\* Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question.\*\*\*

And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press, said Story (supra) does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the State. And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. In short, this freedom does not deprive a State of the primary and essential right of self-preservation, which, so long as human governments endure, they cannot be denied.\*\*\*

That utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace, and ultimate revolution. And the immediate danger is none the less real and substantial because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the

conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipency.

We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press, and we must and do sustain its constitutionality.

We need not enter upon a consideration of the English common law rule of seditious libel or the Federal Sedition Act of 1798, to which reference is made in the defendant's brief. These are so unlike the present statute that we think the decisions under them cast no helpful light upon the questions here.

And finding, for the reasons stated, that the statute is not, in itself, unconstitutional, and that it has not been applied in the present case in derogation of any constitutional right, the judgment of the Court of Appeals is

*Affirmed.*

MR. JUSTICE HOLMES, DISSENTING.

MR. JUSTICE BRANDEIS and I are of opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States. If I am right, then I think that the criterion sanctioned by the full Court in *Schenck v. United States* applies.

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the State] has a right to prevent.

\*\*\* If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief, and, if believed, it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the

community, the only meaning of free speech is that they should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once, and not at some indefinite time in the future, it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication, and nothing more.

## *Whitney v. California*

274 U.S. 357 (1927)

JUSTICE SANFORD DELIVERED THE OPINION OF THE COURT; JUSTICE BRANDEIS FILED A CONCURRING OPINION IN WHICH JUSTICE HOLMES JOINED.

MR. JUSTICE SANFORD DELIVERED THE OPINION OF THE COURT.

By a criminal information filed in the Superior Court of Alameda County, California, the plaintiff in error was charged, in five counts, with violations of the Criminal Syndicalism Act of that State. She was tried, convicted on the first count, and sentenced to imprisonment. \*\*\*

The pertinent provisions of the [California] Criminal Syndicalism Act are:

Section 1. The term "criminal syndicalism" as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

Sec. 2. Any person who: . . . 4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism.

Is guilty of a felony and punishable by imprisonment.

The first count of the information, on which the conviction was had charged that, on or about November 28, 1919, in Alameda County, the defendant, in violation of the Criminal Syndicalism Act,

did then and there unlawfully, willfully, wrongfully, deliberately and feloniously organize and assist in organizing, and was, is, and knowingly became a member of an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism.\*\*\*

The following facts, among many others, were established on the trial by undisputed evidence: the defendant, a resident of Oakland, in Alameda County, California, had been a member of the Local Oakland branch of the Socialist Party. This Local sent delegates to the national convention of the Socialist Party held in Chicago in 1919, which resulted in a split between the "radical" group and the old-wing Socialists. The "radicals" -- to whom the Oakland delegates adhered -- being ejected, went to another hall, and formed the Communist Labor Party of America. Its Constitution provided for the membership of persons subscribing to the principles of the Party and pledging themselves to be guided by its Platform, and for the formation of state organizations conforming to its Platform as the supreme declaration of the Party. In its "Platform and Program," the Party declared that it was in full harmony with "the revolutionary working class parties of all countries," and adhered to the principles of Communism laid down in the Manifesto of the Third International at Moscow, and that its purpose was "to create a unified revolutionary working class movement in America," organizing the workers as a class in a revolutionary class struggle to conquer the capitalist state for the overthrow of capitalist rule, the conquest of political power and the establishment of a working class government, the Dictatorship of the Proletariat, in place of the state machinery of the capitalists, which should make and enforce the laws, reorganize society on the basis of Communism, and bring about the Communist Commonwealth -- advocated, as the most important means of capturing state power, the action of the masses, proceeding from the shops and factories, the use of the political machinery of the capitalist state being only secondary; the organization of the workers into "revolutionary industrial unions"; propaganda pointing out their revolutionary nature and possibilities, and great industrial battles showing the value of the strike as a political weapon -- commended the propaganda and example of the Industrial Workers of the World and their struggles and sacrifices in the class war -- pledged support and cooperation to "the revolutionary industrial proletariat of America" in their struggles against the capitalist class -- cited the Seattle and Winnipeg strikes and the numerous strikes all over the country "proceeding without the authority of the old reactionary Trade Union officials," as manifestations of the new tendency -- and recommended that strikes of national importance be supported and given a political character, and that propagandists and organizers be mobilized "who cannot only teach, but actually help to put in practice the principles of revolutionary industrial unionism and Communism."

Shortly thereafter, the Local Oakland withdrew from the Socialist Party and sent accredited delegates, including the defendant, to a convention held in Oakland in November, 1919, for the purpose of organizing a California branch of the Communist Labor Party. The defendant, after taking out a temporary membership in the Communist Labor Party, attended this convention as a delegate and took an active part in its proceedings. She was elected a member of the Credentials Committee, and, as its chairman, made a report to the convention upon which the delegates were seated. She was also appointed a member of the Resolutions Committee, and, as such, signed the following resolution in reference to political action, among others proposed by the Committee:

The C.L.P. of California fully recognizes the value of political action as a means of spreading communist propaganda; it insists that, in proportion to the development of the economic strength of the working class, it, the working class, must also develop its political power. The C.L.P. of California proclaims and insists that the capture of political power, locally or nationally by the revolutionary working class, can be of tremendous assistance to the workers in their struggle of emancipation. Therefore, we again urge the workers who are possessed of the right of franchise to cast their votes for the party which represents their immediate and final interest -- the C.L.P. -- at all elections, being fully convinced of the utter futility of obtaining any real measure of justice or freedom under officials elected by parties owned and controlled by the capitalist class.

The minutes show that this resolution, with the others proposed by the committee, was read by its chairman to the convention before the Committee on the Constitution had submitted its report. According to the recollection of the defendant, however, she herself read this resolution. Thereafter, before the report of the Committee on the Constitution had been acted upon, the defendant was elected an alternate member of the State Executive Committee. The Constitution, as finally read, was then adopted. This provided that the organization should be named the Communist Labor Party of California; that it should be "affiliated with" the Communist Labor Party of America, and subscribe to its Program, Platform and Constitution, and, "through this affiliation," be "joined with the Communist International of Moscow;" and that the qualifications for membership should be those prescribed in the National Constitution. The proposed resolutions were later taken, up and all adopted except that on political action, which caused a lengthy debate, resulting in its defeat and the acceptance of the National Program in its place. After this action, the defendant, without, so far as appears, making any protest, remained in the convention until it adjourned. She later attended as an alternate member one or two meetings of the State Executive Committee in San Jose and San Francisco, and stated, on the trial, that she was then a member of the Communist Labor Party. She also testified that it was not her intention that the Communist Labor Party of California should be an instrument of terrorism or violence, and that it was not her purpose or that of the Convention to violate any known law.

In the light of this preliminary statement, we now take up, insofar as they require specific consideration, the various grounds upon which it is here contended that the Syndicalism Act and its application in this case is repugnant to the due process and equal protection clauses of the Fourteenth Amendment.

1. While it is not denied that the evidence warranted the jury in finding that the defendant became a member of and assisted in organizing the Communist Labor Party of California, and that this was organized to advocate, teach, aid or abet criminal syndicalism as defined by the Act, it is urged that the Act, as here construed and applied, deprived the defendant of her liberty without due process of law in that it has made her action in attending the Oakland convention unlawful by reason of "a subsequent event brought about against

her will by the agency of others," with no showing of a specific intent on her part to join in the forbidden purpose of the association, and merely because, by reason of a lack of "prophetic" understanding, she failed to foresee the quality that others would give to the convention. The argument is, in effect, that the character of the state organization could not be forecast when she attended the convention; that she had no purpose of helping to create an instrument of terrorism and violence; that she

took part in formulating and presenting to the convention a resolution which, if adopted, would have committed the new organization to a legitimate policy of political reform by the use of the ballot;

that it was not until after the majority of the convention turned out to be "contrary-minded, and other less temperate policies prevailed," that the convention could have taken on the character of criminal syndicalism, and that, as this was done over her protest, her mere presence in the convention, however violent the opinions expressed therein, could not thereby become a crime. This contention, while advanced in the form of a constitutional objection to the Act, is in effect nothing more than an effort to review the weight of the evidence for the purpose of showing that the defendant did not join and assist in organizing the Communist Labor Party of California with a knowledge of its unlawful character and purpose. \*\*\*

2. It is clear that the Syndicalism Act is not repugnant to the due process clause by reason of vagueness and uncertainty of definition. \*\*\* The language of § 2, subd. 4, of the Act, under which the plaintiff in error was convicted, is clear, the definition of "criminal syndicalism" specific. \*\*\* So, as applied here, the Syndicalism Act required of the defendant no "prophetic" understanding of its meaning. \*\*\*

3. Neither is the Syndicalism Act repugnant to the equal protection clause on the ground that, as its penalties are confined to those who advocate a resort to violent and unlawful methods as a means of changing industrial and political conditions, it arbitrarily discriminates between such persons and those who may advocate a resort to these methods as a means of maintaining such conditions. \*\*\* The Syndicalism Act is not class legislation; it affects all alike, no matter what their business associations or callings, who come within its terms and do the things prohibited. \*\*\*

4. Nor is the Syndicalism Act, as applied in this case, repugnant to the due process clause as a restraint of the rights of free speech, assembly, and association.

That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom, and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare,

tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question.

By enacting the provisions of the Syndicalism Act, the State has declared, through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes involves such danger to the public peace and the security of the State, that these acts should be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute, and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest.

The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals is clear. We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the State.

We find no repugnancy in the Syndicalism Act as applied in this case to either the due process or equal protection clauses of the Fourteenth Amendment on any of the grounds upon which its validity has been here challenged. \*\*\*

*Affirmed.*

MR. JUSTICE BRANDEIS, CONCURRING [MR. JUSTICE HOLMES JOINS IN THIS OPINION].

Miss Whitney was convicted of the felony of assisting in organizing, in the year 1919, the Communist Labor Party of California, of being a member of it, and of assembling with it. These acts are held to constitute a crime because the party was formed to teach criminal syndicalism. The statute which made these acts a crime restricted the right of free speech and of assembly theretofore existing. The claim is that the statute, as applied, denied to Miss Whitney the liberty guaranteed by the Fourteenth Amendment.

The felony which the statute created is a crime very unlike the old felony of conspiracy or the old misdemeanor of unlawful assembly. The mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or of assembling with others for that purpose, is given the dynamic quality of crime. There is guilt although the society may not contemplate immediate

promulgation of the doctrine. Thus, the accused is to be punished not for contempt, incitement, or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely. The novelty in the prohibition introduced is that the statute aims not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.

Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus, all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. The right of free speech, the right to teach, and the right of assembly are, of course, fundamental rights. These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not, in their nature, absolute. Their exercise is subject to restriction if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic, or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled.

It is said to be the function of the legislature to determine whether, at a particular time and under the particular circumstances, the formation of, or assembly with, a society organized to advocate criminal syndicalism constitutes a clear and present danger of substantive evil, and that, by enacting the law here in question, the legislature of California determined that question in the affirmative. The legislature must obviously decide, in the first instance, whether a danger exists which calls for a particular protective measure. But where a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity. Prohibitory legislation has repeatedly been held invalid, because unnecessary, where the denial of liberty involved was that of engaging in a particular business. The power of the courts to strike down an offending law is no less when the interests involved are not property rights, but the fundamental personal rights of free speech and assembly.

This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present, and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgement of free speech and assembly as the means of protection. To reach sound conclusions on these matters, we must bear in mind why a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.

Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary. They valued liberty both as

an end, and as a means. They believed liberty to be the secret of happiness, and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech, there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger, it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency

can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. Thus, a State might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this Court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, wastelands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly. \*\*\*

Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent, and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the State, creates merely a rebuttable presumption that these conditions have been satisfied.

Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil might have been made the important issue in the case. She might have required that the issue be determined either by the court or the jury. She claimed below that the statute, as applied to her, violated the Federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury. On the other hand, there was evidence on which the court or jury might have found that such danger existed. I am unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment. In the present case, however, there

was other testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes, and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances, the judgment of the state court cannot be disturbed.

## Notes

1. As the Court makes clear in *Gitlow* in 1925, the First Amendment is incorporated against the states through the liberty provision of the Due Process Clause of the Fourteenth Amendment. Note in later cases how the question of incorporation resurfaces. Note also the relationship between due process arguments and First Amendment arguments.
2. The Court decided *Debs v. United States*, 249 U.S. 211 (1919), the same year as *Schenck*, on which it largely relied. In this brief opinion, the Court upheld Eugene Debs' conviction for an anti-war speech criticizing United States involvement in World War I and upheld the Espionage Act of 1917. Debs was a prominent labor organizer and candidate of the Socialist Party of America for the US presidency. Indeed, Debs was a candidate in the 1920 Presidential election while he was in prison for this conviction; he earned more than 3% of the vote. President Woodrow Wilson denounced Debs as a "traitor" and refused to grant clemency, but in 1921, President Horace Harding commuted Debs' sentence to time-served and soon after the two met personally. Debs died in 1926.
3. Like Eugene Debs, Anita Whitney was also well-known. How does the social or political status of the speaker influence the Court? Should it? What is the relevance of the characterization of the defendants as "poor and puny anonymities" in Holmes' dissent in *Abrams*?
4. The oft-called "war hypothesis" of First Amendment speech doctrine is derived from these cases. Is there language in the cases that would support a "war is different" perspective? Consider whether the notion of "war" is extended in the rest of the cases in this Chapter.

## B. Labor Unrest

### *Bridges v. California*

314 U.S. 252 (1941)

JUSTICE BLACK DELIVERED THE OPINION OF THE COURT. JUSTICE FRANKFURTER FILED A DISSENTING OPINION JOINED BY THE CHIEF JUSTICE [STONE], JUSTICE ROBERTS AND JUSTICE BYRNES.

MR. JUSTICE BLACK DELIVERED THE OPINION OF THE COURT.

These two cases, while growing out of different circumstances and concerning different parties, both relate to the scope of our national constitutional policy safeguarding free speech and a free press. All of the petitioners were adjudged guilty and fined for contempt of court by the Superior Court of Los Angeles County. Their conviction rested upon comments pertaining to pending litigation which were published in newspapers. In the Superior Court, and later in the California Supreme Court, petitioners challenged the state's action as an abridgment, prohibited by the Federal Constitution, of freedom of speech and of the press; but the Superior Court overruled this contention, and the Supreme Court affirmed. The importance of the constitutional question prompted us to grant certiorari. \*\*\*

In presenting the proposals which were later embodied in the Bill of Rights, James Madison, the leader in the preparation of the First Amendment, said: "Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in that body [Parliament], the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution." 1 Annals of Congress 1789-1790, 434. And Madison elsewhere wrote that "the state of the press . . . under the common law, cannot . . . be the standard of its freedom in the United States."

There are no contrary implications in any part of the history of the period in which the First Amendment was framed and adopted. No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. It cannot be denied, for example, that the religious test oath or the restrictions upon assembly then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing. And since the same unequivocal language is used with respect to freedom of the press, it signifies a similar enlargement of that concept as well. Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary, the only conclusion supported by

history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society.

The implications of subsequent American history confirm such a construction of the First Amendment. To be sure, it occurred no more to the people who lived in the decades following Ratification than it would to us now that the power of courts to protect themselves from disturbances and disorder in the court room by use of contempt proceedings could seriously be challenged as conflicting with constitutionally secured guarantees of liberty. In both state and federal courts, this power has been universally recognized. But attempts to expand it in the post-Ratification years evoked popular reactions that bespeak a feeling of jealous solicitude for freedom of the press. In Pennsylvania and New York, for example, heated controversies arose over alleged abuses in the exercise of the contempt power, which in both places culminated in legislation practically forbidding summary punishment for publications.

\*\*\* [W]e are convinced that the judgments below result in a curtailment of expression that cannot be dismissed as insignificant. If they can be justified at all, it must be in terms of some serious substantive evil which they are designed to avert. The substantive evil here sought to be averted has been variously described below. It appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice. The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. The very word "trial" connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases. We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment.

The Los Angeles Times Editorials. The Times-Mirror Company, publisher of the Los Angeles Times, and L.D. Hotchkiss, its managing editor, were cited for contempt for the publication of three editorials. Both found by the trial court to be responsible for one of the editorials, the company and Hotchkiss were each fined \$100. The company alone was held responsible for the other two, and was fined \$100 more on account of one, and \$300 more on account of the other.

The \$300 fine presumably marks the most serious offense. The editorial thus distinguished was entitled "Probation for Gorillas?" After vigorously denouncing two members of a labor union who had previously been found guilty of assaulting nonunion truck drivers, it closes with the observation: "Judge A.A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill." Judge Scott had previously set a day (about a month after the publication) for passing upon the application of Shannon and Holmes for probation and for pronouncing sentence.

The basis for punishing the publication as contempt was by the trial court said to be its "inherent tendency" and by the [California] Supreme Court its "reasonable tendency" to interfere with the orderly administration of justice in an action then before a court for consideration. In accordance with what we have said on the "clear and present danger" cases, neither "inherent tendency" nor "reasonable tendency" is enough to justify a restriction of free expression. But even if they were appropriate measures, we should find exaggeration in the use of those phrases to describe the facts here. \*\*\*

The Bridges Telegram. While a motion for a new trial was pending in a case involving a dispute between an A.F. of L. union and a C.I.O. union of which Bridges was an officer, he either caused to be published or acquiesced in the publication of a telegram which he had sent to the Secretary of Labor. The telegram referred to the judge's decision as "outrageous"; said that attempted enforcement of it would tie up the port of Los Angeles and involve the entire Pacific Coast; and concluded with the announcement that the C.I.O. union, representing some twelve thousand members, did "not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."

Apparently Bridges' conviction is not rested at all upon his use of the word "outrageous." The remainder of the telegram fairly construed appears to be a statement that if the court's decree should be enforced there would be a strike. It is not claimed that such a strike would have been in violation of the terms of the decree, nor that in any other way it would have run afoul of the law of California. On no construction, therefore, can the telegram be taken as a threat either by Bridges or the union to follow an illegal course of action.

Moreover, this statement of Bridges was made to the Secretary of Labor, who is charged with official duties in connection with the prevention of strikes. Whatever the cause might be if a strike was threatened or possible the Secretary was entitled to receive all available information. Indeed, the Supreme Court of California recognized that, publication in the newspapers aside, in sending the message to the Secretary, Bridges was exercising the right of petition to a duly accredited representative of the United States Government, a right protected by the First Amendment.

It must be recognized that Bridges was a prominent labor leader speaking at a time when public interest in the particular labor controversy was at its height. The observations we have previously made here upon the timeliness and importance of utterances as emphasizing rather than diminishing the value of constitutional protection, and upon the breadth and seriousness of the

ensorial effects of punishing publications in the manner followed below, are certainly no less applicable to a leading spokesman for labor than to a powerful newspaper taking another point of view.

\*\*\* Again, we find exaggeration in the conclusion that the utterance even "tended" to interfere with justice. If there was electricity in the atmosphere, it was generated by the facts; the charge added by the Bridges telegram can be dismissed as negligible. The words of Mr. Justice Holmes, spoken in reference to very different facts, seem entirely applicable here: "I confess that I cannot find in all this or in the evidence in the case anything that would have affected a mind of reasonable fortitude, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words."

*Reversed.*

MR. JUSTICE FRANKFURTER, WITH WHOM CONCURRED THE CHIEF JUSTICE, MR. JUSTICE ROBERTS AND MR. JUSTICE BYRNES, DISSENTING.

Our whole history repels the view that it is an exercise of one of the civil liberties secured by the Bill of Rights for a leader of a large following or for a powerful metropolitan newspaper to attempt to overawe a judge in a matter immediately pending before him. The view of the majority deprives California of means for securing to its citizens justice according to law — means which, since the Union was founded, have been the possession, hitherto unchallenged, of all the states. This sudden break with the uninterrupted course of constitutional history has no constitutional warrant. To find justification for such deprivation of the historic powers of the states is to misconceive the idea of freedom of thought and speech as guaranteed by the Constitution.\*\*\*

## C. Communism and the Smith Act

### *Dennis v. United States*

341 U.S. 494 (1951)

CHIEF JUSTICE VINSON ANNOUNCED THE JUDGMENT OF THE COURT AND AN OPINION IN WHICH JUSTICE REED, JUSTICE BURTON AND MR. JUSTICE MINTON JOINED. JUSTICE FRANKFURTER AND JUSTICE JACKSON FILED CONCURRING OPINIONS. JUSTICE BLACK AND DOUGLAS FILED DISSENTING OPINIONS. JUSTICE CLARK TOOK NO PART IN THE CONSIDERATION OR DECISION OF THIS CASE.

MR. CHIEF JUSTICE VINSON ANNOUNCED THE JUDGMENT OF THE COURT.

Petitioners were indicted in July, 1948, for violation of the conspiracy provisions of the Smith Act, 54 Stat. 671, 18 U. S. C. (1946 ed.) § 11, during the period of April, 1945, to July, 1948. The pretrial motion to quash the indictment on the grounds, inter alia, that the statute was unconstitutional was denied. A verdict of guilty as to all the petitioners was returned by the jury. The

Court of Appeals affirmed the convictions. We granted certiorari, limited to the following two questions: (1) Whether either § 2 or § 3 of the Smith Act, inherently or as construed and applied in the instant case, violates the First Amendment and other provisions of the Bill of Rights; (2) whether either § 2 or § 3 of the Act, inherently or as construed and applied in the instant case, violates the First and Fifth Amendments because of indefiniteness.

Sections 2 and 3 of the Smith Act, 54 Stat. 671, 18 U. S. C. (1946 ed.) §§ 10, 11 (see present 18 U. S. C. § 2385), provide as follows:

"SEC. 2. (a) It shall be unlawful for any person—

"(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;

"(2) with intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

"(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

"(b) For the purposes of this section, the term 'government in the United States' means the Government of the United States, the government of any State, Territory, or possession of the United States, the government of the District of Columbia, or the government of any political subdivision of any of them.

"SEC. 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of this title."

The indictment charged the petitioners with wilfully and knowingly conspiring (1) to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (2) knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence. The indictment further alleged that § 2 of the Smith Act proscribes these acts and that any conspiracy to take such action is a violation of § 3 of the Act.

The trial of the case extended over nine months, six of which were devoted to the taking of evidence, resulting in a record of 16,000 pages. Our limited grant of the writ of certiorari has removed from our consideration any question as to the sufficiency of the evidence to support the jury's determination that petitioners are guilty of the offense charged. Whether on this record petitioners did in fact advocate the overthrow of the Government by force and violence is not before us \*\*\* [but by] virtue of their control over the political apparatus of the Communist Political Association, petitioners were able to transform that organization into the Communist Party; that the policies of the Association were

changed from peaceful cooperation with the United States and its economic and political structure to a policy which had existed before the United States and the Soviet Union were fighting a common enemy, namely, a policy which worked for the overthrow of the Government by force and violence; that the Communist Party is a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language; that the Party is rigidly controlled; that Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces, but that the approved program is slavishly followed by the members of the Party; that the literature of the Party and the statements and activities of its leaders, petitioners here, advocate, and the general goal of the Party was, during the period in question, to achieve a successful overthrow of the existing order by force and violence.

## I.

It will be helpful in clarifying the issues to treat next the contention that the trial judge improperly interpreted the statute by charging that the statute required an unlawful intent before the jury could convict. \*\*\*

A survey of Title 18 of the U. S. Code indicates that the vast majority of the crimes designated by that Title require, by express language, proof of the existence of a certain mental state, in words such as "knowingly," "maliciously," "wilfully," "with the purpose of," "with intent to," or combinations or permutations of these and synonymous terms. The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence. \*\*\* If that precise mental state may be an essential element of a crime, surely an intent to overthrow the Government of the United States by advocacy thereof is equally susceptible of proof.

## II.

The obvious purpose of the statute is to protect existing Government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism. That it is within the power of the Congress to protect the Government of the United States from armed rebellion is a proposition which requires little discussion. Whatever theoretical merit there may be to the argument that there is a "right" to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change. We reject any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy. No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence. The question with which we are concerned here is not whether Congress has such power, but whether the means which it has employed conflict with the First and Fifth Amendments to the Constitution.

One of the bases for the contention that the means which Congress has employed are invalid takes the form of an attack on the face of the statute on the grounds that by its terms it prohibits academic discussion of the merits of Marxism-Leninism, that it stifles ideas and is contrary to all concepts of a free

speech and a free press. Although we do not agree that the language itself has that significance, we must bear in mind that it is the duty of the federal courts to interpret federal legislation in a manner not inconsistent with the demands of the Constitution. \*\*\*

The very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy, not discussion. Thus, the trial judge properly charged the jury that they could not convict if they found that petitioners did "no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas." He further charged that it was not unlawful "to conduct in an American college or university a course explaining the philosophical theories set forth in the books which have been placed in evidence." Such a charge is in strict accord with the statutory language, and illustrates the meaning to be placed on those words. Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity in which the evidence showed these petitioners engaged.

### III.

But although the statute is not directed at the hypothetical cases which petitioners have conjured, its application in this case has resulted in convictions for the teaching and advocacy of the overthrow of the Government by force and violence, which, even though coupled with the intent to accomplish that overthrow, contains an element of speech. For this reason, we must pay special heed to the demands of the First Amendment marking out the boundaries of speech.

\*\*\* [T]he basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies. It is for this reason that this Court has recognized the inherent value of free discourse. An analysis of the leading cases in this Court which have involved direct limitations on speech, however, will demonstrate that both the majority of the Court and the dissenters in particular cases have recognized that this is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations.

No important case involving free speech was decided by this Court prior to *Schenck v. United States* (1919). Indeed, the summary treatment accorded an argument based upon an individual's claim that the First Amendment protected certain utterances indicates that the Court at earlier dates placed no unique emphasis upon that right. It was not until the classic dictum of Justice Holmes in the *Schenck* case that speech per se received that emphasis in a majority opinion. That case involved a conviction under the Criminal Espionage Act, 40 Stat. 217. The question the Court faced was whether the evidence was sufficient to sustain the conviction. Writing for a unanimous Court, Justice Holmes stated that the "question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present

danger that they will bring about the substantive evils that Congress has a right to prevent." \*\*\*

The basis of [Justices Holmes and Brandeis dissent in *Abrams* and other opinions] was that, because of the protection which the First Amendment gives to speech, the evidence in each case was insufficient to show that the defendants had created the requisite danger under *Schenck*. But these dissents did not mark a change of principle. The dissenters doubted only the probable effectiveness of the puny efforts toward subversion. In *Abrams*, they wrote, "I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent." \*\*\*

The rule we deduce from these cases is that where an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a "clear and present danger" of attempting or accomplishing the prohibited crime, e. g., interference with enlistment. The dissents, we repeat, in emphasizing the value of speech, were addressed to the argument of the sufficiency of the evidence.

The next important case before the Court in which free speech was the crux of the conflict was *Gitlow v. New York* (1925). \*\*\* The convictions were sustained, Justices Holmes and Brandeis dissenting. The majority refused to apply the "clear and present danger" test to the specific utterance. Its reasoning was as follows: The "clear and present danger" test was applied to the utterance itself in *Schenck* because the question was merely one of sufficiency of evidence under an admittedly constitutional statute. *Gitlow*, however, presented a different question. There a legislature had found that a certain kind of speech was, itself, harmful and unlawful. The constitutionality of such a state statute had to be adjudged by this Court just as it determined the constitutionality of any state statute, namely, whether the statute was "reasonable." Since it was entirely reasonable for a state to attempt to protect itself from violent overthrow, the statute was perforce reasonable. The only question remaining in the case became whether there was evidence to support the conviction, a question which gave the majority no difficulty. Justices Holmes and Brandeis refused to accept this approach, but insisted that wherever speech was the evidence of the violation, it was necessary to show that the speech created the "clear and present danger" of the substantive evil which the legislature had the right to prevent. Justices Holmes and Brandeis, then, made no distinction between a federal statute which made certain acts unlawful, the evidence to support the conviction being speech, and a statute which made speech itself the crime. This approach was emphasized in *Whitney v. California* (1927), where the Court was confronted with a conviction under the California Criminal Syndicalist statute. The Court sustained the conviction, Justices Brandeis and Holmes concurring in the result. In their concurrence they repeated that even though the legislature had designated certain speech as criminal, this could not prevent the defendant from showing that there was no danger that the substantive evil would be brought about.

Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale. \*\*\* But we further suggested that neither Justice Holmes nor Justice Brandeis ever envisioned that a shorthand phrase should be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case. Speech is not an absolute, above and beyond control by the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction. Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative.

In this case we are squarely presented with the application of the "clear and present danger" test, and must decide what that phrase imports. We first note that many of the cases in which this Court has reversed convictions by use of this or similar tests have been based on the fact that the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech. \*\*\* Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected. If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase "clear and present danger" of the utterances bringing about the evil within the power of Congress to punish.

Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt. \*\*\* We must therefore reject the contention that success or probability of success is the criterion.

The situation with which Justices Holmes and Brandeis were concerned in *Gitlow* was a comparatively isolated event, bearing little relation in their minds to any substantial threat to the safety of the community. \*\*\* They were not confronted with any situation comparable to the instant one—the development

of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis.

\*\*\*It is the existence of the conspiracy which creates the danger. If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added.

*Affirmed.*

MR. JUSTICE FRANKFURTER, CONCURRING IN AFFIRMANCE OF THE JUDGMENT.

\*\*\* Few questions of comparable import have come before this Court in recent years. The appellants maintain that they have a right to advocate a political theory, so long, at least, as their advocacy does not create an immediate danger of obvious magnitude to the very existence of our present scheme of society. On the other hand, the Government asserts the right to safeguard the security of the Nation by such a measure as the Smith Act. Our judgment is thus solicited on a conflict of interests of the utmost concern to the well-being of the country. This conflict of interests cannot be resolved by a dogmatic preference for one or the other, nor by a sonorous formula which is in fact only a euphemistic disguise for an unresolved conflict. If adjudication is to be a rational process, we cannot escape a candid examination of the conflicting claims with full recognition that both are supported by weighty title-deeds.

\*\*\* But even the all-embracing power and duty of self-preservation are not absolute. Like the war power, which is indeed an aspect of the power of self-preservation, it is subject to applicable constitutional limitations. \*\*\*

The First Amendment is such a restriction. It exacts obedience even during periods of war; it is applicable when war clouds are not figments of the imagination no less than when they are. The First Amendment categorically demands that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The right of a man to think what he pleases, to write what he thinks, and to have his thoughts made available for others to hear or read has an engaging ring of universality. The Smith Act and this conviction under it no doubt restrict the exercise of free speech and assembly. Does that, without more, dispose of the matter?

Just as there are those who regard as invulnerable every measure for which the claim of national survival is invoked, there are those who find in the Constitution a wholly unfettered right of expression. Such literalness treats the words of the Constitution as though they were found on a piece of outworn parchment instead of being words that have called into being a nation with a past to be preserved for the future. \*\*\*

The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them. Not what words did Madison and Hamilton use, but what was it in their minds which they conveyed? Free speech is subject to prohibition of those abuses of expression which a civilized society

may forbid. As in the case of every other provision of the Constitution that is not crystallized by the nature of its technical concepts, the fact that the First Amendment is not self-defining and self-enforcing neither impairs its usefulness nor compels its paralysis as a living instrument.

\*\*\* The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.

But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?—who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

\*\*\* But in no case has a majority of this Court held that a legislative judgment, even as to freedom of utterance, may be overturned merely because the Court would have made a different choice between the competing interests had the initial legislative judgment been for it to make.

\*\*\* Even though advocacy of overthrow deserves little protection, we should hesitate to prohibit it if we thereby inhibit the interchange of rational ideas so essential to representative government and free society.

But there is underlying validity in the distinction between advocacy and the interchange of ideas, and we do not discard a useful tool because it may be misused. That such a distinction could be used unreasonably by those in power against hostile or unorthodox views does not negate the fact that it may be used reasonably against an organization wielding the power of the centrally controlled international Communist movement. The object of the conspiracy before us is so clear that the chance of error in saying that the defendants conspired to advocate rather than to express ideas is slight. Mr. Justice Douglas quite properly points out that the conspiracy before us is not a conspiracy to overthrow the Government. But it would be equally wrong to treat it as a seminar in political theory.

MR. JUSTICE JACKSON, CONCURRING.

\*\*\* The Constitution does not make conspiracy a civil right. The Court has never before done so and I think it should not do so now. Conspiracies of labor unions, trade associations, and news agencies have been condemned, although accomplished, evidenced and carried out, like the conspiracy here, chiefly by letter-writing, meetings, speeches and organization. Indeed, this Court seems, particularly in cases where the conspiracy has economic ends, to be applying its doctrines with increasing severity. While I consider criminal conspiracy a dragnet device capable of perversion into an instrument of injustice in the

hands of a partisan or complacent judiciary, it has an established place in our system of law, and no reason appears for applying it only to concerted action claimed to disturb interstate commerce and withholding it from those claimed to undermine our whole Government.

\*\*\* I do not suggest that Congress could punish conspiracy to advocate something, the doing of which it may not punish. Advocacy or exposition of the doctrine of communal property ownership, or any political philosophy unassociated with advocacy of its imposition by force or seizure of government by unlawful means could not be reached through conspiracy prosecution. But it is not forbidden to put down force or violence, it is not forbidden to punish its teaching or advocacy, and the end being punishable, there is no doubt of the power to punish conspiracy for the purpose.

\*\*\* The law of conspiracy has been the chief means at the Government's disposal to deal with the growing problems created by such organizations. I happen to think it is an awkward and inept remedy, but I find no constitutional authority for taking this weapon from the Government. There is no constitutional right to "gang up" on the Government.

While I think there was power in Congress to enact this statute and that, as applied in this case, it cannot be held unconstitutional, I add that I have little faith in the long-range effectiveness of this conviction to stop the rise of the Communist movement. Communism will not go to jail with these Communists. No decision by this Court can forestall revolution whenever the existing government fails to command the respect and loyalty of the people and sufficient distress and discontent is allowed to grow up among the masses. Many failures by fallen governments attest that no government can long prevent revolution by outlawry. Corruption, ineptitude, inflation, oppressive taxation, militarization, injustice, and loss of leadership capable of intellectual initiative in domestic or foreign affairs are allies on which the Communists count to bring opportunity knocking to their door. Sometimes I think they may be mistaken. But the Communists are not building just for today—the rest of us might profit by their example.

MR. JUSTICE BLACK, DISSENTING.

\*\*\* At the outset I want to emphasize what the crime involved in this case is, and what it is not. These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the Government. They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date: The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids. I would hold § 3 of the Smith Act authorizing this prior restraint unconstitutional on its face and as applied.

\*\*\*The opinions for affirmance indicate that the chief reason for jettisoning the rule is the expressed fear that advocacy of Communist doctrine endangers the safety of the Republic. Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk. They embodied this philosophy in the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." I have always believed that the First Amendment is the keystone of our Government, that the freedoms it guarantees provide the best insurance against destruction of all freedom. At least as to speech in the realm of public matters, I believe that the "clear and present danger" test does not "mark the furthestmost constitutional boundaries of protected expression" but does "no more than recognize a minimum compulsion of the Bill of Rights." *Bridges v. California*.

So long as this Court exercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere "reasonableness." Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress. The Amendment as so construed is not likely to protect any but those "safe" or orthodox views which rarely need its protection. \*\*\*

Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.

MR. JUSTICE DOUGLAS, DISSENTING.

If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality. This case was argued as if those were the facts. The argument imported much seditious conduct into the record. That is easy and it has popular appeal, for the activities of Communists in plotting and scheming against the free world are common knowledge. But the fact is that no such evidence was introduced at the trial. There is a statute which makes a seditious conspiracy unlawful. Petitioners, however, were not charged with a "conspiracy to overthrow" the Government. They were charged with a conspiracy to form a party and groups and assemblies of people who teach and advocate the overthrow of our Government by force or violence and with a conspiracy to advocate and teach its overthrow by force and violence. It may well be that indoctrination in the techniques of terror to destroy the Government would be indictable under either statute. But the teaching which is condemned here is of a different character.

So far as the present record is concerned, what petitioners did was to organize people to teach and themselves teach the Marxist-Leninist doctrine contained

chiefly in four books: STALIN, FOUNDATIONS OF LENINISM (1924); MARX AND ENGELS, MANIFESTO OF THE COMMUNIST PARTY (1848); LENIN, THE STATE AND REVOLUTION (1917); HISTORY OF THE COMMUNIST PARTY OF THE SOVIET UNION (1939).

Those books are to Soviet Communism what MEIN KAMPF was to Nazism. If they are understood, the ugliness of Communism is revealed, its deceit and cunning are exposed, the nature of its activities becomes apparent, and the chances of its success less likely. That is not, of course, the reason why petitioners chose these books for their classrooms. They are fervent Communists to whom these volumes are gospel. They preached the creed with the hope that some day it would be acted upon.

The opinion of the Court does not outlaw these texts nor condemn them to the fire, as the Communists do literature offensive to their creed. But if the books themselves are not outlawed, if they can lawfully remain on library shelves, by what reasoning does their use in a classroom become a crime? It would not be a crime under the Act to introduce these books to a class, though that would be teaching what the creed of violent overthrow of the Government is. The Act, as construed, requires the element of intent—that those who teach the creed believe in it. The crime then depends not on what is taught but on who the teacher is. That is to make freedom of speech turn not on what is said, but on the intent with which it is said. Once we start down that road we enter territory dangerous to the liberties of every citizen.

\*\*\* There comes a time when even speech loses its constitutional immunity. Speech innocuous one year may at another time fan such destructive flames that it must be halted in the interests of the safety of the Republic. That is the meaning of the clear and present danger test. When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to call a halt. Otherwise, free speech which is the strength of the Nation will be the cause of its destruction.

Yet free speech is the rule, not the exception. The restraint to be constitutional must be based on more than fear, on more than passionate opposition against the speech, on more than a revolted dislike for its contents. There must be some immediate injury to society that is likely if speech is allowed. The classic statement of these conditions was made by Mr. Justice Brandeis in his concurring opinion in *Whitney v. California* \*\*\*.

I had assumed that the question of the clear and present danger, being so critical an issue in the case, would be a matter for submission to the jury. \*\*\*

Yet, whether the question is one for the Court or the jury, there should be evidence of record on the issue. This record, however, contains no evidence whatsoever showing that the acts charged, viz., the teaching of the Soviet theory of revolution with the hope that it will be realized, have created any clear and present danger to the Nation. The Court, however, rules to the contrary. \*\*\*

The nature of Communism as a force on the world scene would, of course, be relevant to the issue of clear and present danger of petitioners' advocacy within the United States. But the primary consideration is the strength and tactical position of petitioners and their converts in this country. On that there is no

evidence in the record. If we are to take judicial notice of the threat of Communists within the nation, it should not be difficult to conclude that as a political party they are of little consequence. Communists in this country have never made a respectable or serious showing in any election. I would doubt that there is a village, let alone a city or county or state, which the Communists could carry. Communism in the world scene is no bogeyman; but Communism as a political faction or party in this country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party. It is inconceivable that those who went up and down this country preaching the doctrine of revolution which petitioners espouse would have any success. In days of trouble and confusion, when bread lines were long, when the unemployed walked the streets, when people were starving, the advocates of a short-cut by revolution might have a chance to gain adherents. But today there are no such conditions. The country is not in despair; the people know Soviet Communism; the doctrine of Soviet revolution is exposed in all of its ugliness and the American people want none of it.

How it can be said that there is a clear and present danger that this advocacy will succeed is, therefore, a mystery. Some nations less resilient than the United States, where illiteracy is high and where democratic traditions are only budding, might have to take drastic steps and jail these men for merely speaking their creed. But in America they are miserable merchants of unwanted ideas; their wares remain unsold. The fact that their ideas are abhorrent does not make them powerful.

The political impotence of the Communists in this country does not, of course, dispose of the problem. Their numbers; their positions in industry and government; the extent to which they have in fact infiltrated the police, the armed services, transportation, stevedoring, power plants, munitions works, and other critical places—these facts all bear on the likelihood that their advocacy of the Soviet theory of revolution will endanger the Republic. But the record is silent on these facts. If we are to proceed on the basis of judicial notice, it is impossible for me to say that the Communists in this country are so potent or so strategically deployed that they must be suppressed for their speech. I could not so hold unless I were willing to conclude that the activities in recent years of committees of Congress, of the Attorney General, of labor unions, of state legislatures, and of Loyalty Boards were so futile as to leave the country on the edge of grave peril. To believe that petitioners and their following are placed in such critical positions as to endanger the Nation is to believe the incredible. It is safe to say that the followers of the creed of Soviet Communism are known to the F. B. I.; that in case of war with Russia they will be picked up overnight as were all prospective saboteurs at the commencement of World War II; that the invisible army of petitioners is the best known, the most beset, and the least thriving of any fifth column in history. Only those held by fear and panic could think otherwise.

\*\*\* The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." The Constitution provides no exception. This does not mean, however, that the Nation need hold its hand until it is in such weakened condition that there is no time to protect itself from incitement to

revolution. Seditious conduct can always be punished. But the command of the First Amendment is so clear that we should not allow Congress to call a halt to free speech except in the extreme case of peril from the speech itself. The First Amendment makes confidence in the common sense of our people and in their maturity of judgment the great postulate of our democracy. Its philosophy is that violence is rarely, if ever, stopped by denying civil liberties to those advocating resort to force. The First Amendment reflects the philosophy of Jefferson "that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order." The political censor has no place in our public debates. Unless and until extreme and necessitous circumstances are shown, our aim should be to keep speech unfettered and to allow the processes of law to be invoked only when the provocateurs among us move from speech to action.

## Notes

1. The opinions in *Dennis* are lengthy and review the earlier World War I cases, including Holmes' dissents. How is Communism portrayed in *Dennis*, especially when compared to earlier political viewpoints? How do the portrayals of Communism compare to current views of Communism? Are there current political viewpoints that seem commensurate with the Court's view of Communism?
2. The Court considers the Smith Act "on its face" and as applied. What are the arguments that it is facially unconstitutional as a violation of the First Amendment?

## III. "Offensive" Speech

### *Chaplinsky v. New Hampshire*

315 U.S. 568 (1942)

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE [UNANIMOUS] COURT.

Appellant, a member of the sect known as Jehovah's Witnesses, was convicted in the municipal court of Rochester, New Hampshire, for violation of Chapter 378, § 2, of the Public Laws of New Hampshire:

No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

The complaint charged that appellant,

with force and arms, in a certain public place in said city of Rochester, to-wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the

entrance of the City Hall, did unlawfully repeat the words following, addressed to the complainant, that is to say, "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists," the same being offensive, derisive and annoying words and names.

There is no substantial dispute over the facts. Chaplinsky was distributing the literature of his sect on the streets of Rochester on a busy Saturday afternoon. Members of the local citizenry complained to the City Marshal, Bowering, that Chaplinsky was denouncing all religion as a "racket." Bowering told them that Chaplinsky was lawfully engaged, and then warned Chaplinsky that the crowd was getting restless. Some time later, a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station, but did not inform him that he was under arrest or that he was going to be arrested. On the way, they encountered Marshal Bowering, who had been advised that a riot was under way and was therefore hurrying to the scene. Bowering repeated his earlier warning to Chaplinsky, who then addressed to Bowering the words set forth in the complaint.

Chaplinsky's version of the affair was slightly different. He testified that, when he met Bowering, he asked him to arrest the ones responsible for the disturbance. In reply, Bowering cursed him and told him to come along. Appellant admitted that he said the words charged in the complaint, with the exception of the name of the Deity.

It is now clear that "Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action."

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

*Cantwell v. Connecticut* (1940).

We are unable to say that the limited scope of the statute as thus construed [by the New Hampshire Supreme Court] contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. This conclusion necessarily disposes of appellant's contention that the statute is so vague and

indefinite as to render a conviction thereunder a violation of due process. A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law.

Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argument is unnecessary to demonstrate that the appellations "damned racketeer" and "damned Fascist" are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

The refusal of the state court to admit evidence of provocation and evidence bearing on the truth or falsity of the utterances is open to no Constitutional objection. Whether the facts sought to be proved by such evidence constitute a defense to the charge, or may be shown in mitigation, are questions for the state court to determine. Our function is fulfilled by a determination that the challenged statute, on its face and as applied, does not contravene the Fourteenth Amendment.

*Affirmed.*

## ***Cohen v. California***

403 U.S. 15 (1971)

MR. JUSTICE HARLAN DELIVERED THE OPINION OF THE COURT. JUSTICE BLACKMUN FILED A DISSENTING OPINION, IN WHICH THE CHIEF JUSTICE [BURGER] AND JUSTICE BLACK JOINED.

MR. JUSTICE HARLAN DELIVERED THE OPINION OF THE COURT.

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

Appellant Paul Robert Cohen was convicted in the Los Angeles Municipal Court of violating that part of California Penal Code § 415 which prohibits "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct. . . ." He was given 30 days' imprisonment. The facts upon which his conviction rests are detailed in the opinion of the Court of Appeal of California, Second Appellate District, as follows:

"On April 26, 1968, the defendant was observed in the Los Angeles County Courthouse in the corridor outside of division 20 of the municipal court wearing a jacket bearing the words 'Fuck the Draft' which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.

"The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest."

In affirming the conviction the Court of Appeal held that "offensive conduct" means "behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace," and that the State had proved this element because, on the facts of this case, "[i]t was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forceably remove his jacket." The California Supreme Court declined review by a divided vote. We brought the case here \*\*\*. We now reverse. \*\*\*

## I

In order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does *not* present.

The conviction quite clearly rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public. The only "conduct" which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon "speech," not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen's ability to express himself. Further, the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected.

Appellant's conviction, then, rests squarely upon his exercise of the "freedom of speech" protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. This does not end the inquiry, of course, for the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses. In this vein, too, however, we think it important to note that several issues typically associated with such problems are not presented here.

In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places. No fair reading of the phrase "offensive conduct" can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.

In the second place, as it comes to us, this case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket.

This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. *Chaplinsky v. New Hampshire* (1942). While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not "directed to the person of the hearer." *Cantwell v. Connecticut* (1940). No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. There is, as noted above, no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.

Finally, in arguments before this Court much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, we have at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech." The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a

recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home. Given the subtlety and complexity of the factors involved, if Cohen's "speech" was otherwise entitled to constitutional protection, we do not think the fact that some unwilling "listeners" in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all "offensive conduct" that disturbs "any neighborhood or person."

## II

Against this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.

The rationale of the California court is plainly untenable. At most it reflects an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Indep. Community School Dist.* (1969). We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves.

Admittedly, it is not so obvious that the First and Fourteenth Amendments must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic. We think, however, that examination and reflection will reveal the shortcomings of a contrary viewpoint.

At the outset, we cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions, discussed above but not applicable here, to the usual rule that governmental bodies may not prescribe the form or content of individual expression. Equally important to our conclusion is the constitutional backdrop against which our decision must be

made. The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. See *Whitney v. California* (1927) (Brandeis, J., concurring).

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why "[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons," and why "so long as the means are peaceful, the communication need not meet standards of acceptability."

Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. \*\*\*

Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon

the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. Because that is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be

*Reversed.*

MR. JUSTICE BLACKMUN, WITH WHOM THE CHIEF JUSTICE [BURGER] AND MR. JUSTICE BLACK JOIN, DISSENTING.

I dissent, and I do so for two reasons:

Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. \*\*\* Further, the case appears to me to be well within the sphere of *Chaplinsky v. New Hampshire* (1942), where Mr. Justice Murphy, a known champion of First Amendment freedoms, wrote for a unanimous bench. As a consequence, this Court's agonizing over First Amendment values seems misplaced and unnecessary.

[The second reason concerns the Court's "jurisdiction" over the constitutional question].

[MR. JUSTICE WHITE, DISSENTING OPINION, discussing the second reason, omitted].

## **Notes**

1. The exclusion of certain types of speech as unprotected by the First Amendment is often described as the "categorical" approach. Consider the categories of speech that the Court excludes from First Amendment consideration. What is the First Amendment doctrine that develops for those categories? Is it operative in the next cases?
2. Why does the Court reject the "appropriately decorous atmosphere in the courthouse" for sustaining Cohen's conviction?

## IV. Distinguishing Protected Advocacy

### *Brandenburg v. Ohio*

395 U.S. 444 (1969)

PER CURIAM OPINION FOR THE COURT. JUSTICE DOUGLAS AND JUSTICE BLACK FILED CONCURRING OPINIONS.

PER CURIAM OPINION FOR THE COURT.

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." Ohio Rev. Code Ann. § 2923.13. He was fined \$1,000 and sentenced to one to 10 years' imprisonment. The appellant challenged the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution, but the intermediate appellate court of Ohio affirmed his conviction without opinion. The Supreme Court of Ohio dismissed his appeal, *sua sponte*, "for the reason that no substantial constitutional question exists herein." It did not file an opinion or explain its conclusions. Appeal was taken to this Court, and we noted probable jurisdiction. We reverse.

The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan "rally" to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

The prosecution's case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews. Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

"This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.

"We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you."

The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of "revengeance" was omitted, and one sentence was added: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." Though some of the figures in the films carried weapons, the speaker did not.

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, the text of which is quite similar to that of the laws of Ohio. *Whitney v. California* (1927). The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. But *Whitney* has been thoroughly discredited by later decisions. See *Dennis v. United States* (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in *Noto v. United States* (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald

definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney v. California*, cannot be supported, and that decision is therefore overruled.

*Reversed.*

MR. JUSTICE DOUGLAS, CONCURRING.

While I join the opinion of the Court, I desire to enter a *caveat*.

The "clear and present danger" test was adumbrated by Mr. Justice Holmes in a case arising during World War I—a war "declared" by the Congress, not by the Chief Executive. The case was *Schenck v. United States*, where the defendant was charged with attempts to cause insubordination in the military and obstruction of enlistment. \* \* \* \*

Though I doubt if the "clear and present danger" test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace.

The Court quite properly overrules *Whitney v. California*, which involved advocacy of ideas which the majority of the Court deemed unsound and dangerous.

Mr. Justice Holmes, though never formally abandoning the "clear and present danger" test, moved closer to the First Amendment ideal \* \* \* in dissent in *Gitlow v. New York*. \* \* \* \*

We have never been faithful to the philosophy of that dissent.

\* \* \* \* My own view is quite different. I see no place in the regime of the First Amendment for any "clear and present danger" test, whether strict and tight as some would make it, or free-wheeling as the Court in *Dennis* rephrased it.

MR. JUSTICE BLACK, CONCURRING [OMITTED]

## *Hess v. Indiana* 414 U.S. 105 (1973)

PER CURIAM OPINION FOR THE COURT. JUSTICE REHNQUIST FILED A DISSENTING OPINION, IN WHICH THE CHIEF JUSTICE AND JUSTICE BLACKMUN JOINED.

PER CURIAM OPINION FOR THE COURT.

Gregory Hess appeals from his conviction in the Indiana courts for violating the State's disorderly conduct statute. Appellant contends that his conviction should be reversed because the statute is unconstitutionally vague, because the statute is overbroad in that it forbids activity that is protected under the First and Fourteenth Amendments, and because the statute, as applied here, abridged his constitutionally protected freedom of speech. These contentions were rejected in the City Court, where Hess was convicted, and in the Superior Court, which reviewed his conviction. The Supreme Court of Indiana, with one dissent, considered and rejected each of Hess' constitutional contentions, and accordingly affirmed his conviction.

The events leading to Hess' conviction began with an antiwar demonstration on the campus of Indiana University. In the course of the demonstration, approximately 100 to 150 of the demonstrators moved onto a public street and blocked the passage of vehicles. When the demonstrators did not respond to verbal directions from the sheriff to clear the street, the sheriff and his deputies began walking up the street, and the demonstrators in their path moved to the curbs on either side, joining a large number of spectators who had gathered. Hess was standing off the street as the sheriff passed him. The sheriff heard Hess utter the word "fuck" in what he later described as a loud voice and immediately arrested him on the disorderly conduct charge. It was later stipulated that what appellant had said was "We'll take the fucking street later," or "We'll take the fucking street again." Two witnesses who were in the immediate vicinity testified, apparently without contradiction, that they heard Hess' words and witnessed his arrest. They indicated that Hess did not appear to be exhorting the crowd to go back into the street, that he was facing the crowd and not the street when he uttered the statement, that his statement did not appear to be addressed to any particular person or group, and that his tone, although loud, was no louder than that of the other people in the area.

Indiana's disorderly conduct statute was applied in this case to punish only spoken words. It hardly needs repeating that "[t]he constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within `narrowly limited classes of speech.'" The words here did not fall within any of these "limited classes." In the first place, it is clear that the Indiana court specifically abjured any suggestion that Hess' words could be punished as obscene.\*\*\* Indeed, after *Cohen v. California* (1971) such a contention with regard to the language at issue would not be tenable. By the same token, any suggestion that Hess' speech amounted to "fighting words," *Chaplinsky v. New Hampshire* (1942), could not withstand scrutiny. Even if under other circumstances this language could be regarded as a personal insult, the evidence is undisputed that Hess' statement was not directed to any person or

group in particular. Although the sheriff testified that he was offended by the language, he also stated that he did not interpret the expression as being directed personally at him, and the evidence is clear that appellant had his back to the sheriff at the time. Thus, under our decisions, the State could not punish this speech as "fighting words."

\*\*\* The Indiana Supreme Court placed primary reliance on the trial court's finding that Hess' statement "was intended to incite further lawless action on the part of the crowd in the vicinity of appellant and was likely to produce such action." At best, however, the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to permit the State to punish Hess' speech. Under our decisions, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio* (1969). (Emphasis added.) Since the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished by the State on the ground that they had "a tendency to lead to violence."

Accordingly, the motion to proceed *in forma pauperis* is granted and the judgment of the Supreme Court of Indiana is reversed.

MR. JUSTICE REHNQUIST, WITH WHOM THE CHIEF JUSTICE AND MR. JUSTICE BLACKMUN JOIN, DISSENTING.

The Court's *per curiam* opinion rendered today aptly demonstrates the difficulties inherent in substituting a different complex of factual inferences for the inferences reached by the courts below. Since it is not clear to me that the Court has a sufficient basis for its action, I dissent.

It should be noted at the outset that the case was tried *de novo* in the Superior Court of Indiana upon a stipulated set of facts, and, therefore, the record is perhaps unusually colorless and devoid of life. Nevertheless, certain facts are clearly established. Appellant was arrested during the course of an antiwar demonstration conducted at Indiana University in May 1970. The demonstration was of sufficient size and vigor to require the summoning of police, and both the Sheriff's Department and the Bloomington Police Department were asked to help university officials and police remove demonstrators blocking doorways to a campus building. At the time the sheriff arrived, "approximately 200-300 persons" were assembled at that particular building.

The doorways eventually were cleared of demonstrators, but, in the process, two students were placed under arrest. This action did not go unnoticed by the demonstrators. As the stipulation notes, "[i]n apparent response to these

arrests, about 100-150 of the persons who had gathered as spectators went into Indiana Avenue in front of Bryan Hall and in front of the patrol car in which the two arrestees had been placed." Thus, by contrast to the majority's somewhat antiseptic description of this massing as being "[i]n the course of the demonstration," the demonstrators' presence in the street was not part of the normal "course of the demonstration" but could reasonably be construed as an attempt to intimidate and impede the arresting officers. Furthermore, as the stipulation also notes, the demonstrators "did not respond to verbal directions" from the sheriff to clear the street. Thus, the sheriff and his deputies found it necessary to disperse demonstrators by walking up the street directly into their path. Only at that point did the demonstrators move to the curbs.

The stipulation contains only one other declaration of fact: that Sheriff Thrasher arrested the appellant, Gregory Hess, for disorderly conduct. The remainder of the stipulation merely summarizes testimony, particularly the testimony of Sheriff Thrasher, two female witnesses (both students at Indiana University) who were apparently part of the crowd, and Dr. Owen Thomas, a professor of English at the university. The only "established" facts which emerge from these summaries are that "Hess was standing off the street on the eastern curb of Indiana Avenue" and that he said, in the words of the trial court, "We'll take the fucking street later (or again)." The two female witnesses testified, as the majority correctly observes, that they were not offended by Hess' statement, that it was said no louder than statements by other demonstrators, "that Hess *did not appear* to be exhorting the crowd to go back into the street," that he was facing the crowd, and "that his statement *did not appear* to be addressed to any particular person or group." (Emphasis added.)

The majority makes much of this "uncontroverted evidence," but I am unable to find anywhere in the opinion an explanation of why it must be believed. Surely the sentence "We'll take the fucking street later (or again)" is susceptible of characterization as an exhortation, particularly when uttered in a loud voice while facing a crowd. The opinions of two defense witnesses cannot be considered *proof* to the contrary, since the trial court was perfectly free to reject this testimony if it so desired. Perhaps, as these witnesses and the majority opinion seem to suggest, appellant was simply expressing his views to the world at large, but that is surely not the only rational explanation.

The majority also places great emphasis on appellant's use of the word "later," even suggesting at one point that the statement "could be taken as counsel for present moderation." The opinion continues: "[A]t worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time." From that observation, the majority somehow concludes that the advocacy was not directed towards inciting imminent action. But whatever other theoretical interpretations may be placed upon the remark, there are surely possible constructions of the statement which would encompass more or less immediate and continuing action against the harassed police. They should not be rejected out of hand because of an unexplained preference for other acceptable alternatives.

The simple explanation for the result in this case is that the majority has interpreted the evidence differently from the courts below. In doing so, however, I believe the Court has exceeded the proper scope of our review. Rather than

considering the "evidence" in the light most favorable to the appellee and resolving credibility questions against the appellant, as many of our cases have required, the Court has instead fashioned its own version of events from a paper record, some "uncontroverted evidence," and a large measure of conjecture. Since this is not the traditional function of any appellate court, and is surely not a wise or proper use of the authority of this Court, I dissent.

## Notes

1. The Court in *Brandenburg* articulated a standard to distinguish protected advocacy from unprotected speech. Make sure you can articulate that standard.
2. The Court in *Brandenburg* overrules *Whitney v. California* explicitly, reasoning that the Ohio Syndicalism Act at issue in *Brandenburg* is similar to the California Syndicalism Act under which *Whitney* was prosecuted. Should other cases also have been overruled, as Justice Douglas seems to have suggested in his dissent?
3. Is there an argument that the speech in *Brandenburg* was actually more of a "clear and present" danger than the speech in *Whitney*?
4. The dissent in *Hess* suggests that the statements and acts of Hess are less clear than the Court describes them. Can you revise the statements and the acts of Hess so that they would be unprotected under the *Brandenburg* standard?
5. Importantly, and similar to Cohen, Hess was convicted under a disorderly conduct statute but was able to raise a First Amendment claim to the statute as applied to his speech acts.

### Note: The Heckler's Veto

The danger of provoking violence by speech is sometimes said to pose the problem of the "heckler's veto." Can a rowdy crowd or "hecklers" essentially extinguish a speaker's First Amendment rights by posing a danger of violence? On the other hand, can apathetic or nonviolent listeners essentially grant a speaker First Amendment protection.

Consider this situation: A group of people known as the "Bible Believers," came to the Arab International festival on the streets of Dearborn, Michigan - - - as they had done the year before - - - to "preach." Their speech included "strongly worded" slogans on signs, t-shirts, and banners (e.g., "Islam Is A Religion of Blood and Murder"), a "severed pig's head on a stick" (intended to protect the Bible Believers by repelling

observers who feared it), statements through a megaphone castigating the following of a "pedophile prophet" and warning of "God's impending judgment." A crowd gathered, seemingly mostly of children, who yelled back and threw items at the "preachers." The throwing and yelling escalated.

A law enforcement officer from the County asked the Bible Believers to leave, and - when pressed - saying they would be cited for disorderly conduct: "You need to leave. If you don't leave, we're going to cite you for disorderly. You're creating a disturbance. I mean, look at your people here. This is crazy!" They were eventually escorted out.

Members of the Bible Believers brought suit in federal court arguing that their First Amendment rights were violated. The district judge granted summary judgment in favor of the County and its officials. On appeal, a divided Sixth Circuit panel affirmed, with the dissenting judge arguing that the "law enforcement is principally required to protect lawful speakers over and above law-breakers." The Sixth Circuit en banc vacated the panel opinion.

What do you think the proper result should be and why?

## V. "Political" Speech in the Age of "Terrorism"

In this complex case, consider how anti-terrorism acts can criminalize speech, and whether the same rationales in this case could have been applied to the earlier cases in this Chapter.

### *Holder v. Humanitarian Law Project*

561 U.S. 1 (2010)

ROBERTS, C. J., DELIVERED THE OPINION OF THE COURT, IN WHICH STEVENS, SCALIA, KENNEDY, THOMAS, AND ALITO, JJ., JOINED. BREYER, J., FILED A DISSENTING OPINION, IN WHICH GINSBURG AND SOTOMAYOR, JJ., JOINED.

CHIEF JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

Congress has prohibited the provision of "material support or resources" to certain foreign organizations that engage in terrorist activity. 18 U. S. C. §2339B(a)(1). That prohibition is based on a finding that the specified organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), §301(a)(7), 110 Stat. 1247, note following 18 U. S. C. §2339B (Findings and Purpose). The plaintiffs in this litigation seek to provide support to two such organizations. Plaintiffs claim that they seek to facilitate only the lawful, nonviolent purposes of those groups, and that

applying the material-support law to prevent them from doing so violates the Constitution. In particular, they claim that the statute is too vague, in violation of the Fifth Amendment, and that it infringes their rights to freedom of speech and association, in violation of the First Amendment. We conclude that the material-support statute is constitutional as applied to the particular activities plaintiffs have told us they wish to pursue. We do not, however, address the resolution of more difficult cases that may arise under the statute in the future.

## I

This litigation concerns 18 U. S. C. §2339B, which makes it a federal crime to "knowingly provid[e] material support or resources to a foreign terrorist organization." Congress has amended the definition of "material support or resources" periodically, but at present it is defined as follows:

"[T]he term 'material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials."

§2339A(b)(1); see also §2339B(g)(4).

The authority to designate an entity a "foreign terrorist organization" rests with the Secretary of State. 8 U. S. C. §§1189(a)(1), (d)(4). She may, in consultation with the Secretary of the Treasury and the Attorney General, so designate an organization upon finding that it is foreign, engages in "terrorist activity" or "terrorism," and thereby "threatens the security of United States nationals or the national security of the United States." §§1189(a)(1), (d)(4). "[N]ational security' means the national defense, foreign relations, or economic interests of the United States." §1189(d)(2). An entity designated a foreign terrorist organization may seek review of that designation before the D. C. Circuit within 30 days of that designation. §1189(c)(1).

In 1997, the Secretary of State designated 30 groups as foreign terrorist organizations. See 62 Fed. Reg. 52650. Two of those groups are the Kurdistan Workers' Party (also known as the Partiya Karkeran Kurdistan, or PKK) and the Liberation Tigers of Tamil Eelam (LTTE). The PKK is an organization founded in 1974 with the aim of establishing an independent Kurdish state in southeastern Turkey. The LTTE is an organization founded in 1976 for the purpose of creating an independent Tamil state in Sri Lanka. The District Court in this action found that the PKK and the LTTE engage in political and humanitarian activities. The Government has presented evidence that both groups have also committed numerous terrorist attacks, some of which have harmed American citizens. The LTTE sought judicial review of its designation as a foreign terrorist organization; the D. C. Circuit upheld that designation. The PKK did not challenge its designation.

Plaintiffs in this litigation are two U. S. citizens and six domestic organizations: the Humanitarian Law Project (HLP) (a human rights organization with consultative status to the United Nations); Ralph Fertig (the HLP's president, and a retired administrative law judge); Nagalingam Jeyalingam (a Tamil

physician, born in Sri Lanka and a naturalized U. S. citizen); and five nonprofit groups dedicated to the interests of persons of Tamil descent. Brief for Petitioners in No. 09-89, pp. ii, 10 (hereinafter Brief for Plaintiffs); App. 48. In 1998, plaintiffs filed suit in federal court challenging the constitutionality of the material-support statute, §2339B. Plaintiffs claimed that they wished to provide support for the humanitarian and political activities of the PKK and the LTTE in the form of monetary contributions, other tangible aid, legal training, and political advocacy, but that they could not do so for fear of prosecution under §2339B.

As relevant here, plaintiffs claimed that the material-support statute was unconstitutional on two grounds: First, it violated their freedom of speech and freedom of association under the First Amendment, because it criminalized their provision of material support to the PKK and the LTTE, without requiring the Government to prove that plaintiffs had a specific intent to further the unlawful ends of those organizations. Second, plaintiffs argued that the statute was unconstitutionally vague.

\*\*\* [While the litigation was pending] in 2001, Congress amended the definition of "material support or resources" to add the term "expert advice or assistance." Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act), §805(a)(2)(B), 115 Stat. 377.\*\*\* [And] Congress again amended §2339B and the definition of "material support or resources." Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), §6603, 118 Stat. 3762-3764.

In IRTPA, Congress clarified the mental state necessary to violate §2339B, requiring knowledge of the foreign group's designation as a terrorist organization or the group's commission of terrorist acts. §2339B(a)(1). Congress also added the term "service" to the definition of "material support or resources," §2339A(b)(1), and defined "training" to mean "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," §2339A(b)(2). It also defined "expert advice or assistance" to mean "advice or assistance derived from scientific, technical or other specialized knowledge." §2339A(b)(3). Finally, IRTPA clarified the scope of the term "personnel" by providing:

"No person may be prosecuted under [§2339B] in connection with the term 'personnel' unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control." §2339B(h).

\*\*\* The Government petitioned for certiorari, and plaintiffs filed a conditional cross-petition. We granted both petitions. 557 U. S. \_\_\_ (2009).

## II

Given the complicated 12-year history of this litigation, we pause to clarify the questions before us. Plaintiffs challenge §2339B's prohibition on four types of material support--"training," "expert advice or assistance," "service," and "personnel." They raise three constitutional claims. First, plaintiffs claim that §2339B violates the Due Process Clause of the Fifth Amendment because these four statutory terms are impermissibly vague. Second, plaintiffs claim that §2339B violates their freedom of speech under the First Amendment. Third, plaintiffs claim that §2339B violates their First Amendment freedom of association.

Plaintiffs do not challenge the above statutory terms in all their applications. Rather, plaintiffs claim that §2339B is invalid to the extent it prohibits them from engaging in certain specified activities. With respect to the HLP and Judge Fertig, those activities are: (1) "train[ing] members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes"; (2) "engag[ing] in political advocacy on behalf of Kurds who live in Turkey"; and (3) "teach[ing] PKK members how to petition various representative bodies such as the United Nations for relief." With respect to the other plaintiffs, those activities are: (1) "train[ing] members of [the] LTTE to present claims for tsunami-related aid to mediators and international bodies"; (2) "offer[ing] their legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government"; and (3) "engag[ing] in political advocacy on behalf of Tamils who live in Sri Lanka."

Plaintiffs also state that "the LTTE was recently defeated militarily in Sri Lanka," so "[m]uch of the support the Tamil organizations and Dr. Jeyalingam sought to provide is now moot." Plaintiffs thus seek only to support the LTTE "as a political organization outside Sri Lanka advocating for the rights of Tamils." Counsel for plaintiffs specifically stated at oral argument that plaintiffs no longer seek to teach the LTTE how to present claims for tsunami-related aid, because the LTTE now "has no role in Sri Lanka." For that reason, helping the LTTE negotiate a peace agreement with Sri Lanka appears to be moot as well. Thus, we do not consider the application of §2339B to those activities here.

One last point. Plaintiffs seek preenforcement review of a criminal statute. Before addressing the merits, we must be sure that this is a justiciable case or controversy under Article III. We conclude that it is: Plaintiffs face "a credible threat of prosecution" and "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." \*\*\*

## III

Plaintiffs claim, as a threshold matter, that we should affirm the Court of Appeals without reaching any issues of constitutional law. They contend that we should interpret the material-support statute, when applied to speech, to require proof that a defendant intended to further a foreign terrorist organization's illegal activities. That interpretation, they say, would end the litigation because plaintiffs' proposed activities consist of speech, but plaintiffs do not intend to further unlawful conduct by the PKK or the LTTE.

We reject plaintiffs' interpretation of §2339B because it is inconsistent with the text of the statute. Section 2339B(a)(1) prohibits "knowingly" providing material support. It then specifically describes the type of knowledge that is required: "To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity ..., or that the organization has engaged or engages in terrorism... ." Congress plainly spoke to the necessary mental state for a violation of §2339B, and it chose knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities.\*\*\*

Finally, plaintiffs give the game away when they argue that a specific intent requirement should apply only when the material-support statute applies to speech. There is no basis whatever in the text of §2339B to read the same provisions in that statute as requiring intent in some circumstances but not others. It is therefore clear that plaintiffs are asking us not to interpret §2339B, but to revise it. \*\*\*

We cannot avoid the constitutional issues in this litigation through plaintiffs' proposed interpretation of §2339B.

#### IV

We turn to the question whether the material-support statute, as applied to plaintiffs, is impermissibly vague under the Due Process Clause of the Fifth Amendment. "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams* (2008). \*\*\* We have said that when a statute "interferes with the right of free speech or of association, a more stringent vagueness test should apply." "But 'perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.'" *Williams* (quoting *Ward v. Rock Against Racism* (1989)).

The Court of Appeals did not adhere to these principles. Instead, the lower court merged plaintiffs' vagueness challenge with their First Amendment claims, holding that portions of the material-support statute were unconstitutionally vague because they applied to protected speech--regardless of whether those applications were clear. The court stated that, even if persons of ordinary intelligence understood the scope of the term "training," that term would "remain impermissibly vague" because it could "be read to encompass speech and advocacy protected by the First Amendment." It also found "service" and a portion of "expert advice or assistance" to be vague because those terms covered protected speech.

\*\*\* [T]he Court of Appeals contravened the rule that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." That rule makes no exception for conduct in the form of speech. Thus, even to the extent a heightened vagueness standard applies, a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice. And he certainly cannot do so based on the

speech of others. Such a plaintiff may have a valid overbreadth claim under the First Amendment, but our precedents make clear that a Fifth Amendment vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression. Otherwise the doctrines would be substantially redundant.

Under a proper analysis, plaintiffs' claims of vagueness lack merit. \*\*\*

V

A

We next consider whether the material-support statute, as applied to plaintiffs, violates the freedom of speech guaranteed by the First Amendment. Both plaintiffs and the Government take extreme positions on this question. Plaintiffs claim that Congress has banned their "pure political speech." It has not. Under the material-support statute, plaintiffs may say anything they wish on any topic. They may speak and write freely about the PKK and LTTE, the governments of Turkey and Sri Lanka, human rights, and international law. They may advocate before the United Nations. As the Government states: "The statute does not prohibit independent advocacy or expression of any kind." Section 2339B also "does not prevent [plaintiffs] from becoming members of the PKK and LTTE or impose any sanction on them for doing so." Congress has not, therefore, sought to suppress ideas or opinions in the form of "pure political speech." Rather, Congress has prohibited "material support," which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.<sup>4</sup>

For its part, the Government takes the foregoing too far, claiming that the only thing truly at issue in this litigation is conduct, not speech. Section 2339B is directed at the fact of plaintiffs' interaction with the PKK and LTTE, the Government contends, and only incidentally burdens their expression. The Government argues that the proper standard of review is therefore the one set out in *United States v. O'Brien* (1968). In that case, the Court rejected a First Amendment challenge to a conviction under a generally applicable prohibition on destroying draft cards, even though O'Brien had burned his card in protest against the draft. In so doing, we applied what we have since called "intermediate scrutiny," under which a "content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broadcasting System, Inc. v. FCC* (1997)(citing *O'Brien*).

The Government is wrong that the only thing actually at issue in this litigation is conduct, and therefore wrong to argue that *O'Brien* provides the correct standard of review. *O'Brien* does not provide the applicable standard for reviewing a content-based regulation of speech, see *R. A. V. v. St. Paul* (1992); *Texas v. Johnson* (1989), and §2339B regulates speech on the basis of its content. Plaintiffs want to speak to the PKK and the LTTE, and whether they may do so under §2339B depends on what they say. If plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from

"specialized knowledge"--for example, training on the use of international law or advice on petitioning the United Nations--then it is barred. On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecialized knowledge.

The Government argues that §2339B should nonetheless receive intermediate scrutiny because it *generally* functions as a regulation of conduct. That argument runs headlong into a number of our precedents, most prominently *Cohen v. California* (1971). *Cohen* also involved a generally applicable regulation of conduct, barring breaches of the peace. But when Cohen was convicted for wearing a jacket bearing an epithet, we did not apply *O'Brien*. Instead, we recognized that the generally applicable law was directed at Cohen because of what his speech communicated--he violated the breach of the peace statute because of the offensive content of his particular message. We accordingly applied more rigorous scrutiny and reversed his conviction.

This suit falls into the same category. The law here may be described as directed at conduct, as the law in *Cohen* was directed at breaches of the peace, but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message. As we explained in *Texas v. Johnson*: "If the [Government's] regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien's* test, and we must [apply] a more demanding standard."

## B

The First Amendment issue before us is more refined than either plaintiffs or the Government would have it. It is not whether the Government may prohibit pure political speech, or may prohibit material support in the form of conduct. It is instead whether the Government may prohibit what plaintiffs want to do--provide material support to the PKK and LTTE in the form of speech.

Everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order. Plaintiffs' complaint is that the ban on material support, applied to what they wish to do, is not "necessary to further that interest." The objective of combating terrorism does not justify prohibiting their speech, plaintiffs argue, because their support will advance only the legitimate activities of the designated terrorist organizations, not their terrorism.

Whether foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism is an empirical question. When it enacted §2339B in 1996, Congress made specific findings regarding the serious threat posed by international terrorism. One of those findings explicitly rejects plaintiffs' contention that their support would not further the terrorist activities of the PKK and LTTE: "[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an organization* facilitates that conduct." §301(a)(7) (emphasis added).

Plaintiffs argue that the reference to "any contribution" in this finding meant only monetary support. There is no reason to read the finding to be so limited, particularly because Congress expressly prohibited so much more than monetary support in §2339B. Congress's use of the term "contribution" is best

read to reflect a determination that any form of material support furnished "to" a foreign terrorist organization should be barred, which is precisely what the material-support statute does. Indeed, when Congress enacted §2339B, Congress simultaneously removed an exception that had existed in §2339A(a) (1994 ed.) for the provision of material support in the form of "humanitarian assistance to persons not directly involved in" terrorist activity. AEDPA §323, 110 Stat. 1255; 205 F. 3d, at 1136. That repeal demonstrates that Congress considered and rejected the view that ostensibly peaceful aid would have no harmful effects.

We are convinced that Congress was justified in rejecting that view. The PKK and the LTTE are deadly groups. "The PKK's insurgency has claimed more than 22,000 lives." The LTTE has engaged in extensive suicide bombings and political assassinations, including killings of the Sri Lankan President, Security Minister, and Deputy Defense Minister. "On January 31, 1996, the LTTE exploded a truck bomb filled with an estimated 1,000 pounds of explosives at the Central Bank in Colombo, killing 100 people and injuring more than 1,400. This bombing was the most deadly terrorist incident in the world in 1996." It is not difficult to conclude as Congress did that the "tain[t]" of such violent activities is so great that working in coordination with or at the command of the PKK and LTTE serves to legitimize and further their terrorist means.

Material support meant to "promot[e] peaceable, lawful conduct," can further terrorism by foreign groups in multiple ways. "Material support" is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups--legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds--all of which facilitate more terrorist attacks. "Terrorist organizations do not maintain *organizational* 'firewalls' that would prevent or deter . . . sharing and commingling of support and benefits." "[I]nvestigators have revealed how terrorist groups systematically conceal their activities behind charitable, social, and political fronts." M. LEVITT, *HAMAS: POLITICS, CHARITY, AND TERRORISM IN THE SERVICE OF JIHAD* 2-3 (2006). "Indeed, some designated foreign terrorist organizations use social and political components to recruit personnel to carry out terrorist operations, and to provide support to criminal terrorists and their families in aid of such operations."

Money is fungible, and "[w]hen foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put." But "there is reason to believe that foreign terrorist organizations do not maintain legitimate *financial* firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations." Thus, "[f]unds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives." There is evidence that the PKK and the LTTE, in particular, have not "respected the line between humanitarian and violent activities."

The dissent argues that there is "no natural stopping place" for the proposition that aiding a foreign terrorist organization's lawful activity promotes the terrorist organization as a whole. But Congress has settled on just such a

natural stopping place: The statute reaches only material support coordinated with or under the direction of a designated foreign terrorist organization. Independent advocacy that might be viewed as promoting the group's legitimacy is not covered.

Providing foreign terrorist groups with material support in any form also furthers terrorism by straining the United States' relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks. We see no reason to question Congress's finding that "international cooperation is required for an effective response to terrorism, as demonstrated by the numerous multilateral conventions in force providing universal prosecutive jurisdiction over persons involved in a variety of terrorist acts, including hostage taking, murder of an internationally protected person, and aircraft piracy and sabotage." The material-support statute furthers this international effort by prohibiting aid for foreign terrorist groups that harm the United States' partners abroad: "A number of designated foreign terrorist organizations have attacked moderate governments with which the United States has vigorously endeavored to maintain close and friendly relations," and those attacks "threaten [the] social, economic and political stability" of such governments. "[O]ther foreign terrorist organizations attack our NATO allies, thereby implicating important and sensitive multilateral security arrangements."

For example, the Republic of Turkey--a fellow member of NATO--is defending itself against a violent insurgency waged by the PKK. That nation and our other allies would react sharply to Americans furnishing material support to foreign groups like the PKK, and would hardly be mollified by the explanation that the support was meant only to further those groups' "legitimate" activities. From Turkey's perspective, there likely are no such activities.

## C

In analyzing whether it is possible in practice to distinguish material support for a foreign terrorist group's violent activities and its nonviolent activities, we do not rely exclusively on our own inferences drawn from the record evidence. We have before us an affidavit stating the Executive Branch's conclusion on that question. The State Department informs us that "[t]he experience and analysis of the U. S. government agencies charged with combating terrorism strongly support[t]" Congress's finding that all contributions to foreign terrorist organizations further their terrorism. McKune Affidavit, App. 133, ¶8. In the Executive's view: "Given the purposes, organizational structure, and clandestine nature of foreign terrorist organizations, it is highly likely that any material support to these organizations will ultimately inure to the benefit of their criminal, terrorist functions--regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities."

That evaluation of the facts by the Executive, like Congress's assessment, is entitled to deference. This litigation implicates sensitive and weighty interests of national security and foreign affairs. The PKK and the LTTE have committed terrorist acts against American citizens abroad, and the material-support statute addresses acute foreign policy concerns involving relationships with our Nation's allies. \*\*\*

Our precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role. We do not defer to the Government's reading of the First Amendment, even when such interests are at stake. We are one with the dissent that the Government's "authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals." But when it comes to collecting evidence and drawing factual inferences in this area, "the lack of competence on the part of the courts is marked," and respect for the Government's conclusions is appropriate.

\*\*\* This context is different from that in decisions like *Cohen*. In that case, the application of the statute turned on the offensiveness of the speech at issue. Observing that "one man's vulgarity is another's lyric," we invalidated Cohen's conviction in part because we concluded that "governmental officials cannot make principled distinctions in this area." In this litigation, by contrast, Congress and the Executive are uniquely positioned to make principled distinctions between activities that will further terrorist conduct and undermine United States foreign policy, and those that will not.

We also find it significant that Congress has been conscious of its own responsibility to consider how its actions may implicate constitutional concerns. First, §2339B only applies to designated foreign terrorist organizations. There is, and always has been, a limited number of those organizations designated by the Executive Branch, and any groups so designated may seek judicial review of the designation. Second, in response to the lower courts' holdings in this litigation, Congress added clarity to the statute by providing narrowing definitions of the terms "training," "personnel," and "expert advice or assistance," as well as an explanation of the knowledge required to violate §2339B. Third, in effectuating its stated intent not to abridge First Amendment rights, Congress has also displayed a careful balancing of interests in creating limited exceptions to the ban on material support. The definition of material support, for example, excludes medicine and religious materials. In this area perhaps more than any other, the Legislature's superior capacity for weighing competing interests means that "we must be particularly careful not to substitute our judgment of what is desirable for that of Congress." Finally, and most importantly, Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups.

At bottom, plaintiffs simply disagree with the considered judgment of Congress and the Executive that providing material support to a designated foreign terrorist organization--even seemingly benign support--bolsters the terrorist activities of that organization. That judgment, however, is entitled to significant weight, and we have persuasive evidence before us to sustain it. Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that, to serve the Government's interest in preventing terrorism, it was necessary to prohibit providing material support in the form of training, expert advice, personnel, and services to foreign terrorist groups, even if the supporters meant to promote only the groups' nonviolent ends.

We turn to the particular speech plaintiffs propose to undertake. First, plaintiffs propose to "train members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes." Congress can, consistent with the First Amendment, prohibit this direct training. \*\*\* A foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt. This possibility is real, not remote.

Second, plaintiffs propose to "teach PKK members how to petition various representative bodies such as the United Nations for relief." The Government acts within First Amendment strictures in banning this proposed speech because it teaches the organization how to acquire "relief," which plaintiffs never define with any specificity, and which could readily include monetary aid. \*\*\* Money is fungible and Congress logically concluded that money a terrorist group such as the PKK obtains using the techniques plaintiffs propose to teach could be redirected to funding the group's violent activities.

Finally, plaintiffs propose to "engage in political advocacy on behalf of Kurds who live in Turkey," and "engage in political advocacy on behalf of Tamils who live in Sri Lanka." \*\*\* Plaintiffs' proposals are phrased at such a high level of generality that they cannot prevail in this preenforcement challenge.

In responding to the foregoing, the dissent fails to address the real dangers at stake. It instead considers only the possible benefits of plaintiffs' proposed activities in the abstract. The dissent seems unwilling to entertain the prospect that training and advising a designated foreign terrorist organization on how to take advantage of international entities might benefit that organization in a way that facilitates its terrorist activities. In the dissent's world, such training is all to the good. Congress and the Executive, however, have concluded that we live in a different world: one in which the designated foreign terrorist organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." AEDPA §301(a)(7). One in which, for example, "the United Nations High Commissioner for Refugees was forced to close a Kurdish refugee camp in northern Iraq because the camp had come under the control of the PKK, and the PKK had failed to respect its 'neutral and humanitarian nature.'" Training and advice on how to work with the United Nations could readily have helped the PKK in its efforts to use the United Nations camp as a base for terrorist activities.

If only good can come from training our adversaries in international dispute resolution, presumably it would have been unconstitutional to prevent American citizens from training the Japanese Government on using international organizations and mechanisms to resolve disputes during World War II. It would, under the dissent's reasoning, have been contrary to our commitment to resolving disputes through " 'deliberative forces,' " (quoting *Whitney v. California* (1927) (Brandeis, J., concurring)), for Congress to conclude that assisting Japan on that front might facilitate its war effort more generally. That view is not one the First Amendment requires us to embrace.

All this is not to say that any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny. It is also not to say that any other statute relating to speech and terrorism would satisfy the

First Amendment. In particular, we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations. We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations. We simply hold that, in prohibiting the particular forms of support that plaintiffs seek to provide to foreign terrorist groups, §2339B does not violate the freedom of speech.

## VI

Plaintiffs' final claim is that the material-support statute violates their freedom of association under the First Amendment. Plaintiffs argue that the statute criminalizes the mere fact of their associating with the PKK and the LTTE.\*\*\*

The Court of Appeals correctly rejected this claim because the statute does not penalize mere association with a foreign terrorist organization. \*\*\*

Plaintiffs also argue that the material-support statute burdens their freedom of association because it prevents them from providing support to designated foreign terrorist organizations, but not to other groups. Any burden on plaintiffs' freedom of association in this regard is justified for the same reasons that we have denied plaintiffs' free speech challenge. It would be strange if the Constitution permitted Congress to prohibit certain forms of speech that constitute material support, but did not permit Congress to prohibit that support only to particularly dangerous and lawless foreign organizations. Congress is not required to ban material support to every group or none at all.

The Preamble to the Constitution proclaims that the people of the United States ordained and established that charter of government in part to "provide for the common defence." As Madison explained, "[s]ecurity against foreign danger is . . . an avowed and essential object of the American Union." THE FEDERALIST NO. 41, p. 269 (J. Cooke ed. 1961). We hold that, in regulating the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations, Congress has pursued that objective consistent with the limitations of the First and Fifth Amendments.

The judgment of the United States Court of Appeals for the Ninth Circuit is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE BREYER, WITH WHOM JUSTICES GINSBURG AND SOTOMAYOR JOIN, DISSENTING.

Like the Court, and substantially for the reasons it gives, I do not think this statute is unconstitutionally vague. But I cannot agree with the Court's conclusion that the Constitution permits the Government to prosecute the plaintiffs criminally for engaging in coordinated teaching and advocacy furthering the designated organizations' lawful political objectives. In my view, the Government has not met its burden of showing that an interpretation of the statute that would prohibit this speech- and association-related activity serves the Government's compelling interest in combating terrorism. And I would interpret the statute as normally placing activity of this kind outside its scope.

\*\*\* In my view, the Government has not made the strong showing necessary to justify under the First Amendment the criminal prosecution of those who engage in these [described] activities. All the activities involve the communication and advocacy of political ideas and lawful means of achieving political ends. Even the subjects the plaintiffs wish to teach--using international law to resolve disputes peacefully or petitioning the United Nations, for instance--concern political speech. We cannot avoid the constitutional significance of these facts on the basis that some of this speech takes place outside the United States and is directed at foreign governments, for the activities also involve advocacy in *this* country directed to *our* government and *its* policies. The plaintiffs, for example, wish to write and distribute publications and to speak before the United States Congress.

That this speech and association for political purposes is the *kind* of activity to which the First Amendment ordinarily offers its strongest protection is elementary.

Although in the Court's view the statute applies only where the PKK helps to coordinate a defendant's activities, the simple fact of "coordination" alone cannot readily remove protection that the First Amendment would otherwise grant. That amendment, after all, also protects the freedom of association. "Coordination" with a political group, like membership, involves association.

"Coordination" with a group that engages in unlawful activity also does not deprive the plaintiffs of the First Amendment's protection under any traditional "categorical" exception to its protection. The plaintiffs do not propose to solicit a crime. They will not engage in fraud or defamation or circulate obscenity. Cf. *United States v. Stevens* (2010) (describing "categories" of unprotected speech). And the First Amendment protects advocacy even of *unlawful* action so long as that advocacy is not "directed to inciting or producing *imminent lawless action* and . . . *likely to incite or produce* such action." *Brandenburg v. Ohio*, (1969) (*per curiam*) (emphasis added). Here the plaintiffs seek to advocate peaceful, *lawful* action to secure *political* ends; and they seek to teach others how to do the same. No one contends that the plaintiffs' speech to these organizations can be prohibited as incitement under *Brandenburg*.

Moreover, the Court has previously held that a person who associates with a group that uses unlawful means to achieve its ends does not thereby necessarily forfeit the First Amendment's protection for freedom of association.

\*\*\*

Not even the "serious and deadly problem" of international terrorism can require *automatic* forfeiture of First Amendment rights. §301(a)(1), 110 Stat. 1247, note following 18 U. S. C. §2339B. Cf. §2339B(i) (instructing courts not to "constru[e] or appl[y the statute] so as to abridge the exercise of right guaranteed under the First Amendment"). After all, this Court has recognized that not " '[e]ven the war power ... remove[s] constitutional limitations safeguarding essential liberties.' " See also *Abrams v. United States* (1919) (Holmes, J., dissenting) ("[A]s against dangers peculiar to war, as against others, the principle of the right to free speech is always the same"). Thus, there is no general First Amendment exception that applies here. If the statute is

constitutional in this context, it would have to come with a strong justification attached.

It is not surprising that the majority, in determining the constitutionality of criminally prohibiting the plaintiffs' proposed activities, would apply, not the kind of intermediate First Amendment standard that applies to conduct, but " 'a more demanding standard.' " Indeed, where, as here, a statute applies criminal penalties and at least arguably does so on the basis of content-based distinctions, I should think we would scrutinize the statute and justifications "strictly"--to determine whether the prohibition is justified by a "compelling" need that cannot be "less restrictively" accommodated.

But, even if we assume for argument's sake that "strict scrutiny" does not apply, no one can deny that we must at the very least "measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment." And here I need go no further, for I doubt that the statute, as the Government would interpret it, can survive any reasonably applicable First Amendment standard.

The Government does identify a compelling countervailing interest, namely, the interest in protecting the security of the United States and its nationals from the threats that foreign terrorist organizations pose by denying those organizations financial and other fungible resources. I do not dispute the importance of this interest. But I do dispute whether the interest can justify the statute's criminal prohibition. To put the matter more specifically, precisely how does application of the statute to the protected activities before us *help achieve* that important security-related end?

The Government makes two efforts to answer this question. *First*, the Government says that the plaintiffs' support for these organizations is "fungible" in the same sense as other forms of banned support. Being fungible, the plaintiffs' support could, for example, free up other resources, which the organization might put to terrorist ends.

The proposition that the two very different kinds of "support" are "fungible," however, is not *obviously* true. There is no *obvious* way in which undertaking advocacy for political change through peaceful means or teaching the PKK and LTTE, say, how to petition the United Nations for political change is fungible with other resources that might be put to more sinister ends in the way that donations of money, food, or computer training are fungible. It is far from obvious that these advocacy activities can themselves be redirected, or will free other resources that can be directed, towards terrorist ends. Thus, we must determine whether the Government has come forward with evidence to support its claim.

The Government has provided us with no empirical information that might convincingly support this claim. Instead, the Government cites only to evidence that Congress was concerned about the "fungible" nature in general of resources, predominately money and material goods. It points to a congressional finding that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any *contribution* to such an organization facilitates that conduct." §301(a)(7), 110 Stat. 1247, note following 18 U. S. C. §2339B (emphasis added). It also points to a House Report's

statement that "supply[ing] *funds, goods, or services*" would "hel[p] defray the cost to the terrorist organization of running the ostensibly legitimate activities," and "in turn fre[e] an equal sum that can then be spent on terrorist activities." H. R. Rep. No. 104-383, p. 81 (1995) (emphasis added). Finally, the Government refers to a State Department official's affidavit describing how ostensibly charitable contributions have either been "redirected" to terrorist ends or, even if spent charitably, have "unencumber[ed] *funds* raised from other sources for use in facilitating violent, terrorist activities and gaining political support for these activities." Declaration of Kenneth R. McKune, App. 134, 136 (emphasis added).

The most one can say in the Government's favor about these statements is that they *might* be read as offering highly general support for its argument. The statements do not, however, explain in any detail how the plaintiffs' political-advocacy-related activities might actually be "fungible" and therefore capable of being diverted to terrorist use. Nor do they indicate that Congress itself was concerned with "support" of this kind. The affidavit refers to "funds," "financing," and "goods"--none of which encompasses the plaintiffs' activities. The statutory statement and the House Report use broad terms like "contributions" and "services" that *might* be construed as encompassing the plaintiffs' activities. But in context, those terms are more naturally understood as referring to contributions of goods, money, or training and other services (say, computer programming) that could be diverted to, or free funding for, terrorist ends. Peaceful political advocacy does not obviously fall into these categories. And the statute itself suggests that Congress did not intend to curtail freedom of speech or association. See §2339B(i) ("Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment").

*Second*, the Government says that the plaintiffs' proposed activities will "bolste[r] a terrorist organization's efficacy and strength in a community" and "undermin[e] this nation's efforts to *delegitimize and weaken* those groups." In the Court's view, too, the Constitution permits application of the statute to activities of the kind at issue in part because those activities could provide a group that engages in terrorism with "legitimacy." The Court suggests that, armed with this greater "legitimacy," these organizations will more readily be able to obtain material support of the kinds Congress plainly intended to ban--money, arms, lodging, and the like.

Yet the Government does not claim that the statute forbids *any* speech "legitimizing" a terrorist group. Rather, it reads the statute as permitting (1) membership in terrorist organizations, (2) "peaceably assembling with members of the PKK and LTTE for lawful discussion," or (3) "independent advocacy" on behalf of these organizations. The Court, too, emphasizes that activities not "*coordinated with*" the terrorist groups are not banned. And it argues that speaking, writing, and teaching aimed at furthering a terrorist organization's peaceful political ends could "mak[e] it easier for those groups to persist, to recruit members, and to raise funds."

But this "legitimacy" justification cannot by itself warrant suppression of political speech, advocacy, and association. Speech, association, and related activities on behalf of a group will often, perhaps always, help to legitimate that

group. Thus, were the law to accept a "legitimizing" effect, in and of itself and without qualification, as providing sufficient grounds for imposing such a ban, the First Amendment battle would be lost in untold instances where it should be won. Once one accepts this argument, there is no natural stopping place. The argument applies as strongly to "independent" as to "coordinated" advocacy. That fact is reflected in part in the Government's claim that the ban here, so supported, prohibits a lawyer hired by a designated group from filing on behalf of that group an *amicus* brief before the United Nations or even before this Court.

That fact is also reflected in the difficulty of drawing a line designed to accept the legitimacy argument in some instances but not in others. It is inordinately difficult to distinguish when speech activity will and when it will not initiate the chain of causation the Court suggests--a chain that leads from peaceful advocacy to "legitimacy" to increased support for the group to an increased supply of material goods that support its terrorist activities. Even were we to find some such line of distinction, its application would seem so inherently uncertain that it would often, perhaps always, "chill" protected speech beyond its boundary. In short, the justification, put forward simply in abstract terms and without limitation, must *always*, or it will *never*, be sufficient. Given the nature of the plaintiffs' activities, "always" cannot possibly be the First Amendment's answer.

\*\*\* In my own view, the majority's arguments stretch the concept of "fungibility" beyond constitutional limits. Neither Congress nor the Government advanced these particular hypothetical claims. I am not aware of any case in this Court--not *Gitlow v. New York* (1925), not *Schenck v. United States* (1919), not *Abrams* (1919) not the later Communist Party cases decided during the heat of the Cold War--in which the Court accepted anything like a claim that speech or teaching might be criminalized lest it, *e.g.*, buy negotiating time for an opponent who would put that time to bad use.

Moreover, the risk that those who are taught will put otherwise innocent speech or knowledge to bad use is omnipresent, at least where that risk rests on little more than (even informed) speculation. Hence to accept this kind of argument without more and to apply it to the teaching of a subject such as international human rights law is to adopt a rule of law that, contrary to the Constitution's text and First Amendment precedent, would automatically forbid the teaching of any subject in a case where national security interests conflict with the First Amendment. The Constitution does not allow all such conflicts to be decided in the Government's favor. \*\*\*

## II

For the reasons I have set forth, I believe application of the statute as the Government interprets it would gravely and without adequate justification injure interests of the kind the First Amendment protects. \*\*\*

I believe that a construction that would avoid the constitutional problem is "fairly possible." In particular, I would read the statute as criminalizing First-Amendment-protected pure speech and association only when the defendant knows or intends that those activities will assist the organization's unlawful terrorist actions. Under this reading, the Government would have to show, at a

minimum, that such defendants provided support that they knew was significantly likely to help the organization pursue its unlawful terrorist aims.

\*\*\* This reading of the statute protects those who engage in pure speech and association ordinarily protected by the First Amendment. But it does not protect that activity where a defendant purposefully intends it to help terrorism or where a defendant knows (or willfully blinds himself to the fact) that the activity is significantly likely to assist terrorism. Where the activity fits into these categories of purposefully or knowingly supporting terrorist ends, the act of providing material support to a known terrorist organization bears a close enough relation to terrorist acts that, in my view, it likely can be prohibited notwithstanding any First Amendment interest. Cf. *Brandenburg*. At the same time, this reading does not require the Government to undertake the difficult task of proving which, as between peaceful and nonpeaceful purposes, a defendant specifically preferred; knowledge is enough.

\*\*\* [T]he defendant would have to know or intend (1) that he is *providing* support or resources, (2) that he is providing that support *to a foreign terrorist organization*, and (3) that he is providing support that is *material*, meaning (4) that his support bears a significant likelihood of furthering the organization's terrorist ends.

This fourth requirement flows directly from the statute's use of the word "material." That word can mean being of a physical or worldly nature, but it also can mean "being of real importance or great consequence." Webster's Third New International Dictionary 1392 (1961). Here, it must mean the latter, for otherwise the statute, applying only to physical aid, would not apply to speech at all. See also §2339A(b)(1) (defining "material support or resources" as "any property, *tangible or intangible*" (emphasis added)). And if the statute applies only to support that would likely be of real importance or great consequence, it must have importance or consequence in respect to the organization's terrorist activities. That is because support that is not significantly likely to help terrorist activities, for purposes of this statute, neither has "importance" nor is of "great consequence."

\*\*\* Thus, textually speaking, a statutory requirement that the defendant *knew* the support was material can be read to require the Government to show that the defendant knew that the consequences of his acts had a significant likelihood of furthering the organization's terrorist, not just its lawful, aims. \*\*\* The statute's history strongly supports this reading. That history makes clear that Congress primarily sought to end assistance that takes the form of fungible donations of money or goods. \*\*\*

In any event, the principle of constitutional avoidance demands this interpretation. As Part II makes clear, there is a "serious" doubt--indeed, a "grave" doubt--about the constitutionality of the statute insofar as it is read to criminalize the activities before us. We therefore must "read the statute to eliminate" that constitutional "doub[t] so long as such a reading is not plainly contrary to the intent of Congress.

For this reason, the majority's statutory claim that Congress did not use the word "knowingly" as I would use it is beside the point. Our consequent reading is consistent with the statute's text; it is consistent with Congress' basic intent;

it interprets but does not significantly add to what the statute otherwise contains. We should adopt it.

### III

Having interpreted the statute to impose the *mens rea* requirement just described, I would remand the cases so that the lower courts could consider more specifically the precise activities in which the plaintiffs still wish to engage and determine whether and to what extent a grant of declaratory and injunctive relief were warranted. I do not see why the majority does not also remand the cases for consideration of the plaintiffs' activities relating to "advocating" for the organizations' peaceful causes. \*\*\* Moreover, the majority properly rejects the Government's argument that the plaintiffs' speech-related activities amount to "conduct" and should be reviewed as such. Hence, I should think the majority would wish the lower courts to reconsider this aspect of the cases, applying a proper standard of review.

### IV

In sum, these cases require us to consider how to apply the First Amendment where national security interests are at stake. When deciding such cases, courts are aware and must respect the fact that the Constitution entrusts to the Executive and Legislative Branches the power to provide for the national defense, and that it grants particular authority to the President in matters of foreign affairs. Nonetheless, this Court has also made clear that authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals. In these cases, for the reasons I have stated, I believe the Court has failed to examine the Government's justifications with sufficient care. It has failed to insist upon specific evidence, rather than general assertion. It has failed to require tailoring of means to fit compelling ends. And ultimately it deprives the individuals before us of the protection that the First Amendment demands.

That is why, with respect, I dissent.

## Notes

1. How should the Congressional intent not to abridge First Amendment rights be understood? Does Chief Justice Roberts's opinion for the Court or Justice Breyer's dissenting opinion have the better view?
2. *Holder v. Humanitarian Law* project is a preenforcement challenge. Are there possible situations in which a "material support" prosecution could be successfully challenged as violative of the First Amendment?
3. What is the "fungible" analysis? How does that relate to speech?

# Chapter Three: OF CONDUCT, CONTENT, AND CATEGORIES

This chapter considers sometimes complex definitions of speech.

Speech must be distinguished from “mere” conduct, although the First Amendment certainly protects expressive conduct and symbolic speech, which are subject to definitional disputes.

The content of speech may place it in various categories of speech, some more protected and some less protected as evinced by levels of scrutiny.

The content of speech may also exclude it from protection under the First Amendment, as was apparent in the last chapter and which is also explored in this and later chapters. Consider whether this “categorical approach” to protectable speech is workable.

## Chapter Outline

### I. Defining Expression

- United States v. O'Brien
- Spence v. Washington
- Texas v. Johnson
- Notes

### II. Hate Speech

- R.A.V. v. St. Paul
- Wisconsin v. Mitchell
- Virginia v. Black
- Notes
- Note: “True Threats”

### III. Considering “Content” in the Context of the Military

- Schacht v. United States
- United States v. Alvarez
- Notes

### IV. Note: Developing a Structural Analysis of Free Speech Issues

## I. Defining Expression

We often express ourselves through gestures and “conduct.” Should these be protected to the same extent as speech? How should the expressive aspect of conduct be assessed?

### *United States v. O’Brien*

391 U.S. 367 (1968)

WARREN, C.J., DELIVERED THE OPINION OF THE COURT; MARSHALL, J., TOOK NO PART IN THE CONSIDERATION OF THE CASE; HARLAN, J., FILED A CONCURRING OPINION. DOUGLAS, J., FILED A DISSENTING OPINION.

CHIEF JUSTICE WARREN DELIVERED THE OPINION OF THE COURT.

On the morning of March 31, 1966, David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse. A sizable crowd, including several agents of the Federal Bureau of Investigation, witnessed the event. Immediately after the burning, members of the crowd began attacking O'Brien and his companions. An FBI agent ushered O'Brien to safety inside the courthouse. After he was advised of his right to counsel and to silence, O'Brien stated to FBI agents that he had burned his registration certificate because of his beliefs, knowing that he was violating federal law. He produced the charred remains of the certificate, which, with his consent, were photographed.

For this act, O'Brien was indicted, tried, convicted, and sentenced in the United States District Court for the District of Massachusetts. He did not contest the fact that he had burned the certificate. He stated in argument to the jury that he burned the certificate publicly to influence others to adopt his antiwar beliefs, as he put it, "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position."

The indictment upon which he was tried charged that he "willfully and knowingly did mutilate, destroy, and change by burning . . . [his] Registration Certificate (Selective Service System Form No. 2); in violation of Title 50, App., United States Code, Section 462 (b)." \*\*\* [It had been] amended by Congress in 1965, 79 Stat. 586 (adding the words italicized below), so that at the time O'Brien burned his certificate an offense was committed by any person,

"who forges, alters, *knowingly destroys, knowingly mutilates*, or in any manner changes any such certificate. . . ." (Italics supplied.)

In the District Court, O'Brien argued that the 1965 Amendment prohibiting the knowing destruction or mutilation of certificates was unconstitutional because it was enacted to abridge free speech, and because it served no legitimate legislative purpose. The District Court rejected these arguments, holding that the statute on its face did not abridge First Amendment rights, that the court

was not competent to inquire into the motives of Congress in enacting the 1965 Amendment, and that the Amendment was a reasonable exercise of the power of Congress to raise armies.

On appeal, the Court of Appeals for the First Circuit held the 1965 Amendment unconstitutional as a law abridging freedom of speech. \*\*\* [This] decision conflicted with decisions by the Courts of Appeals for the Second and Eighth Circuits upholding the 1965 Amendment against identical constitutional challenges. \*\*\* We hold that the 1965 Amendment is constitutional both as enacted and as applied. \*\*\*

## I.

When a male reaches the age of 18, he is required by the Universal Military Training and Service Act to register with a local draft board. He is assigned a Selective Service number, and within five days he is issued a registration certificate (SSS Form No. 2). Subsequently, and based on a questionnaire completed by the registrant, he is assigned a classification denoting his eligibility for induction, and "[a]s soon as practicable" thereafter he is issued a Notice of Classification (SSS Form No. 110). This initial classification is not necessarily permanent, and if in the interim before induction the registrant's status changes in some relevant way, he may be reclassified. After such a reclassification, the local board "as soon as practicable" issues to the registrant a new Notice of Classification.

Both the registration and classification certificates are small white cards, approximately 2 by 3 inches. The registration certificate specifies the name of the registrant, the date of registration, and the number and address of the local board with which he is registered. Also inscribed upon it are the date and place of the registrant's birth, his residence at registration, his physical description, his signature, and his Selective Service number. The Selective Service number itself indicates his State of registration, his local board, his year of birth, and his chronological position in the local board's classification record.

The classification certificate shows the registrant's name, Selective Service number, signature, and eligibility classification. It specifies whether he was so classified by his local board, an appeal board, or the President. It contains the address of his local board and the date the certificate was mailed.

Both the registration and classification certificates bear notices that the registrant must notify his local board in writing of every change in address, physical condition, and occupational, marital, family, dependency, and military status, and of any other fact which might change his classification. Both also contain a notice that the registrant's Selective Service number should appear on all communications to his local board.

Congress demonstrated its concern that certificates issued by the Selective Service System might be abused well before the 1965 Amendment here challenged. \*\*\*

By the 1965 Amendment, Congress added to § 12 (b) (3) of the 1948 Act the provision here at issue, subjecting to criminal liability not only one who "forges, alters, or in any manner changes" but also one who "knowingly destroys, [or] knowingly mutilates" a certificate. We note at the outset that the 1965

Amendment plainly does not abridge free speech on its face, and we do not understand O'Brien to argue otherwise. Amended § 12 (b) (3) on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The Amendment does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views. A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records.

O'Brien nonetheless argues that the 1965 Amendment is unconstitutional in its application to him, and is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of speech." We consider these arguments separately.

## II.

O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech" within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of "communication of ideas by conduct," and that his conduct is within this definition because he did it in "demonstration against the war and against the draft."

We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment to § 12 (b) (3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.

The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. \*\*\* The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning

of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration. \*\*\*

We think it apparent that the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies. We think it also apparent that the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances. For these reasons, the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.

It is equally clear that the 1965 Amendment specifically protects this substantial governmental interest. We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction. The 1965 Amendment prohibits such conduct and does nothing more. In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted. \*\*\*

In conclusion, we find that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because amended § 462 (b) is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction.

### III.

O'Brien finally argues that the 1965 Amendment is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of speech." We reject this argument because under settled principles the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation unconstitutional. \*\*\*

We think it not amiss, in passing, to comment upon O'Brien's legislative-purpose argument. There was little floor debate on this legislation in either House. Only Senator Thurmond commented on its substantive features in the Senate. 111 Cong. Rec. 19746, 20433. After his brief statement, and without any additional substantive comments, the bill, H. R. 10306, passed the Senate. 111 Cong. Rec. 20434. In the House debate only two Congressmen addressed themselves to the Amendment—Congressmen Rivers and Bray. 111 Cong. Rec. 19871, 19872. The bill was passed after their statements without any further debate by a vote of 393 to 1. It is principally on the basis of the statements by

these three Congressmen that O'Brien makes his congressional-"purpose" argument. We note that if we were to examine legislative purpose in the instant case, we would be obliged to consider not only these statements but also the more authoritative reports of the Senate and House Armed Services Committees. The portions of those reports explaining the purpose of the Amendment are reproduced in the Appendix in their entirety. While both reports make clear a concern with the "defiant" destruction of so-called "draft cards" and with "open" encouragement to others to destroy their cards, both reports also indicate that this concern stemmed from an apprehension that unrestrained destruction of cards would disrupt the smooth functioning of the Selective Service System.

#### IV.

Since the 1965 Amendment to § 12 (b) (3) of the Universal Military Training and Service Act is constitutional as enacted and as applied \*\*\* we vacate the judgment of the Court of Appeals, and reinstate the judgment and sentence of the District Court. \*\*\*

*It is so ordered.*

## ***Spence v. Washington***

418 U.S. 405 (1974)

PER CURIAM. DOUGLAS, J., FILED A CONCURRING OPINION. BURGER, C.J. FILED A DISSENTING OPINION. REHNQUIST, J., FILED A DISSENTING OPINION, IN WHICH BURGER, C.J., AND WHITE, J., JOINED.

PER CURIAM.

Appellant displayed a United States flag, which he owned, out of the window of his apartment. Affixed to both surfaces of the flag was a large peace symbol fashioned of removable tape. Appellant was convicted under a Washington statute forbidding the exhibition of a United States flag to which is attached or superimposed figures, symbols, or other extraneous material. The Supreme Court of Washington affirmed appellant's conviction. It rejected appellant's contentions that the statute under which he was charged, on its face and as applied, contravened the First Amendment, as incorporated by the Fourteenth Amendment, and was void for vagueness. \*\*\* We reverse on the ground that as applied to appellant's activity the Washington statute impermissibly infringed protected expression.

#### I

On May 10, 1970, appellant, a college student, hung his United States flag from the window of his apartment on private property in Seattle, Washington. The flag was upside down, and attached to the front and back was a peace symbol (*i. e.*, a circle enclosing a trident) made of removable black tape. The window was above the ground floor. The flag measured approximately three by five feet and was plainly visible to passersby. The peace symbol occupied roughly half of the surface of the flag.

Three Seattle police officers observed the flag and entered the apartment house. They were met at the main door by appellant, who said: "I suppose you are here about the flag. I didn't know there was anything wrong with it. I will take it down." Appellant permitted the officers to enter his apartment, where they seized the flag and arrested him. Appellant cooperated with the officers. There was no disruption or altercation.

Appellant was not charged under Washington's flag-desecration statute. See Wash. Rev. Code § 9.86.030, as amended. Rather, the State relied on the so-called "improper use" statute, Wash. Rev. Code § 9.86.020. This statute provides, in pertinent part:

"No person shall, in any manner, for exhibition or display:

"(1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state . . . or

"(2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement . . . ."

\*\*\* [At trial] he testified that he put a peace symbol on the flag and displayed it to public view as a protest against the invasion of Cambodia and the killings at Kent State University, events which occurred a few days prior to his arrest. He said that his purpose was to associate the American flag with peace instead of war and violence:

"I felt there had been so much killing and that this was not what America stood for. I felt that the flag stood for America and I wanted people to know that I thought America stood for peace."

Appellant further testified that he chose to fashion the peace symbol from tape so that it could be removed without damaging the flag. The State made no effort to controvert any of appellant's testimony.

The trial court instructed the jury in essence that the mere act of displaying the flag with the peace symbol attached, if proved beyond a reasonable doubt, was sufficient to convict. There was no requirement of specific intent to do anything more than display the flag in that manner. The jury returned a verdict of guilty. The court sentenced appellant to 10 days in jail, suspended, and to a \$75 fine. The Washington Court of Appeals reversed the conviction. It held the improper-use statute overbroad and invalid on its face under the First and Fourteenth Amendments. With one justice dissenting and two concurring in the result, the Washington Supreme Court reversed and reinstated the conviction.

## II

A number of factors are important in the instant case. First, this was a privately owned flag. In a technical property sense it was not the property of any government. We have no doubt that the State or National Governments constitutionally may forbid anyone from mishandling in any manner a flag that is public property. But this is a different case. Second, appellant displayed his flag on private property. He engaged in no trespass or disorderly conduct. Nor is this a case that might be analyzed in terms of reasonable time, place, or

manner restraints on access to a public area. Third, the record is devoid of proof of any risk of breach of the peace. It was not appellant's purpose to incite violence or even stimulate a public demonstration. There is no evidence that any crowd gathered or that appellant made any effort to attract attention beyond hanging the flag out of his own window. Indeed, on the facts stipulated by the parties there is no evidence that anyone other than the three police officers observed the flag.

Fourth, the State concedes, as did the Washington Supreme Court, that appellant engaged in a form of communication. Although the stipulated facts fail to show that any member of the general public viewed the flag, the State's concession is inevitable on this record. The undisputed facts are that appellant "wanted people to know that I thought America stood for peace." To be sure, appellant did not choose to articulate his views through printed or spoken words. It is therefore necessary to determine whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments, for as the Court noted in *United States v. O'Brien*, "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." But the nature of appellant's activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression.

The Court for decades has recognized the communicative connotations of the use of flags. In many of their uses flags are a form of symbolism comprising a "primitive but effective way of communicating ideas . . .," and "a short cut from mind to mind." *Board of Education v. Barnette* (1943). On this record there can be little doubt that appellant communicated through the use of symbols. The symbolism included not only the flag but also the superimposed peace symbol.

Moreover, the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol. \*\*\* In this case, appellant's activity was roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy, also issues of great public moment. A flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it.

It may be noted, further, that this was not an act of mindless nihilism. Rather, it was a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government. An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.

We are confronted then with a case of prosecution for the expression of an idea through activity. Moreover, the activity occurred on private property, rather than in an environment over which the State by necessity must have certain supervisory powers unrelated to expression. Accordingly, we must examine with particular care the interests advanced by appellee to support its prosecution.

\*\*\* [The] state court's thesis [was] that Washington has an interest in preserving the national flag as an unalloyed symbol of our country. The court did not define this interest; it simply asserted it. Mr. Justice Rehnquist's dissenting opinion today, adopts essentially the same approach. Presumably, this interest might be seen as an effort to prevent the appropriation of a revered national symbol by an individual, interest group, or enterprise where there was a risk that association of the symbol with a particular product or viewpoint might be taken erroneously as evidence of governmental endorsement. Alternatively, it might be argued that the interest asserted by the state court is based on the uniquely universal character of the national flag as a symbol. For the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice, and valor of the millions of Americans who in peace and war have joined together to build and to defend a Nation in which self-government and personal liberty endure. It evidences both the unity and diversity which are America. For others the flag carries in varying degrees a different message. "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." *Board of Education v. Barnette*. It might be said that we all draw something from our national symbol, for it is capable of conveying simultaneously a spectrum of meanings. If it may be destroyed or permanently disfigured, it could be argued that it will lose its capability of mirroring the sentiments of all who view it.

But we need not decide in this case whether the interest advanced by the court below is valid. We assume, *arguendo*, that it is. The statute is nonetheless unconstitutional as applied to appellant's activity. There was no risk that appellant's acts would mislead viewers into assuming that the Government endorsed his viewpoint. To the contrary, he was plainly and peacefully protesting the fact that it did not. Appellant was not charged under the desecration statute nor did he permanently disfigure the flag or destroy it. He displayed it as a flag of his country in a way closely analogous to the manner in which flags have always been used to convey ideas. Moreover, his message was direct, likely to be understood, and within the contours of the First Amendment. Given the protected character of his expression and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts, the conviction must be invalidated.

The judgment is reversed.

*It is so ordered.*

MR. JUSTICE REHNQUIST, WITH WHOM THE CHIEF JUSTICE AND MR. JUSTICE WHITE JOIN, DISSENTING.

The Court holds that a Washington statute prohibiting persons from attaching material to the American flag was unconstitutionally applied to appellant. Although I agree with the Court that appellant's activity was a form of communication, I do not agree that the First Amendment prohibits the State from restricting this activity in furtherance of other important interests. And I believe the rationale by which the Court reaches its conclusion is unsound.

"[T]he right of free speech is not absolute at all times and under all circumstances." *Chaplinsky v. New Hampshire* (1942). This Court has long recognized, for example, that some forms of expression are not entitled to any protection at all under the First Amendment, despite the fact that they could reasonably be thought protected under its literal language. See *Roth v. United States* (1957). The Court has further recognized that even protected speech may be subject to reasonable limitation when important countervailing interests are involved. Citizens are not completely free to commit perjury, to libel other citizens, to infringe copyrights, to incite riots, or to interfere unduly with passage through a public thoroughfare. The right of free speech, though precious, remains subject to reasonable accommodation to other valued interests.

Since a State concededly may impose some limitations on speech directly, it would seem to follow *a fortiori* that a State may legislate to protect important state interests even though an incidental limitation on free speech results. Virtually any law enacted by a State, when viewed with sufficient ingenuity, could be thought to interfere with some citizen's preferred means of expression. But no one would argue, I presume, that a State could not prevent the painting of public buildings simply because a particular class of protesters believed their message would best be conveyed through that medium. Had appellant here chosen to tape his peace symbol to a federal courthouse, I have little doubt that he could be prosecuted under a statute properly drawn to protect public property.

Yet the Court today holds that the State of Washington cannot limit use of the American flag, at least insofar as its statute prevents appellant from using a privately owned flag to convey his personal message. Expressing its willingness to assume, *arguendo*, that Washington has a valid interest in preserving the integrity of the flag, the Court nevertheless finds that interest to be insufficient in this case. To achieve this result the Court first devalues the State's interest under these circumstances, noting that "no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts . . . ." The Court takes pains to point out that appellant did not "permanently disfigure the flag or destroy it," and emphasizes that the flag was displayed "in a way closely analogous to the manner in which flags have always been used to convey ideas." The Court then restates the notion that such state interests are secondary to messages which are "direct, likely to be understood, and within the contours of the First Amendment." In my view the first premise demonstrates a total misunderstanding of the State's interest in the integrity of the American flag, and the second premise places the Court in the position either of ultimately favoring appellant's message because of its subject matter, a position about which almost all members of the majority have only recently expressed doubt, or, alternatively, of making the flag available for a limitless succession of political and commercial messages. \*\*\*

What appellant here seeks is simply license to use the flag however he pleases, so long as the activity can be tied to a concept of speech, regardless of any state interest in having the flag used only for more limited purposes. I find no reasoning in the Court's opinion which convinces me that the Constitution requires such license to be given.

The fact that the State has a valid interest in preserving the character of the flag does not mean, of course, that it can employ all conceivable means to enforce it. It certainly could not require all citizens to own the flag or compel citizens to salute one. *Board of Education v. Barnette* (1943). It presumably cannot punish criticism of the flag, or the principles for which it stands, any more than it could punish criticism of this country's policies or ideas. But the statute in this case demands no such allegiance. Its operation does not depend upon whether the flag is used for communicative or noncommunicative purposes; upon whether a particular message is deemed commercial or political; upon whether the use of the flag is respectful or contemptuous; or upon whether any particular segment of the State's citizenry might applaud or oppose the intended message. It simply withdraws a unique national symbol from the roster of materials that may be used as a background for communications. Since I do not believe the Constitution prohibits Washington from making that decision, I dissent.

## *Texas v. Johnson* 491 U.S. 397 (1989)

BRENNAN, J., DELIVERED THE OPINION OF THE COURT, IN WHICH MARSHALL, BLACKMUN, SCALIA, AND KENNEDY, JJ., JOINED. KENNEDY, J., FILED A CONCURRING OPINION. REHNQUIST, C. J., FILED A DISSENTING OPINION, IN WHICH WHITE AND O'CONNOR, JJ., JOINED. STEVENS, J., FILED A DISSENTING OPINION.

JUSTICE BRENNAN DELIVERED THE OPINION OF THE COURT.

After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.

### I

While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the "Republican War Chest Tour." As explained in literature distributed by the demonstrators and in speeches made by them, the purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations to stage "die-ins" intended to dramatize the consequences of nuclear war. On several occasions they spray-painted the walls of buildings and overturned potted plants, but Johnson himself took no part in such activities. He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flagpole outside one of the targeted buildings.

The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted: "America, the red, white, and blue, we spit on

you." After the demonstrators dispersed, a witness to the flag burning collected the flag's remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning.

Of the approximately 100 demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object in violation of Tex. Penal Code Ann. 42.09(a)(3) (1989). After a trial, he was convicted, sentenced to one year in prison, and fined \$2,000. The Court of Appeals for the Fifth District of Texas at Dallas affirmed Johnson's conviction, but the Texas Court of Criminal Appeals reversed, holding that the State could not, consistent with the First Amendment, punish Johnson for burning the flag in these circumstances. \*\*\* Because it reversed Johnson's conviction on the ground that 42.09 was unconstitutional as applied to him, the state court did not address Johnson's argument that the statute was, on its face, unconstitutionally vague and overbroad. We granted certiorari and now affirm.

## II

Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words. This fact somewhat complicates our consideration of his conviction under the First Amendment. We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. *See, e. g., Spence v. Washington* (1974). If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. *See, e. g., United States v. O'Brien* (1968); *Spence*. If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien's* test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard. A third possibility is that the State's asserted interest is simply not implicated on these facts, and in that event the interest drops out of the picture.

The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," *O'Brien*, we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," *Spence*.

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Spence*. Hence, we have recognized the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam, *Tinker v. Des Moines Independent Community School Dist.* (1969); of a sit-in by blacks in a "whites only" area to protest segregation, *Brown v. Louisiana* (1966); of the wearing of American military uniforms in a dramatic

presentation criticizing American involvement in Vietnam, *Schacht v. United States* (1970); and of picketing about a wide variety of causes.

Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, "the one visible manifestation of two hundred years of nationhood." \*\*\* Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in "America."

\*\*\*The State of Texas conceded for purposes of its oral argument in this case that Johnson's conduct was expressive conduct, and this concession seems to us as prudent as was Washington's in *Spence*. Johnson burned an American flag as part - indeed, as the culmination - of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. \*\*\*

### III

The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. *See O'Brien*. It may not, however, proscribe particular conduct because it has expressive elements. \*\*\* It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.

Thus, although we have recognized that where "'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms," *O'Brien*, we have limited the applicability of *O'Brien's* relatively lenient standard to those cases in which "the governmental interest is unrelated to the suppression of free expression." [We] have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under *O'Brien's* less demanding rule.

In order to decide whether *O'Brien's* test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression. If we find that an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether *O'Brien's* test applies. The State offers two separate interests to justify this conviction: preventing breaches of the peace and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated on this record and that the second is related to the suppression of expression.

### A

Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration. However, no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag. Although the State stresses the disruptive behavior of the protestors

during their march toward City Hall, it admits that "no actual breach of the peace occurred at the time of the flagburning or in response to the flagburning."

\*\*\* The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. \*\*\*

Thus, we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio* (1969). To accept Texas' arguments that it need only demonstrate "the potential for a breach of the peace," and that every flag burning necessarily possesses that potential, would be to eviscerate our holding in *Brandenburg*. This we decline to do.

Nor does Johnson's expressive conduct fall within that small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky v. New Hampshire* (1942). \*\*\*

We thus conclude that the State's interest in maintaining order is not implicated on these facts. The State need not worry that our holding will disable it from preserving the peace. We do not suggest that the First Amendment forbids a State to prevent "imminent lawless action." *Brandenburg*. And, in fact, Texas already has a statute specifically prohibiting breaches of the peace, which tends to confirm that Texas need not punish this flag desecration in order to keep the peace.

## B

The State also asserts an interest in preserving the flag as a symbol of nationhood and national unity. In *Spence*, we acknowledged that the government's interest in preserving the flag's special symbolic value "is directly related to expression in the context of activity" such as affixing a peace symbol to a flag. We are equally persuaded that this interest is related to expression in the case of Johnson's burning of the flag. The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, that we do not enjoy unity as a Nation. These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related "to the suppression of free expression" within the meaning of *O'Brien*. We are thus outside of *O'Brien's* test altogether.

## IV

It remains to consider whether the State's interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson's conviction.

\*\*\*Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values.

Moreover, Johnson was prosecuted because he knew that his politically charged expression would cause "serious offense." If he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law: federal law designates burning as the preferred means of disposing of a flag "when it is in such condition that it is no longer a fitting emblem for display," 36 U.S.C. 176(k), and Texas has no quarrel with this means of disposal. The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others. Texas concedes as much. \*\*\* Johnson's political expression was restricted because of the content of the message he conveyed. We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to "the most exacting scrutiny."

Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis. Quoting extensively from the writings of this Court chronicling the flag's historic and symbolic role in our society, the State emphasizes the "special place" reserved for the flag in our Nation. The State's argument is not that it has an interest simply in maintaining the flag as a symbol of something, no matter what it symbolizes; indeed, if that were the State's position, it would be difficult to see how that interest is endangered by highly symbolic conduct such as Johnson's. Rather, the State's claim is that it has an interest in preserving the flag as a symbol of nationhood and national unity, a symbol with a determinate range of meanings. According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the message conveyed thereby is a harmful one and therefore may be prohibited.

If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

We have not recognized an exception to this principle even where our flag has been involved. \*\*\*

In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it. To bring its argument outside our precedents, Texas attempts to convince us that even if its interest in preserving the flag's symbolic role does not allow it to prohibit words or some expressive conduct critical of the flag, it does permit it to forbid the outright destruction of the flag. The State's argument cannot depend here on the distinction between written or spoken words and nonverbal conduct. That distinction, we have shown, is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here. In addition, both *Barnette* and *Spence* involved expressive conduct, not only verbal communication, and both found that conduct protected.

Texas' focus on the precise nature of Johnson's expression, moreover, misses the point of our prior decisions: their enduring lesson, that the government may not prohibit expression simply because it disagrees with its message, is not

dependent on the particular mode in which one chooses to express an idea. If we were to hold that a State may forbid flag burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role - as where, for example, a person ceremoniously burns a dirty flag - we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol - as a substitute for the written or spoken word or a "short cut from mind to mind" - only in one direction. We would be permitting a State to "prescribe what shall be orthodox" by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity.

We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents. \*\*\*

There is, moreover, no indication - either in the text of the Constitution or in our cases interpreting it - that a separate juridical category exists for the American flag alone. Indeed, we would not be surprised to learn that the persons who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack. The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole - such as the principle that discrimination on the basis of race is odious and destructive - will go unquestioned in the marketplace of ideas. See *Brandenburg v. Ohio* (1969). We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.

It is not the State's ends, but its means, to which we object. It cannot be gainsaid that there is a special place reserved for the flag in this Nation, and thus we do not doubt that the government has a legitimate interest in making efforts to "preserv[e] the national flag as an unalloyed symbol of our country." *Spence*. We reject the suggestion, urged at oral argument by counsel for Johnson, that the government lacks "any state interest whatsoever" in regulating the manner in which the flag may be displayed. Congress has, for example, enacted precatory regulations describing the proper treatment of the flag, and we cast no doubt on the legitimacy of its interest in making such recommendations. To say that the government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a person for burning a flag as a means of political protest. "National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement." *Barnette*.

We are fortified in today's conclusion by our conviction that forbidding criminal punishment for conduct such as Johnson's will not endanger the special role played by our flag or the feelings it inspires. To paraphrase Justice Holmes, we submit that nobody can suppose that this one gesture of an unknown man will change our Nation's attitude towards its flag. See *Abrams v. United States* (1919) (Holmes, J., dissenting). \*\*\*

We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that

the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag - and it is that resilience that we reassert today.

The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. "To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California* (1927) (Brandeis, J., concurring). And, precisely because it is our flag that is involved, one's response to the flag burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by - as one witness here did - according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

## V

Johnson was convicted for engaging in expressive conduct. The State's interest in preventing breaches of the peace does not support his conviction because Johnson's conduct did not threaten to disturb the peace. Nor does the State's interest in preserving the flag as a symbol of nationhood and national unity justify his criminal conviction for engaging in political expression. The judgment of the Texas Court of Criminal Appeals is therefore

*Affirmed.*

CHIEF JUSTICE REHNQUIST, WITH WHOM JUSTICE WHITE AND JUSTICE O'CONNOR JOIN, DISSENTING.

In holding this Texas statute unconstitutional, the Court ignores Justice Holmes' familiar aphorism that "a page of history is worth a volume of logic." For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here. \*\*\*

The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of

social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag. \*\*\*

Our Constitution wisely places limits on powers of legislative majorities to act, but the declaration of such limits by this Court "is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case." *Fletcher v. Peck* (1810) (Marshall, C. J.). Uncritical extension of constitutional protection to the burning of the flag risks the frustration of the very purpose for which organized governments are instituted. The Court decides that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. The government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case.

STEVENS, J., DISSENTING.

As the Court analyzes this case, it presents the question whether the State of Texas, or indeed the Federal Government, has the power to prohibit the public desecration of the American flag. The question is unique. In my judgment rules that apply to a host of other symbols, such as state flags, armbands, or various privately promoted emblems of political or commercial identity, are not necessarily controlling. Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable.

A country's flag is a symbol of more than "nationhood and national unity." It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas. The fleurs-de-lis and the tricolor both symbolized "nationhood and national unity," but they had vastly different meanings. The message conveyed by some flags - the swastika, for example - may survive long after it has outlived its usefulness as a symbol of regimented unity in a particular nation.

So it is with the American flag. It is more than a proud symbol of the courage, the determination, and the gifts of nature that transformed 13 fledgling Colonies into a world power. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations. The symbol carries its message to dissidents both at home and abroad who may have no interest at all in our national unity or survival.

The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate. Conceivably that value will be enhanced by the Court's conclusion that our national commitment to free expression is so strong that even the

United States as ultimate guarantor of that freedom is without power to prohibit the desecration of its unique symbol. But I am unpersuaded. The creation of a federal right to post bulletin boards and graffiti on the Washington Monument might enlarge the market for free expression, but at a cost I would not pay. Similarly, in my considered judgment, sanctioning the public desecration of the flag will tarnish its value - both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it. That tarnish is not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression - including uttering words critical of the flag, be employed.

It is appropriate to emphasize certain propositions that are not implicated by this case. The statutory prohibition of flag desecration does not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Board of Education v. Barnette* (1943). The statute does not compel any conduct or any profession of respect for any idea or any symbol. Nor does the statute violate "the government's paramount obligation of neutrality in its regulation of protected communication." *Young v. American Mini Theatres, Inc.* (1976) (plurality opinion). The content of respondent's message has no relevance whatsoever to the case. The concept of "desecration" does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the act will take serious offense. Accordingly, one intending to convey a message of respect for the flag by burning it in a public square might nonetheless be guilty of desecration if he knows that others - perhaps simply because they misperceive the intended message - will be seriously offended. Indeed, even if the actor knows that all possible witnesses will understand that he intends to send a message of respect, he might still be guilty of desecration if he also knows that this understanding does not lessen the offense taken by some of those witnesses. Thus, this is not a case in which the fact that "it is the speaker's opinion that gives offense" provides a special "reason for according it constitutional protection," *FCC v. Pacifica Foundation* (1978) (plurality opinion). The case has nothing to do with "disagreeable ideas." It involves disagreeable conduct that, in my opinion, diminishes the value of an important national asset.

The Court is therefore quite wrong in blandly asserting that respondent "was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies. Had he chosen to spray-paint - or perhaps convey with a motion picture projector - his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag. \*

The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for - and our history demonstrates that they are - it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.

I respectfully dissent.

[ Footnote \* ] The Court suggests that a prohibition against flag desecration is not content neutral because this form of symbolic speech is only used by persons who are critical of the flag or the ideas it represents. In making this suggestion the Court does not pause to consider the far-reaching consequences of its introduction of disparate-impact analysis into our First Amendment jurisprudence. It seems obvious that a prohibition against the desecration of a gravesite is content neutral even if it denies some protesters the right to make a symbolic statement by extinguishing the flame in Arlington Cemetery where John F. Kennedy is buried while permitting others to salute the flame by bowing their heads. Few would doubt that a protester who extinguishes the flame has desecrated the gravesite, regardless of whether he prefaces that act with a speech explaining that his purpose is to express deep admiration or unmitigated scorn for the late President. Likewise, few would claim that the protester who bows his head has desecrated the gravesite, even if he makes clear that his purpose is to show disrespect. In such a case, as in a flag burning case, the prohibition against desecration has absolutely nothing to do with the content of the message that the symbolic speech is intended to convey.

## Notes

1. Is the American flag unique? Does the difference of opinion on this issue fully explain the contrary conclusions of the Court and the dissents?

Note that Congress reacted to *Texas v. Johnson* by passing the Flag Protection Act of 1989, 103 Stat. 777, 18 U.S.C. § 700, which the Court held unconstitutional in *United States v. Eichman*, 496 U.S. 310 (1990). The House of Representatives has passed a resolution to amend the United States Constitution, The Flag Desecration Amendment, to specifically permit Congress to pass legislation to prohibit the physical desecration of the flag of the United States, but the proposed Constitutional amendment has not been enthusiastically advanced.

2. What is the *O'Brien* standard? Why did the Court find it inapplicable in *Texas v. Johnson*? What is the argument that the *O'Brien* standard should not have been applicable in *O'Brien*?

3. What is the *Spence* test? How does it apply in the context of public school dress codes that prohibit “saggy pants,” “gang attire,” fishnet tights, gender non-conforming clothes or males wearing facial make-up?

How does a specific prohibition influence the analysis of whether an “expression” is sufficient under *Spence*?

4. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), involved students wearing black armbands which the Court held was expressive conduct. This important case is included in the chapter on Government as Employer and Educator.

5. In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the Court assumed but did not decide that sleeping could be expressive conduct. The context was a challenge to a National Park Service regulation prohibiting camping in certain parks as applied to prohibit demonstrators from sleeping in D.C.’s Lafayette Park and the Mall in connection with a demonstration intended to call attention to the plight of the homeless. The National Park Service allowed “symbolic tents” but disallowed sleeping in those tents. The Court found that there was a substantial governmental interest (preserving park property) unrelated to the suppression of the arguably protected expressive sleeping and upheld the park regulation.

5. *Clark* was central to some of the First Amendment litigation surrounding “Occupy” in 2011. At least one district judge determined that sleeping was expressive conduct.

The Court finds that in the context of this case the tenting and sleeping in the park as described by plaintiffs' counsel is symbolic conduct which is protected by the First Amendment. The conduct of tenting and sleeping in the park 24 hours a day to simulate an “occupation” is intended to be communicative and in context is reasonably understood by the viewer to be communicative. This expressive conduct relates to matters of public concern because it can be fairly considered as relating to matters of political, social, or other concern to the community and is a subject of general interest and of value and concern to the public.

*Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320, 1328 (M.D. Fla. 2011).

## II. Hate Speech

The conflict between “free speech” and equality is a persistent one. The next two cases resolve the balance in different ways, but they are generally thought not to conflict. How do you explain the differences between the next two cases?

### *R.A.V. v. St. Paul*

505 U.S. 377 (1992)

SCALIA, J., DELIVERED THE OPINION OF THE COURT, IN WHICH REHNQUIST, C.J., AND KENNEDY, SOUTER, AND THOMAS, JJ., JOINED. WHITE, J., FILED AN OPINION CONCURRING IN THE JUDGMENT, IN WHICH BLACKMUN AND O'CONNOR, JJ., JOINED, AND IN WHICH STEVENS, J., JOINED EXCEPT AS TO PART I-A. BLACKMUN J., FILED AN OPINION CONCURRING IN THE JUDGMENT. STEVENS, J., FILED AN OPINION CONCURRING IN THE JUDGMENT, IN PART I OF WHICH WHITE AND BLACKMUN, JJ., JOINED.

JUSTICE SCALIA DELIVERED THE OPINION OF THE COURT.

In the predawn hours of June 21, 1990, petitioner and several other teenagers allegedly assembled a crudely made cross by taping together broken chair legs. They then allegedly burned the cross inside the fenced yard of a black family that lived across the street from the house where petitioner was staying. Although this conduct could have been punished under any of a number of laws, one of the two provisions under which respondent city of St. Paul chose to charge petitioner (then a juvenile) was the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code 292.02 (1990), which provides:

"Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."

Petitioner moved to dismiss this count on the ground that the St. Paul ordinance was substantially overbroad and impermissibly content based, and therefore facially invalid under the First Amendment. The trial court granted this motion, but the Minnesota Supreme Court reversed. That court rejected petitioner's overbreadth claim because, as construed in prior Minnesota cases, the modifying phrase "arouses anger, alarm or resentment in others" limited the reach of the ordinance to conduct that amounts to "fighting words," i.e., "conduct that itself inflicts injury or tends to incite immediate violence . . .," and therefore the ordinance reached only expression "that the first amendment does not protect." The court also concluded that the ordinance was not impermissibly content based because, in its view, "the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order." We granted certiorari.

In construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota court. Accordingly, we accept the Minnesota Supreme Court's authoritative statement that the ordinance reaches only those expressions that constitute "fighting words" within the meaning of *Chaplinsky*. Petitioner and his amici urge us to modify the scope of the *Chaplinsky* formulation, thereby invalidating the ordinance as "substantially overbroad." We find it unnecessary to consider this issue. Assuming, arguendo, that all of the expression reached by the ordinance is proscribable under the "fighting words" doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.

The First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*. We have recognized that "the freedom of speech" referred to by the First Amendment does not include a freedom to disregard these traditional limitations. See, e.g., *Roth v. United States* (1957) (obscenity); *Beauharnais v. Illinois* (1952) (defamation); *Chaplinsky v. New Hampshire* ("fighting" words). Our decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation, see *New York Times Co. v. Sullivan* (1964); *Gertz v. Robert Welch, Inc.* (1974) and for obscenity, see *Miller v. California* (1973), but a limited categorical approach has remained an important part of our First Amendment jurisprudence.

We have sometimes said that these categories of expression are "not within the area of constitutionally protected speech," or that the "protection of the First Amendment does not extend" to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity "as not being speech at all." What they mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) - not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government. \*\*\*

Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government "may regulate [them] freely," post (White, J., concurring in judgment). That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government. Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and

with our jurisprudence as well. It is not true that "fighting words" have at most a "de minimis" expressive content, or that their content is in all respects "worthless and undeserving of constitutional protection;" sometimes they are quite expressive indeed. We have not said that they constitute "no part of the expression of ideas," but only that they constitute "no essential part of any exposition of ideas." *Chaplinsky* (emphasis added).

The proposition that a particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of another (e.g., opposition to the city government) is commonplace and has found application in many contexts. We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses - so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not. Similarly, we have upheld reasonable "time, place, or manner" restrictions, but only if they are "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism* (1989); see also *Clark v. Community for Creative Non-Violence* (1984) (noting that the *O'Brien* test differs little from the standard applied to time, place, or manner restrictions). And just as the power to proscribe particular speech on the basis of a non-content element (e.g., noise) does not entail the power to proscribe the same speech on the basis of a content element, so also the power to proscribe it on the basis of one content element (e.g., obscenity) does not entail the power to proscribe it on the basis of other content elements.

In other words, the exclusion of "fighting words" from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a "nonspeech" element of communication. Fighting words are thus analogous to a noisy sound truck: each is, as Justice Frankfurter recognized, a "mode of speech," both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: the government may not regulate use based on hostility - or favoritism - towards the underlying message expressed.

The concurrences describe us as setting forth a new First Amendment principle that prohibition of constitutionally proscribable speech cannot be "underinclusiv[e]," post (White, J., concurring in judgment) - a First Amendment "absolutism" whereby "[w]ithin a particular 'proscribable' category of expression, . . . a government must either proscribe all speech or no speech at all," post (Stevens, J., concurring in judgment). That easy target is of the concurrences' own invention. In our view, the First Amendment imposes not an "underinclusiveness" limitation, but a "content discrimination" limitation, upon a State's prohibition of proscribable speech. There is no problem whatever, for example, with a State's prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be "underinclusive," it would not discriminate on the basis of content.

Even the prohibition against content discrimination that we assert the First Amendment requires is not absolute. It applies differently in the context of proscribable speech than in the area of fully protected speech. The rationale of the general prohibition, after all, is that content discrimination "raises the

specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." But content discrimination among various instances of a class of proscribable speech often does not pose this threat.

When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. To illustrate: a State might choose to prohibit only that obscenity which is the most patently offensive in its prurience - i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive political messages. And the Federal Government can criminalize only those threats of violence that are directed against the President, see 18 U.S.C. 871 - since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President. See *Watts v. United States* (1969) (upholding the facial validity of 871 because of the "overwhelm[ing] interest in protecting the safety of [the] Chief Executive and in allowing him to perform his duties without interference from threats of physical violence"). But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities. And to take a final example (one mentioned by Justice Stevens, post), a State may choose to regulate price advertising in one industry, but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection is in its view greater there. But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion.

Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular "secondary effects" of the speech, so that the regulation is "justified without reference to the content of the . . . speech." A State could, for example, permit all obscene live performances except those involving minors. Moreover, since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct, rather than speech. Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices, 42 U.S.C. 2000e-2. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

\*\*\* There may be other such bases as well. Indeed, to validate such selectivity (where totally proscribable speech is at issue), it may not even be necessary to identify any particular "neutral" basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official

suppression of ideas is afoot. (We cannot think of any First Amendment interest that would stand in the way of a State's prohibiting only those obscene motion pictures with blue-eyed actresses.) Save for that limitation, the regulation of "fighting words," like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive, instances alone.

## II

Applying these principles to the St. Paul ordinance, we conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional. Although the phrase in the ordinance, "arouses anger, alarm or resentment in others," has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to "fighting words," the remaining, unmodified terms make clear that the ordinance applies only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion or gender." Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas - to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality - are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.

In its practical operation, moreover, the ordinance goes even beyond mere content discrimination to actual viewpoint discrimination. Displays containing some words - odious racial epithets, for example - would be prohibited to proponents of all views. But "fighting words" that do not themselves invoke race, color, creed, religion, or gender - aspersions upon a person's mother, for example - would seemingly be usable *ad libitum* in the placards of those arguing in favor of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.

What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be facially valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain (as the Minnesota Supreme Court repeatedly emphasized) messages of "bias-motivated" hatred and, in particular, as applied to this case, messages "based on virulent notions of racial supremacy." One must wholeheartedly agree with the Minnesota Supreme Court that "[i]t is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear," but the manner of that confrontation cannot consist of selective limitations upon speech. St. Paul's brief asserts that a general "fighting words" law would not meet the city's needs, because only a content-specific measure can communicate to minority groups that the "group hatred" aspect of such speech "is not condoned by the majority." The point of the First Amendment is that majority preferences must be

expressed in some fashion other than silencing speech on the basis of its content.

Despite the fact that the Minnesota Supreme Court and St. Paul acknowledge that the ordinance is directed at expression of group hatred, Justice Stevens suggests that this "fundamentally misreads" the ordinance. It is directed, he claims, not to speech of a particular content, but to particular "injur[ies]" that are "qualitatively different" from other injuries. This is wordplay. What makes the anger, fear, sense of dishonor, etc., produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc., produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily. \*\*\*

Finally, St. Paul and its amici defend the conclusion of the Minnesota Supreme Court that, even if the ordinance regulates expression based on hostility towards its protected ideological content, this discrimination is nonetheless justified because it is narrowly tailored to serve compelling state interests. Specifically, they assert that the ordinance helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish. We do not doubt that these interests are compelling, and that the ordinance can be said to promote them. But the "danger of censorship" presented by a facially content-based statute, requires that that weapon be employed only where it is "necessary to serve the asserted [compelling] interest." The existence of adequate content-neutral alternatives thus "undercut[s] significantly" any defense of such a statute, casting considerable doubt on the government's protestations that "the asserted justification is in fact an accurate description of the purpose and effect of the law." The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact, the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility - but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.

Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.

The judgment of the Minnesota Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

*It is so ordered.*

JUSTICE WHITE, WITH WHOM JUSTICE BLACKMUN AND JUSTICE O'CONNOR JOIN, AND WITH WHOM JUSTICE STEVENS JOINS EXCEPT AS TO PART I-A, CONCURRING IN THE JUDGMENT.

I agree with the majority that the judgment of the Minnesota Supreme Court should be reversed. However, our agreement ends there.

This case could easily be decided within the contours of established First Amendment law by holding, as petitioner argues, that the St. Paul ordinance is fatally overbroad because it criminalizes not only unprotected expression but expression protected by the First Amendment. \*\*\*

Any contribution of this holding to First Amendment jurisprudence is surely a negative one, since it necessarily signals that expressions of violence, such as the message of intimidation and racial hatred conveyed by burning a cross on someone's lawn, are of sufficient value to outweigh the social interest in order and morality that has traditionally placed such fighting words outside the First Amendment. Indeed, by characterizing fighting words as a form of "debate," the majority legitimates hate speech as a form of public discussion. \*\*\*

As with its rejection of the Court's categorical analysis, the majority offers no reasoned basis for discarding our firmly established strict scrutiny analysis at this time. The majority appears to believe that its doctrinal revisionism is necessary to prevent our elected lawmakers from prohibiting libel against members of one political party, but not another, and from enacting similarly preposterous laws. The majority is misguided.

Although the First Amendment does not apply to categories of unprotected speech, such as fighting words, the Equal Protection Clause requires that the regulation of unprotected speech be rationally related to a legitimate government interest. A defamation statute that drew distinctions on the basis of political affiliation or "an ordinance prohibiting only those legally obscene works that contain criticism of the city government," would unquestionably fail rational-basis review. \*\*\*

I.  
[A & B omitted]  
C

The Court has patched up its argument with an apparently nonexhaustive list of ad hoc exceptions, in what can be viewed either as an attempt to confine the effects of its decision to the facts of this case, or as an effort to anticipate some of the questions that will arise from its radical revision of First Amendment law.

For instance, if the majority were to give general application to the rule on which it decides this case, today's decision would call into question the constitutionality of the statute making it illegal to threaten the life of the President. 18 U.S.C. 871. Surely, this statute, by singling out certain threats, incorporates a content-based distinction; it indicates that the Government especially disfavors threats against the President, as opposed to threats against all others. But because the Government could prohibit all threats, and not just those directed against the President, under the Court's theory, the compelling reasons justifying the enactment of special legislation to safeguard the President would be irrelevant, and the statute would fail First Amendment review.

To save the statute, the majority has engrafted the following exception onto its newly announced First Amendment rule: content-based distinctions may be

drawn within an unprotected category of speech if the basis for the distinctions is "the very reason the entire class of speech at issue is proscribable." Thus, the argument goes, the statute making it illegal to threaten the life of the President is constitutional, since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President."

The exception swallows the majority's rule. Certainly, it should apply to the St. Paul ordinance, since "the reasons why [fighting words] are outside the First Amendment . . . have special force when applied to [groups that have historically been subjected to discrimination]."

To avoid the result of its own analysis, the Court suggests that fighting words are simply a mode of communication, rather than a content-based category, and that the St. Paul ordinance has not singled out a particularly objectionable mode of communication. Again, the majority confuses the issue. A prohibition on fighting words is not a time, place, or manner restriction; it is a ban on a class of speech that conveys an overriding message of personal injury and imminent violence, a message that is at its ugliest when directed against groups that have long been the targets of discrimination. Accordingly, the ordinance falls within the first exception to the majority's theory.

\*\*\* As I see it, the Court's theory does not work, and will do nothing more than confuse the law. Its selection of this case to rewrite First Amendment law is particularly inexplicable, because the whole problem could have been avoided by deciding this case under settled First Amendment principles.

## II

Although I disagree with the Court's analysis, I do agree with its conclusion: the St. Paul ordinance is unconstitutional. However, I would decide the case on overbreadth grounds.

We have emphasized time and again that overbreadth doctrine is an exception to the established principle that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." A defendant being prosecuted for speech or expressive conduct may challenge the law on its face if it reaches protected expression, even when that person's activities are not protected by the First Amendment. This is because "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." \*\*\*

I agree with petitioner that the ordinance is invalid on its face. Although the ordinance, as construed, reaches categories of speech that are constitutionally unprotected, it also criminalizes a substantial amount of expression that - however repugnant - is shielded by the First Amendment. \*\*\*

Our fighting words cases have made clear, however, that such generalized reactions are not sufficient to strip expression of its constitutional protection.

The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.

In the First Amendment context, “[c]riminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.” The St. Paul antibias ordinance is such a law. Although the ordinance reaches conduct that is unprotected, it also makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment. The ordinance is therefore fatally overbroad and invalid on its face.

### III

Today, the Court has disregarded two established principles of First Amendment law without providing a coherent replacement theory. Its decision is an arid, doctrinaire interpretation, driven by the frequently irresistible impulse of judges to tinker with the First Amendment. The decision is mischievous at best, and will surely confuse the lower courts. I join the judgment, but not the folly of the opinion.

JUSTICE BLACKMUN, CONCURRING IN THE JUDGMENT.

I regret what the Court has done in this case. The majority opinion signals one of two possibilities: It will serve as precedent for future cases, or it will not. Either result is disheartening.

In the first instance, by deciding that a State cannot regulate speech that causes great harm unless it also regulates speech that does not (setting law and logic on their heads), the Court seems to abandon the categorical approach, and inevitably to relax the level of scrutiny applicable to content-based laws. As Justice White points out, this weakens the traditional protections of speech. If all expressive activity must be accorded the same protection, that protection will be scant. The simple reality is that the Court will never provide child pornography or cigarette advertising the level of protection customarily granted political speech. If we are forbidden from categorizing, as the Court has done here, we shall reduce protection across the board. It is sad that, in its effort to reach a satisfying result in this case, the Court is willing to weaken First Amendment protections.

In the second instance is the possibility that this case will not significantly alter First Amendment jurisprudence but, instead, will be regarded as an aberration - a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than other fighting words. I fear that the Court has been distracted from its proper mission by the temptation to decide the issue over "politically correct speech" and "cultural diversity," neither of which is presented here. If this is the meaning of today's opinion, it is perhaps even more regrettable.

I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing the people of Saint Paul from

specifically punishing the race-based fighting words that so prejudice their community.

I concur in the judgment, however, because I agree with Justice White that this particular ordinance reaches beyond fighting words to speech protected by the First Amendment.

JUSTICE STEVENS, WITH WHOM JUSTICE WHITE AND JUSTICE BLACKMUN JOIN AS TO PART I, CONCURRING IN THE JUDGMENT.

## I.

\*\*\* I am, however, even more troubled by the second step of the Court's analysis - namely, its conclusion that the St. Paul ordinance is an unconstitutional content-based regulation of speech. Drawing on broadly worded dicta, the Court establishes a near-absolute ban on content-based regulations of expression, and holds that the First Amendment prohibits the regulation of fighting words by subject matter. Thus, while the Court rejects the "all-or-nothing-at-all" nature of the categorical approach, it promptly embraces an absolutism of its own: Within a particular "proscribable" category of expression, the Court holds, a government must either proscribe all speech or no speech at all. This aspect of the Court's ruling fundamentally misunderstands the role and constitutional status of content-based regulations on speech, conflicts with the very nature of First Amendment jurisprudence, and disrupts well-settled principles of First Amendment law. \*\*\*

Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all. Assuming that the Court is correct that this last class of speech is not wholly "unprotected," it certainly does not follow that fighting words and obscenity receive the same sort of protection afforded core political speech. Yet, in ruling that proscribable speech cannot be regulated based on subject matter, the Court does just that. Perversely, this gives fighting words greater protection than is afforded commercial speech. If Congress can prohibit false advertising directed at airline passengers without also prohibiting false advertising directed at bus passengers, and if a city can prohibit political advertisements in its buses, while allowing other advertisements, it is ironic to hold that a city cannot regulate fighting words based on "race, color, creed, religion or gender," while leaving unregulated fighting words based on "union membership . . . or homosexuality." The Court today turns First Amendment law on its head: Communication that was once entirely unprotected (and that still can be wholly proscribed) is now entitled to greater protection than commercial speech - and possibly greater protection than core political speech. \*\*\*

## II

Although I agree with much of Justice White's analysis, I do not join Part I-A of his opinion because I have reservations about the "categorical approach" to the

First Amendment. These concerns, which I have noted on other occasions, lead me to find Justice White's response to the Court's analysis unsatisfying.

Admittedly, the categorical approach to the First Amendment has some appeal: Either expression is protected or it is not - the categories create safe harbors for governments and speakers alike. But this approach sacrifices subtlety for clarity, and is, I am convinced, ultimately unsound. As an initial matter, the concept of "categories" fits poorly with the complex reality of expression. Few dividing lines in First Amendment law are straight and unwavering, and efforts at categorization inevitably give rise only to fuzzy boundaries. Our definitions of "obscenity," and "public forum," illustrate this all too well. The quest for doctrinal certainty through the definition of categories and subcategories is, in my opinion, destined to fail.

Moreover, the categorical approach does not take seriously the importance of context. The meaning of any expression and the legitimacy of its regulation can only be determined in context. Whether, for example, a picture or a sentence is obscene cannot be judged in the abstract, but rather only in the context of its setting, its use, and its audience. Similarly, although legislatures may freely regulate most nonobscene child pornography, such pornography that is part of "a serious work of art, a documentary on behavioral problems, or a medical or psychiatric teaching device" may be entitled to constitutional protection; the "question whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context." The categorical approach sweeps too broadly when it declares that all such expression is beyond the protection of the First Amendment. \*\*\*

### III

As the foregoing suggests, I disagree with both the Court's and part of Justice White's analysis of the constitutionality of the St. Paul ordinance. Unlike the Court, I do not believe that all content-based regulations are equally infirm and presumptively invalid; unlike Justice White, I do not believe that fighting words are wholly unprotected by the First Amendment. To the contrary, I believe our decisions establish a more complex and subtle analysis, one that considers the content and context of the regulated speech, and the nature and scope of the restriction on speech. Applying this analysis and assuming *arguendo* (as the Court does) that the St. Paul ordinance is not overbroad, I conclude that such a selective, subject matter regulation on proscribable speech is constitutional.

Not all content-based regulations are alike; our decisions clearly recognize that some content-based restrictions raise more constitutional questions than others. Although the Court's analysis of content-based regulations cannot be reduced to a simple formula, we have considered a number of factors in determining the validity of such regulations. \*\*\*

In sum, the St. Paul ordinance (as construed by the Court) regulates expressive activity that is wholly proscribable, and does so not on the basis of viewpoint, but rather in recognition of the different harms caused by such activity. Taken together, these several considerations persuade me that the St. Paul ordinance is not an unconstitutional content-based regulation of speech. Thus, were the ordinance not overbroad, I would vote to uphold it.

## *Wisconsin v. Mitchell*

508 U.S. 476 (1993)

CHIEF JUSTICE REHNQUIST DELIVERED THE OPINION OF THE UNANIMOUS COURT.

Respondent Todd Mitchell's sentence for aggravated battery was enhanced because he intentionally selected his victim on account of the victim's race. The question presented in this case is whether this penalty enhancement is prohibited by the First and Fourteenth Amendments. We hold that it is not.

On the evening of October 7, 1989, a group of young black men and boys, including Mitchell, gathered at an apartment complex in Kenosha, Wisconsin. Several members of the group discussed a scene from the motion picture "Mississippi Burning" in which a white man beat a young black boy who was praying. The group moved outside and Mitchell asked them: "Do you all feel hyped up to move on some white people?" Shortly thereafter, a young white boy approached the group on the opposite side of the street where they were standing. As the boy walked by, Mitchell said: "You all want to fuck somebody up? There goes a white boy; go get him." Mitchell counted to three and pointed in the boy's direction. The group ran toward the boy, beat him severely, and stole his tennis shoes. The boy was rendered unconscious and remained in a coma for four days.

After a jury trial in the Circuit Court for Kenosha County, Mitchell was convicted of aggravated battery. Wis.Stat. 939.05 and 940.19(1m) (1989-1990). That offense ordinarily carries a maximum sentence of two years' imprisonment. But because the jury found that Mitchell had intentionally selected his victim because of the boy's race, the maximum sentence for Mitchell's offense was increased to seven years under 939.645. That provision enhances the maximum penalty for an offense whenever the defendant "[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person. . . ." 939.645(1)(b). The Circuit Court sentenced Mitchell to four years' imprisonment for the aggravated battery.

Mitchell unsuccessfully sought postconviction relief in the Circuit Court. Then he appealed his conviction and sentence, challenging the constitutionality of Wisconsin's penalty-enhancement provision on First Amendment grounds. The Wisconsin Court of Appeals rejected Mitchell's challenge, but the Wisconsin Supreme Court reversed. The Supreme Court held that the statute "violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought." It rejected the State's contention "that the statute punishes only the `conduct' of intentional selection of a victim." According to the court, "[t]he statute punishes the "because of" aspect of the defendant's selection, the reason the defendant selected the victim, the motive behind the selection." And under *R.A.V. v. St. Paul* (1992), "the Wisconsin legislature cannot criminalize bigoted thought with which it disagrees."

The Supreme Court also held that the penalty-enhancement statute was unconstitutionally overbroad. It reasoned that, in order to prove that a defendant intentionally selected his victim because of the victim's protected status, the State would often have to introduce evidence of the defendant's prior speech, such as racial epithets he may have uttered before the commission of the offense. This evidentiary use of protected speech, the court thought, would have a "chilling effect" on those who feared the possibility of prosecution for offenses subject to penalty enhancement. Finally, the court distinguished antidiscrimination laws, which have long been held constitutional, on the ground that the Wisconsin statute punishes the "subjective mental process" of selecting a victim because of his protected status, whereas antidiscrimination laws prohibit "objective acts of discrimination."

We granted certiorari because of the importance of the question presented and the existence of a conflict of authority among state high courts on the constitutionality of statutes similar to Wisconsin's penalty-enhancement provision. We reverse.

Mitchell argues that we are bound by the Wisconsin Supreme Court's conclusion that the statute punishes bigoted thought, and not conduct. There is no doubt that we are bound by a state court's construction of a state statute. \*\*\* But here the Wisconsin Supreme Court did not, strictly speaking, construe the Wisconsin statute in the sense of defining the meaning of a particular statutory word or phrase. Rather, it merely characterized the "practical effect" of the statute for First Amendment purposes. This assessment does not bind us. Once any ambiguities as to the meaning of the statute are resolved, we may form our own judgment as to its operative effect.

The State argues that the statute does not punish bigoted thought, as the Supreme Court of Wisconsin said, but instead punishes only conduct. While this argument is literally correct, it does not dispose of Mitchell's First Amendment challenge. To be sure, our cases reject the "view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien* (1968); accord, *R.A.V.*, *Spence v. Washington*. Thus, a physical assault is not, by any stretch of the imagination, expressive conduct protected by the First Amendment.

But the fact remains that, under the Wisconsin statute, the same criminal conduct may be more heavily punished if the victim is selected because of his race or other protected status than if no such motive obtained. Thus, although the statute punishes criminal conduct, it enhances the maximum penalty for conduct motivated by a discriminatory point of view more severely than the same conduct engaged in for some other reason or for no reason at all. Because the only reason for the enhancement is the defendant's discriminatory motive for selecting his victim, Mitchell argues (and the Wisconsin Supreme Court held) that the statute violates the First Amendment by punishing offenders' bigoted beliefs.

Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant. Thus, in many States, the commission of a murder or

other capital offense for pecuniary gain is a separate aggravating circumstance under the capital sentencing statute.

But it is equally true that a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge. *Dawson v. Delaware* (1992). In *Dawson*, the State introduced evidence at a capital sentencing hearing that the defendant was a member of a white supremacist prison gang. Because "the evidence proved nothing more than [the defendant's] abstract beliefs," we held that its admission violated the defendant's First Amendment rights. In so holding, however, we emphasized that "the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." Thus, in *Barclay v. Florida* (1983) (plurality opinion), we allowed the sentencing judge to take into account the defendant's racial animus towards his victim. The evidence in that case showed that the defendant's membership in the Black Liberation Army and desire to provoke a "race war" were related to the murder of a white man for which he was convicted. Because "the elements of racial hatred in [the] murder" were relevant to several aggravating factors, we held that the trial judge permissibly took this evidence into account in sentencing the defendant to death.

Mitchell suggests that *Dawson* and *Barclay* are inapposite because they did not involve application of a penalty-enhancement provision. But in *Barclay* we held that it was permissible for the sentencing court to consider the defendant's racial animus in determining whether he should be sentenced to death, surely the most severe "enhancement" of all. And the fact that the Wisconsin Legislature has decided, as a general matter, that bias-motivated offenses warrant greater maximum penalties across the board does not alter the result here. For the primary responsibility for fixing criminal penalties lies with the legislature.

Mitchell argues that the Wisconsin penalty-enhancement statute is invalid because it punishes the defendant's discriminatory motive, or reason, for acting. But motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge. Title VII, of the Civil Rights Act of 1964, for example, makes it unlawful for an employer to discriminate against an employee "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1).\*\*\*

Nothing in our decision last Term in *R.A.V.* compels a different result here. That case involved a First Amendment challenge to a municipal ordinance prohibiting the use of "'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'" Because the ordinance only proscribed a class of "fighting words" deemed particularly offensive by the city - i.e., those "that contain . . . messages of 'bias-motivated' hatred," we held that it violated the rule against content-based discrimination. But whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression, the statute in this case is aimed at conduct unprotected by the First Amendment.

Moreover, the Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its amici, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. *See, e.g.*, Brief for Petitioner 24-27; Brief for United States as Amicus Curiae 13-15; Brief for Lawyers' Committee for Civil Rights Under Law as Amicus Curiae 18-22; Brief for the American Civil Liberties Union as Amicus Curiae 17-19; Brief for the Anti-Defamation League et al. as Amici Curiae 910; Brief for Congressman Charles E. Schumer et al. as Amici Curiae 8-9. The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases. As Blackstone said long ago, "it is but reasonable that, among crimes of different natures, those should be most severely punished which are the most destructive of the public safety and happiness."

Finally, there remains to be considered Mitchell's argument that the Wisconsin statute is unconstitutionally overbroad because of its "chilling effect" on free speech. Mitchell argues (and the Wisconsin Supreme Court agreed) that the statute is "overbroad" because evidence of the defendant's prior speech or associations may be used to prove that the defendant intentionally selected his victim on account of the victim's protected status. Consequently, the argument goes, the statute impermissibly chills free expression with respect to such matters by those concerned about the possibility of enhanced sentences if they should, in the future, commit a criminal offense covered by the statute. We find no merit in this contention.

The sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional "overbreadth" cases. We must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that, if he later commits an offense covered by the statute, these opinions will be offered at trial to establish that he selected his victim on account of the victim's protected status, thus qualifying him for penalty-enhancement. To stay within the realm of rationality, we must surely put to one side minor misdemeanor offenses covered by the statute, such as negligent operation of a motor vehicle for it is difficult, if not impossible, to conceive of a situation where such offenses would be racially motivated. We are left, then, with the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against person or property. This is simply too speculative a hypothesis to support Mitchell's overbreadth claim.

The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like. Nearly half a century ago, in *Haupt v. United States* (1947), we rejected a contention similar to that advanced by Mitchell here. Haupt was tried for the offense of treason, which, as defined by the Constitution (Art. III, 3), may depend very much on proof of motive. To prove that the acts in question were committed out of "adherence to the enemy" rather than "parental solicitude,"

the Government introduced evidence of conversations that had taken place long prior to the indictment, some of which consisted of statements showing Haupt's sympathy with Germany and Hitler and hostility towards the United States. We rejected Haupt's argument that this evidence was improperly admitted. While "[s]uch testimony is to be scrutinized with care to be certain the statements are not expressions of mere lawful and permissible difference of opinion with our own government or quite proper appreciation of the land of birth, "we held that "these statements . . . clearly were admissible on the question of intent and adherence to the enemy."

For the foregoing reasons, we hold that Mitchell's First Amendment rights were not violated by the application of the Wisconsin penalty-enhancement provision in sentencing him. The judgment of the Supreme Court of Wisconsin is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

## ***Virginia v. Black*** 538 U.S. 343 (2003)

JUSTICE O'CONNOR ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED THE OPINION OF THE COURT WITH RESPECT TO PARTS I, II, AND III, AND AN OPINION WITH RESPECT TO PARTS IV AND V, IN WHICH THE CHIEF JUSTICE, JUSTICE STEVENS, AND JUSTICE BREYER JOIN. STEVENS, J., FILED A CONCURRING OPINION. SCALIA, J., FILED AN OPINION CONCURRING IN PART, CONCURRING IN THE JUDGMENT IN PART, AND DISSENTING IN PART, IN WHICH THOMAS, J., JOINED AS TO PARTS I AND II. SOUTER, J., FILED AN OPINION CONCURRING IN THE JUDGMENT IN PART AND DISSENTING IN PART, IN WHICH KENNEDY AND GINSBURG, JJ., JOINED. THOMAS, J., FILED A DISSENTING OPINION.

JUSTICE O'CONNOR ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED THE OPINION OF THE COURT WITH RESPECT TO PARTS I, II, AND III, AND AN OPINION WITH RESPECT TO PARTS IV AND V, IN WHICH THE CHIEF JUSTICE, JUSTICE STEVENS, AND JUSTICE BREYER JOIN.

In this case we consider whether the Commonwealth of Virginia's statute banning cross burning with "an intent to intimidate a person or group of persons" violates the First Amendment. Va. Code Ann. §18.2-423 (1996). We conclude that while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form.

### I

Respondents Barry Black, Richard Elliott, and Jonathan O'Mara were convicted separately of violating Virginia's cross-burning statute, §18.2-423. That statute provides:

"It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the

property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.

"Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."

On August 22, 1998, Barry Black led a Ku Klux Klan rally in Carroll County, Virginia. Twenty-five to thirty people attended this gathering, which occurred on private property with the permission of the owner, who was in attendance. The property was located on an open field just off Brushy Fork Road (State Highway 690) in Cana, Virginia.

When the sheriff of Carroll County learned that a Klan rally was occurring in his county, he went to observe it from the side of the road. During the approximately one hour that the sheriff was present, about 40 to 50 cars passed the site, a "few" of which stopped to ask the sheriff what was happening on the property. Eight to ten houses were located in the vicinity of the rally. Rebecca Sechrist, who was related to the owner of the property where the rally took place, "sat and watched to see wha[t] [was] going on" from the lawn of her in-laws' house. She looked on as the Klan prepared for the gathering and subsequently conducted the rally itself.

During the rally, Sechrist heard Klan members speak about "what they were" and "what they believed in." The speakers "talked real bad about the blacks and the Mexicans. One speaker told the assembled gathering that "he would love to take a .30/.30 and just random[ly] shoot the blacks." The speakers also talked about "President Clinton and Hillary Clinton," and about how their tax money "goes to ... the black people." Sechrist testified that this language made her "very ... scared."

At the conclusion of the rally, the crowd circled around a 25- to 30-foot cross. The cross was between 300 and 350 yards away from the road. According to the sheriff, the cross "then all of a sudden ... went up in a flame." As the cross burned, the Klan played Amazing Grace over the loudspeakers. Sechrist stated that the cross burning made her feel "awful" and "terrible."

When the sheriff observed the cross burning, he informed his deputy that they needed to "find out who's responsible and explain to them that they cannot do this in the State of Virginia." The sheriff then went down the driveway, entered the rally, and asked "who was responsible for burning the cross." Black responded, "I guess I am because I'm the head of the rally." The sheriff then told Black, "[T]here's a law in the State of Virginia that you cannot burn a cross and I'll have to place you under arrest for this."

Black was charged with burning a cross with the intent of intimidating a person or group of persons, in violation of §18.2-423. At his trial, the jury was instructed that "intent to intimidate means the motivation to intentionally put a person or a group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused rather than from some mere temperamental timidity of the victim." The trial court also instructed the jury that "the burning of a cross by itself is sufficient evidence from which you may infer the required intent." When Black objected to this last instruction on First Amendment grounds, the prosecutor responded that the instruction was "taken straight out

of the [Virginia] Model Instructions." The jury found Black guilty, and fined him \$2,500. The Court of Appeals of Virginia affirmed Black's conviction.

On May 2, 1998, respondents Richard Elliott and Jonathan O'Mara, as well as a third individual, attempted to burn a cross on the yard of James Jubilee. Jubilee, an African-American, was Elliott's next-door neighbor in Virginia Beach, Virginia. Four months prior to the incident, Jubilee and his family had moved from California to Virginia Beach. Before the cross burning, Jubilee spoke to Elliott's mother to inquire about shots being fired from behind the Elliott home. Elliott's mother explained to Jubilee that her son shot firearms as a hobby, and that he used the backyard as a firing range.

On the night of May 2, respondents drove a truck onto Jubilee's property, planted a cross, and set it on fire. Their apparent motive was to "get back" at Jubilee for complaining about the shooting in the backyard. Respondents were not affiliated with the Klan. The next morning, as Jubilee was pulling his car out of the driveway, he noticed the partially burned cross approximately 20 feet from his house. After seeing the cross, Jubilee was "very nervous" because he "didn't know what would be the next phase," and because "a cross burned in your yard ... tells you that it's just the first round."

Elliott and O'Mara were charged with attempted cross burning and conspiracy to commit cross burning. O'Mara pleaded guilty to both counts, reserving the right to challenge the constitutionality of the cross-burning statute. The judge sentenced O'Mara to 90 days in jail and fined him \$2,500. The judge also suspended 45 days of the sentence and \$1,000 of the fine.

At Elliott's trial, the judge originally ruled that the jury would be instructed "that the burning of a cross by itself is sufficient evidence from which you may infer the required intent." At trial, however, the court instructed the jury that the Commonwealth must prove that "the defendant intended to commit cross burning," that "the defendant did a direct act toward the commission of the cross burning," and that "the defendant had the intent of intimidating any person or group of persons." The court did not instruct the jury on the meaning of the word "intimidate," nor on the prima facie evidence provision of §18.2-423. The jury found Elliott guilty of attempted cross burning and acquitted him of conspiracy to commit cross burning. It sentenced Elliott to 90 days in jail and a \$2,500 fine. The Court of Appeals of Virginia affirmed the convictions of both Elliott and O'Mara.

Each respondent appealed to the Supreme Court of Virginia, arguing that §18.2-423 is facially unconstitutional. The Supreme Court of Virginia consolidated all three cases, and held that the statute is unconstitutional on its face. It held that the Virginia cross-burning statute "is analytically indistinguishable from the ordinance found unconstitutional in *R. A. V.* The Virginia statute, the court held, discriminates on the basis of content since it "selectively chooses only cross burning because of its distinctive message." The court also held that the prima facie evidence provision renders the statute overbroad because "[t]he enhanced probability of prosecution under the statute chills the expression of protected speech."

Three justices dissented, concluding that the Virginia cross-burning statute passes constitutional muster because it proscribes only conduct that

constitutes a true threat. The justices noted that unlike the ordinance found unconstitutional in *R.A.V.*, the Virginia statute does not just target cross burning "on the basis of race, color, creed, religion or gender." Rather, "the Virginia statute applies to any individual who burns a cross for any reason provided the cross is burned with the intent to intimidate." The dissenters also disagreed with the majority's analysis of the prima facie provision because the inference alone "is clearly insufficient to establish beyond a reasonable doubt that a defendant burned a cross with the intent to intimidate." The dissent noted that the burden of proof still remains on the Commonwealth to prove intent to intimidate. We granted certiorari.

## II

Cross burning originated in the 14th century as a means for Scottish tribes to signal each other. See M. NEWTON & J. NEWTON, *THE KU KLUX KLAN: AN ENCYCLOPEDIA* 145 (1991). Sir Walter Scott used cross burnings for dramatic effect in *The Lady of the Lake*, where the burning cross signified both a summons and a call to arms. See W. SCOTT, *THE LADY OF THE LAKE, CANTO THIRD*. Cross burning in this country, however, long ago became unmoored from its Scottish ancestry. Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan.

The first Ku Klux Klan began in Pulaski, Tennessee, in the spring of 1866. Although the Ku Klux Klan started as a social club, it soon changed into something far different. The Klan fought Reconstruction and the corresponding drive to allow freed blacks to participate in the political process. Soon the Klan imposed "a veritable reign of terror" throughout the South. S. KENNEDY, *SOUTHERN EXPOSURE* 31 (1991) (hereinafter Kennedy). The Klan employed tactics such as whipping, threatening to burn people at the stake, and murder. W. Wade, *THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA* 48-49 (1987) (hereinafter Wade). The Klan's victims included blacks, southern whites who disagreed with the Klan, and "carpetbagger" northern whites.

The activities of the Ku Klux Klan prompted legislative action at the national level. In 1871, "President Grant sent a message to Congress indicating that the Klan's reign of terror in the Southern States had rendered life and property insecure." In response, Congress passed what is now known as the Ku Klux Klan Act. See "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes," 17 Stat. 13 (now codified at 42 U. S. C. §§1983, 1985, and 1986). President Grant used these new powers to suppress the Klan in South Carolina, the effect of which severely curtailed the Klan in other States as well. By the end of Reconstruction in 1877, the first Klan no longer existed.

The genesis of the second Klan began in 1905, with the publication of Thomas Dixon's *THE CLANSMEN: AN HISTORICAL ROMANCE OF THE KU KLUX KLAN*. Dixon's book was a sympathetic portrait of the first Klan, depicting the Klan as a group of heroes "saving" the South from blacks and the "horrors" of Reconstruction. Although the first Klan never actually practiced cross burning, Dixon's book depicted the Klan burning crosses to celebrate the execution of former slaves. Cross burning thereby became associated with the first Ku Klux Klan. When D. W. Griffith turned Dixon's book into the movie *The Birth of a Nation* in 1915, the

association between cross burning and the Klan became indelible. In addition to the cross burnings in the movie, a poster advertising the film displayed a hooded Klansman riding a hooded horse, with his left hand holding the reins of the horse and his right hand holding a burning cross above his head. Soon thereafter, in November 1915, the second Klan began.

From the inception of the second Klan, cross burnings have been used to communicate both threats of violence and messages of shared ideology. The first initiation ceremony occurred on Stone Mountain near Atlanta, Georgia. While a 40-foot cross burned on the mountain, the Klan members took their oaths of loyalty. This cross burning was the second recorded instance in the United States. The first known cross burning in the country had occurred a little over one month before the Klan initiation, when a Georgia mob celebrated the lynching of Leo Frank by burning a "gigantic cross" on Stone Mountain that was "visible throughout" Atlanta.

The new Klan's ideology did not differ much from that of the first Klan. As one Klan publication emphasized, "We avow the distinction between [the] races, ... and we shall ever be true to the faithful maintenance of White Supremacy and will strenuously oppose any compromise thereof in any and all things." Violence was also an elemental part of this new Klan. By September 1921, the New York World newspaper documented 152 acts of Klan violence, including 4 murders, 41 floggings, and 27 tar-and-featherings.

Often, the Klan used cross burnings as a tool of intimidation and a threat of impending violence. For example, in 1939 and 1940, the Klan burned crosses in front of synagogues and churches. After one cross burning at a synagogue, a Klan member noted that if the cross burning did not "shut the Jews up, we'll cut a few throats and see what happens." In Miami in 1941, the Klan burned four crosses in front of a proposed housing project, declaring, "We are here to keep niggers out of your town ... . When the law fails you, call on us." And in Alabama in 1942, in "a whirlwind climax to weeks of flogging and terror," the Klan burned crosses in front of a union hall and in front of a union leader's home on the eve of a labor election. These cross burnings embodied threats to people whom the Klan deemed antithetical to its goals. And these threats had special force given the long history of Klan violence.

The Klan continued to use cross burnings to intimidate after World War II. In one incident, an African-American "school teacher who recently moved his family into a block formerly occupied only by whites asked the protection of city police ... after the burning of a cross in his front yard." And after a cross burning in Suffolk, Virginia during the late 1940's, the Virginia Governor stated that he would "not allow any of our people of any race to be subjected to terrorism or intimidation in any form by the Klan or any other organization." These incidents of cross burning, among others, helped prompt Virginia to enact its first version of the cross-burning statute in 1950.

The decision of this Court in *Brown v. Board of Education* (1954), along with the civil rights movement of the 1950's and 1960's, sparked another outbreak of Klan violence. These acts of violence included bombings, beatings, shootings, stabbings, and mutilations. Members of the Klan burned crosses on the lawns of those associated with the civil rights movement, assaulted the Freedom

Riders, bombed churches, and murdered blacks as well as whites whom the Klan viewed as sympathetic toward the civil rights movement.

Throughout the history of the Klan, cross burnings have also remained potent symbols of shared group identity and ideology. The burning cross became a symbol of the Klan itself and a central feature of Klan gatherings. According to the Klan constitution (called the kloran), the "fiery cross" was the "emblem of that sincere, unselfish devotedness of all klansmen to the sacred purpose and principles we have espoused." And the Klan has often published its newsletters and magazines under the name *The Fiery Cross*.

At Klan gatherings across the country, cross burning became the climax of the rally or the initiation. Posters advertising an upcoming Klan rally often featured a Klan member holding a cross. Typically, a cross burning would start with a prayer by the "Klavern" minister, followed by the singing of Onward Christian Soldiers. The Klan would then light the cross on fire, as the members raised their left arm toward the burning cross and sang *The Old Rugged Cross*. Wade 185. Throughout the Klan's history, the Klan continued to use the burning cross in their ritual ceremonies.

For its own members, the cross was a sign of celebration and ceremony. During a joint Nazi-Klan rally in 1940, the proceeding concluded with the wedding of two Klan members who "were married in full Klan regalia beneath a blazing cross." In response to antimasking bills introduced in state legislatures after World War II, the Klan burned crosses in protest. On March 26, 1960, the Klan engaged in rallies and cross burnings throughout the South in an attempt to recruit 10 million members. Later in 1960, the Klan became an issue in the third debate between Richard Nixon and John Kennedy, with both candidates renouncing the Klan. After this debate, the Klan reiterated its support for Nixon by burning crosses. And cross burnings featured prominently in Klan rallies when the Klan attempted to move toward more nonviolent tactics to stop integration. In short, a burning cross has remained a symbol of Klan ideology and of Klan unity.

To this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a "symbol of hate." And while cross burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message conveyed. For example, when a cross burning is directed at a particular person not affiliated with the Klan, the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical. The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan. Indeed, as the cases of respondents Elliott and O'Mara indicate, individuals without Klan affiliation who wish to threaten or menace another person sometimes use cross burning because of this association between a burning cross and violence.

In sum, while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message

fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful.

### III

#### A

The First Amendment, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law ... abridging the freedom of speech." The hallmark of the protection of free speech is to allow "free trade in ideas"--even ideas that the overwhelming majority of people might find distasteful or discomforting. *Abrams v. United States* (1919) (Holmes, J., dissenting); see also *Texas v. Johnson*, (1989). Thus, the First Amendment "ordinarily" denies a State "the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence." *Whitney v. California* (Brandeis, J., concurring). The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech. See, e.g., *R. A. V. v. City of St. Paul*, *Texas v. Johnson*, *United States v. O'Brien*, *Tinker v. Des Moines Independent Community School Dist.* (1969).

The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution. See, e.g., *Chaplinsky v. New Hampshire* (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem"). The First Amendment permits "restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' "

\*\*\*

"True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. See *Watts v. United States* (1969) ("political hyberbole" is not a true threat); *R.A.V. v. City of St. Paul*. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As noted in Part II, *supra*, the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.

#### B

The Supreme Court of Virginia ruled that in light of *R.A.V. v. City of St. Paul*, even if it is constitutional to ban cross burning in a content-neutral manner,

the Virginia cross-burning statute is unconstitutional because it discriminates on the basis of content and viewpoint. It is true, as the Supreme Court of Virginia held, that the burning of a cross is symbolic expression. The reason why the Klan burns a cross at its rallies, or individuals place a burning cross on someone else's lawn, is that the burning cross represents the message that the speaker wishes to communicate. Individuals burn crosses as opposed to other means of communication because cross burning carries a message in an effective and dramatic manner.

The fact that cross burning is symbolic expression, however, does not resolve the constitutional question. The Supreme Court of Virginia relied upon *R.A.V. v. City of St. Paul* to conclude that once a statute discriminates on the basis of this type of content, the law is unconstitutional. We disagree.

\*\*\* We did not hold in *R.A.V.* that the First Amendment prohibits *all* forms of content-based discrimination within a proscribable area of speech. Rather, we specifically stated that some types of content discrimination did not violate the First Amendment:

"When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class."

\*\*\* Similarly, Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R. A. V.*, the Virginia statute does not single out for opprobrium only that speech directed toward "one of the specified disfavored topics." It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's "political affiliation, union membership, or homosexuality." Moreover, as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities. Indeed, in the case of Elliott and O'Mara, it is at least unclear whether the respondents burned a cross due to racial animus.

The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R. A. V.* and is proscribable under the First Amendment.

#### IV

#### [PLURALITY]

The Supreme Court of Virginia ruled in the alternative that Virginia's cross-burning statute was unconstitutionally overbroad due to its provision stating that "[a]ny such burning of a cross shall be prima facie evidence of an intent to

intimidate a person or group of persons." Va. Code Ann. §18.2-423 (1996). The Commonwealth added the prima facie provision to the statute in 1968. The court below did not reach whether this provision is severable from the rest of the cross-burning statute under Virginia law.

The Supreme Court of Virginia has not ruled on the meaning of the prima facie evidence provision. It has, however, stated that "the act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief." The jury in the case of Richard Elliott did not receive any instruction on the prima facie evidence provision, and the provision was not an issue in the case of Jonathan O'Mara because he pleaded guilty. The court in Barry Black's case, however, instructed the jury that the provision means: "The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent." This jury instruction is the same as the Model Jury Instruction in the Commonwealth of Virginia. See Virginia Model Jury Instructions, Criminal, Instruction No. 10.250 (1998 and Supp. 2001).

The prima facie evidence provision, as interpreted by the jury instruction, renders the statute unconstitutional. Because this jury instruction is the Model Jury Instruction, and because the Supreme Court of Virginia had the opportunity to expressly disavow the jury instruction, the jury instruction's construction of the prima facie provision "is a ruling on a question of state law that is as binding on us as though the precise words had been written into" the statute. As construed by the jury instruction, the prima facie provision strips away the very reason why a State may ban cross burning with the intent to intimidate. The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.

It is apparent that the provision as so interpreted "would create an unacceptable risk of the suppression of ideas." The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech. The prima facie evidence provision in this statute blurs the line between these two meanings of a burning cross. As interpreted by the jury instruction, the provision chills constitutionally protected political speech because of the possibility that a State will prosecute--and potentially convict--somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.

As the history of cross burning indicates, a burning cross is not always intended to intimidate. Rather, sometimes the cross burning is a statement of ideology, a symbol of group solidarity. It is a ritual used at Klan gatherings, and it is used to represent the Klan itself. Thus, "[b]urning a cross at a political rally would almost certainly be protected expression." Indeed, occasionally a person who burns a cross does not intend to express either a statement of ideology or

intimidation. Cross burnings have appeared in movies such as *Mississippi Burning*, and in plays such as the stage adaptation of Sir Walter Scott's *The Lady of the Lake*.

The prima facie provision makes no effort to distinguish among these different types of cross burnings. It does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers. It allows a jury to treat a cross burning on the property of another with the owner's acquiescence in the same manner as a cross burning on the property of another without the owner's permission. To this extent I agree with *Justice Souter* that the prima facie evidence provision can "skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning." *Post* (opinion concurring in judgment and dissenting in part).

It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings. \*\*\*The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.

For these reasons, the prima facie evidence provision, as interpreted through the jury instruction and as applied in *Barry Black's* case, is unconstitutional on its face. We recognize that the Supreme Court of Virginia has not authoritatively interpreted the meaning of the prima facie evidence provision. Unlike *Justice Scalia*, we refuse to speculate on whether *any* interpretation of the prima facie evidence provision would satisfy the First Amendment. Rather, all we hold is that because of the interpretation of the prima facie evidence provision given by the jury instruction, the provision makes the statute facially invalid at this point. We also recognize the theoretical possibility that the court, on remand, could interpret the provision in a manner different from that so far set forth in order to avoid the constitutional objections we have described. We leave open that possibility. We also leave open the possibility that the provision is severable, and if so, whether *Elliott and O'Mara* could be retried under §18.2-423.

## V

With respect to *Barry Black*, we agree with the Supreme Court of Virginia that his conviction cannot stand, and we affirm the judgment of the Supreme Court of Virginia. With respect to *Elliott and O'Mara*, we vacate the judgment of the Supreme Court of Virginia, and remand the case for further proceedings.

*It is so ordered.*

JUSTICE SCALIA, WITH WHOM JUSTICE THOMAS JOINS AS TO PARTS I AND II, CONCURRING IN PART, CONCURRING IN THE JUDGMENT IN PART, AND DISSENTING IN PART.\*\*\* [OMITTED]

JUSTICE SOUTER, WITH WHOM JUSTICE KENNEDY AND JUSTICE GINSBURG JOIN, CONCURRING IN THE JUDGMENT IN PART AND DISSENTING IN PART.

I agree with the majority that the Virginia statute makes a content-based distinction within the category of punishable intimidating or threatening expression, the very type of distinction we considered in *R. A. V. v. St. Paul* (1992). I disagree that any exception should save Virginia's law from unconstitutionality under the holding in *R. A. V.* or any acceptable variation of it.

## I

The ordinance struck down in *R. A. V.*, as it had been construed by the State's highest court, prohibited the use of symbols (including but not limited to a burning cross) as the equivalent of generally proscribable fighting words, but the ordinance applied only when the symbol was provocative " 'on the basis of race, color, creed, religion or gender.' " Although the Virginia statute in issue here contains no such express "basis of" limitation on prohibited subject matter, the specific prohibition of cross burning with intent to intimidate selects a symbol with particular content from the field of all proscribable expression meant to intimidate. To be sure, that content often includes an essentially intimidating message, that the cross burner will harm the victim, most probably in a physical way, given the historical identification of burning crosses with arson, beating, and lynching. But even when the symbolic act is meant to terrify, a burning cross may carry a further, ideological message of white Protestant supremacy. The ideological message not only accompanies many threatening uses of the symbol, but is also expressed when a burning cross is not used to threaten but merely to symbolize the supremacist ideology and the solidarity of those who espouse it. As the majority points out, the burning cross can broadcast threat and ideology together, ideology alone, or threat alone, as was apparently the choice of respondents Elliott and O'Mara. \*\*\*

## II

[omitted]

## III

As I see the likely significance of the [prima facie] evidence provision, its primary effect is to skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning. To understand how the provision may work, recall that the symbolic act of burning a cross, without more, is consistent with both intent to intimidate and intent to make an ideological statement free of any aim to threaten. One can tell the intimidating instance from the wholly ideological one only by reference to some further circumstance. In the real world, of course, and in real-world prosecutions, there will always be further circumstances, and the factfinder will always learn something more

than the isolated fact of cross burning. Sometimes those circumstances will show an intent to intimidate, but sometimes they will be at least equivocal, as in cases where a white supremacist group burns a cross at an initiation ceremony or political rally visible to the public. In such a case, if the factfinder is aware of the prima facie evidence provision, as the jury was in respondent Black's case, the provision will have the practical effect of tilting the jury's thinking in favor of the prosecution. What is significant is not that the provision permits a factfinder's conclusion that the defendant acted with proscribable and punishable intent without any further indication, because some such indication will almost always be presented. What is significant is that the provision will encourage a factfinder to err on the side of a finding of intent to intimidate when the evidence of circumstances fails to point with any clarity either to the criminal intent or to the permissible one. The effect of such a distortion is difficult to remedy, since any guilty verdict will survive sufficiency review unless the defendant can show that, "viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." The provision will thus tend to draw nonthreatening ideological expression within the ambit of the prohibition of intimidating expression, as Justice O'Connor notes (plurality opinion).

To the extent the prima facie evidence provision skews prosecutions, then, it skews the statute toward suppressing ideas. Thus, the appropriate way to consider the statute's prima facie evidence term, in my view, is not as if it were an overbroad statutory definition amenable to severance or a narrowing construction. The question here is not the permissible scope of an arguably overbroad statute, but the claim of a clearly content-based statute to an exception from the general prohibition of content-based proscriptions, an exception that is not warranted if the statute's terms show that suppression of ideas may be afoot. Accordingly, the way to look at the prima facie evidence provision is to consider it for any indication of what is afoot. And if we look at the provision for this purpose, it has a very obvious significance as a mechanism for bringing within the statute's prohibition some expression that is doubtfully threatening though certainly distasteful.

It is difficult to conceive of an intimidation case that could be easier to prove than one with cross burning, assuming any circumstances suggesting intimidation are present. The provision, apparently so unnecessary to legitimate prosecution of intimidation, is therefore quite enough to raise the question whether Virginia's content-based statute seeks more than mere protection against a virulent form of intimidation. It consequently bars any conclusion that an exception to the general rule of *R. A. V.* is warranted on the ground "that there is no realistic [or little realistic] possibility that official suppression of ideas is afoot." Since no *R. A. V.* exception can save the statute as content based, it can only survive if narrowly tailored to serve a compelling state interest, a stringent test the statute cannot pass; a content-neutral statute banning intimidation would achieve the same object without singling out particular content.

#### IV

I conclude that the statute under which all three of the respondents were prosecuted violates the First Amendment, since the statute's content-based distinction was invalid at the time of the charged activities, regardless of whether the prima facie evidence provision was given any effect in any respondent's individual case. In my view, severance of the prima facie evidence provision now could not eliminate the unconstitutionality of the whole statute at the time of the respondents' conduct. I would therefore affirm the judgment of the Supreme Court of Virginia vacating the respondents' convictions and dismissing the indictments. Accordingly, I concur in the Court's judgment as to respondent Black and dissent as to respondents Elliott and O'Mara.

JUSTICE THOMAS, DISSENTING.

In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred, see *Texas v. Johnson*, and the profane. I believe that cross burning is the paradigmatic example of the latter.

#### I

Although I agree with the majority's conclusion that it is constitutionally permissible to "ban ... cross burning carried out with intent to intimidate," I believe that the majority errs in imputing an expressive component to the activity in question. In my view, whatever expressive value cross burning has, the legislature simply wrote it out by banning only intimidating conduct undertaken by a particular means. A conclusion that the statute prohibiting cross burning with intent to intimidate sweeps beyond a prohibition on certain conduct into the zone of expression overlooks not only the words of the statute but also reality.

#### A

"In holding [the ban on cross burning with intent to intimidate] unconstitutional, the Court ignores Justice Holmes' familiar aphorism that 'a page of history is worth a volume of logic.'" \*\*\*

To me, the majority's brief history of the Ku Klux Klan only reinforces this common understanding of the Klan as a terrorist organization, which, in its endeavor to intimidate, or even eliminate those its dislikes, uses the most brutal of methods.

Such methods typically include cross burning--"a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan." For those not easily frightened, cross burning has been followed by more extreme measures, such as beatings and murder. JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS 1954-1965*, at 39 (1965). As the Solicitor General points out, the association between acts of intimidating cross burning and violence is well documented in recent American history. Brief for the United States at 3-4 & n. 2. Indeed, the connection between cross burning and violence is well ingrained, and lower courts have so recognized. \*\*\*

## B

Virginia's experience has been no exception. In Virginia, though facing widespread opposition in 1920s, the KKK developed localized strength in the southeastern part of the State, where there were reports of scattered raids and floggings. Although the KKK was disbanded at the national level in 1944, a series of cross burnings in Virginia took place between 1949 and 1952.

Most of the crosses were burned on the lawns of black families, who either were business owners or lived in predominantly white neighborhoods. At least one of the cross burnings was accompanied by a shooting. The crosses burned near residences were about five to six feet tall; while a "huge cross reminiscent of the Ku Klux Klan days" burned "atop a hill" as part of the initiation ceremony of the secret organization of the Knights of Kavaliers, was twelve feet tall. These incidents were, in the words of the time, "*terroristic* [sic] . . . un-American act[s], designed to *intimidate* Negroes from seeking their rights as citizens."

In February 1952, in light of this series of cross burnings and attendant reports that the Klan, "long considered dead in Virginia, is being revitalized in Richmond," Governor Battle announced that "Virginia 'might well consider passing legislation' to restrict the activities of the Ku Klux Klan." As newspapers reported at the time, the bill was "to ban the burning of crosses and other similar evidences of *terrorism*." The bill was presented to the House of Delegates by a former FBI agent and future two-term Governor, Delegate Mills E. Godwin, Jr. "Godwin said law and order in the State were impossible if organized groups could *create fear by intimidation*."

That in the early 1950s the people of Virginia viewed cross burning as creating an intolerable atmosphere of terror is not surprising: Although the cross took on some religious significance in the 1920's when the Klan became connected with certain southern white clergy, by the postwar period it had reverted to its original function "as an instrument of intimidation."

Strengthening Delegate Godwin's explanation, as well as my conclusion, that the legislature sought to criminalize terrorizing *conduct* is the fact that at the time the statute was enacted, racial segregation was not only the prevailing practice, but also the law in Virginia. And, just two years after the enactment of this statute, Virginia's General Assembly embarked on a campaign of "massive resistance" in response to *Brown v. Board of Education* (1954).

It strains credulity to suggest that a state legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch the segregationist message. Even for segregationists, violent and terroristic conduct, the Siamese twin of cross burning, was intolerable. The ban on cross burning with intent to intimidate demonstrates that even segregationists understood the difference between intimidating and terroristic conduct and racist expression. It is simply beyond belief that, in passing the statute now under review, the Virginia legislature was concerned with anything but penalizing conduct it must have viewed as particularly vicious.

Accordingly, this statute prohibits only conduct, not expression. And, just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate

to make their point. In light of my conclusion that the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests.

## II

Even assuming that the statute implicates the First Amendment, in my view, the fact that the statute permits a jury to draw an inference of intent to intimidate from the cross burning itself presents no constitutional problems. Therein lies my primary disagreement with the plurality.

### A

But even with respect to statutes containing a mandatory irrebuttable presumption as to intent, the Court has not shown much concern. For instance, there is no scienter requirement for statutory rape. That is, a person can be arrested, prosecuted, and convicted for having sex with a minor, without the government ever producing any evidence, let alone proving beyond a reasonable doubt, that a minor did not consent. In fact, "[f]or purposes of the child molesting statute . . . consent is irrelevant. The legislature has determined in such cases that children under the age of sixteen (16) cannot, as a matter of law, consent to have sexual acts performed upon them, or consent to engage in a sexual act with someone over the age of sixteen (16)." The legislature finds the behavior so reprehensible that the intent is satisfied by the mere act committed by a perpetrator. Considering the horrific effect cross burning has on its victims, it is also reasonable to presume intent to intimidate from the act itself.

Statutes prohibiting possession of drugs with intent to distribute operate much the same way as statutory rape laws. Under these statutes, the intent to distribute is effectively satisfied by possession of some threshold amount of drugs. As with statutory rape, the presumption of intent in such statutes is irrebuttable--not only can a person be arrested for the crime of possession with intent to distribute (or "trafficking") without any evidence of intent beyond quantity of drugs, but such person cannot even mount a defense to the element of intent. However, as with statutory rape statutes, our cases do not reveal any controversy with respect to the presumption of intent in these drug statutes.

Because the prima facie clause here is an inference, not an irrebuttable presumption, there is all the more basis under our Due Process precedents to sustain this statute.

### B

The plurality, however, is troubled by the presumption because this is a First Amendment case. The plurality laments the fate of an innocent cross-burner who burns a cross, but does so without an intent to intimidate. The plurality fears the chill on expression because, according to the plurality, the inference permits "the Commonwealth to arrest, prosecute and convict a person based solely on the fact of cross burning itself." First, it is, at the very least, unclear that the inference comes into play during arrest and initiation of a prosecution, that is, prior to the instructions stage of an actual trial. Second, as I explained above, the inference is rebuttable and, as the jury instructions given in this

case demonstrate, Virginia law still requires the jury to find the existence of each element, including intent to intimidate, beyond a reasonable doubt.

Moreover, even in the First Amendment context, the Court has upheld such regulations where conduct that initially appears culpable, ultimately results in dismissed charges. A regulation of pornography is one such example. While possession of child pornography is illegal, *Ferber v. New York* (1982), possession of adult pornography, as long as it is not obscene, is allowed, *Miller v. California* (1973). As a result, those pornographers trafficking in images of adults who look like minors, may be not only deterred but also arrested and prosecuted for possessing what a jury might find to be legal materials. This "chilling" effect has not, however, been a cause for grave concern with respect to overbreadth of such statutes among the members of this Court.

That the First Amendment gives way to other interests is not a remarkable proposition. What is remarkable is that, under the plurality's analysis, the determination of whether an interest is sufficiently compelling depends not on the harm a regulation in question seeks to prevent, but on the area of society at which it aims. For instance, in *Hill v. Colorado* (2000), the Court upheld a restriction on protests near abortion clinics, explaining that the State had a legitimate interest, which was sufficiently narrowly tailored, in protecting those seeking services of such establishments "from unwanted advice" and "unwanted communication." In so concluding, the Court placed heavy reliance on the "vulnerable physical and emotional conditions" of patients. Thus, when it came to the rights of those seeking abortions, the Court deemed restrictions on "unwanted advice," which, notably, can be given only from a distance of at least 8 feet from a prospective patient, justified by the countervailing interest in obtaining abortion. Yet, here, the plurality strikes down the statute because one day an individual might wish to burn a cross, but might do so without an intent to intimidate anyone. That cross burning subjects its targets, and, sometimes, an unintended audience to extreme emotional distress, and is virtually never viewed merely as "unwanted communication," but rather, as a physical threat, is of no concern to the plurality. Henceforth, under the plurality's view, physical safety will be valued less than the right to be free from unwanted communications.

### III

Because I would uphold the validity of this statute, I respectfully dissent.

## Notes

1. Be prepared to discuss the "categorical approach." What is the logic of the categorical approach? What are the differing views of how that logic should be understood when a subcategory is involved? Should the content (or viewpoint) of that subcategory be considered?
2. The combination of symbolic speech and hate speech/conduct as in *Virginia v. Black* occurs in some First Amendment challenges to the anti-masking statutes Justice Thomas mentions in his dissent. The

Second Circuit, in *Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197 (2d Cir. 2004), took an interesting approach to a challenge to New York's anti-masking statute. The KKK group had sought an injunction against the statute to allow a demonstration while wearing masks. Rejecting the First Amendment claim, the court agreed that the KKK regalia - - - the robe, hood, and mask - - - met the threshold requirement for expressive speech, but nevertheless separated the mask in its analysis. In the court's view, the mask was "redundant" and did "not convey a message independently of the robe and hood." Thus, the mask did not rise to the level of symbolic speech.

Does this seem correct? In contexts other than the KKK? What about the "Guy Fawkes" mask that was adopted by some during the Occupy movements? Or the balaclava worn by "Pussy Riot" members and supporters?

### **Note: "True Threats"**

In *Watts v. United States*, 394 U.S. 705 (1969), the Court upheld the constitutionality of the "threats against the President" statute, 18 U.S.C. s 871(a), in a brief per curiam opinion. However, the Court concluded that a "threat" under the statute "must be distinguished from what is constitutionally protected speech."

As the Court described it:

According to an investigator for the Army Counter Intelligence Corps who was present, petitioner [Watts] responded: 'They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.' 'They are not going to make me kill my black brothers.'

*Id.* at 706.

The jury found that petitioner had committed a felony by knowingly and willfully threatening the President; a divided Court of Appeals for the D.C. Circuit affirmed.

The Court concluded:

whatever the "willfulness" requirement implies, the statute initially requires the Government to prove a true "threat." We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term.

*Id.* at 709.

In the years since *Watts*, whether statements are hyperbole or true threats has become an issue in electronic and social media communications.

In *Elonis v. United States*, 575 U.S. \_\_\_ (2015), the Court considered statements and “lyrics” in facebook postings in the context of a domestic violence situation. Elonis was convicted and the Court granted certiorari petition focused on the First Amendment and pointed to a split in the circuits regarding an application of *Virginia v. Black* (2003) to a conviction of threatening another person: did it require proof of the defendant’s subjective intent to threaten or whether it is enough to show that a “reasonable person” would regard the statement as threatening. However, the Court's Order granting certiorari instructed:

In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U. S. C. §875(c) requires proof of the defendant's subjective intent to threaten."

Given the Court’s instruction, not surprisingly the Court’s opinion, authored by Chief Justice Roberts, “side-stepped” the First Amendment issue. It held that as a matter of statutory interpretation, the instructions to the jury at trial that guilt could be predicated on a "reasonable person" standard merited reversal. The Court added: “Given our disposition, it is not necessary to consider any First Amendment issues.”

However, many commentators believe that the constitutional contours of true threats First Amendment doctrine will be returning to the Court in the near future.

### III. Considering “Content” in the Context of the Military

This next pair of cases concerns the constitutionality of specific statutes Congress enacted to protect the military from civilian speech, not unlike the wartime enactments considered in the previous chapter. Consider how the opinions valorize - - - or not - - - the military, as well as whether how the opinions construe “content” and “categories” in this context.

#### *Schacht v. United States*

398 U.S. 58 (1970)

BLACK, J. DELIVERED THE OPINION OF THE COURT. HARLAN, J., FILED A CONCURRING OPINION IN WHICH THE CHIEF JUSTICE AND STEWART, J. JOINED.

MR. JUSTICE BLACK DELIVERED THE OPINION OF THE COURT.

The petitioner, Daniel Jay Schacht, was indicted in a United States District Court for violating 18 U.S.C. §702, which makes it a crime for any person

"without authority [to wear] the uniform or a distinctive part thereof . . . of any of the armed forces of the United States . . . ." He was tried and convicted by a jury, and on February 29, 1968, he was sentenced to pay a fine of \$250 and to serve a six-month prison term, the maximum sentence allowable under 18 U.S.C. §702. There is no doubt that Schacht did wear distinctive parts of the uniform of the United States Army and that he was not a member of the Armed Forces. He has defended his conduct since the beginning, however, on the ground that he was authorized to wear the uniform by an Act of Congress, 10 U.S.C. §772 (f), which provides as follows:

"When wearing by persons not on active duty authorized. . . . .

"(f) While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force *if the portrayal does not tend to discredit that armed force.*" (Emphasis added.)

Schacht argued in the trial court and in this Court that he wore the army uniform as an "actor" in a "theatrical production" performed several times between 6:30 and 8:30 a.m. on December 4, 1967, in front of the Armed Forces Induction Center at Houston, Texas. The street skit in which Schacht wore the army uniform as a costume was designed, in his view, to expose the evil of the American presence in Vietnam and was part of a larger, peaceful antiwar demonstration at the induction center that morning. The Court of Appeals' opinion affirming the conviction summarized the facts surrounding the skit as follows:

"The evidence indicates that the demonstration in Houston was part of a nationally coordinated movement which was to take place contemporaneously at several places throughout the country. The appellants and their colleagues prepared a script to be followed at the induction center and they actually rehearsed their roles at least once prior to the appointed day before a student organization called the 'Humanists.'

"The skit was composed of three people. There was Schacht who was dressed in a uniform and cap. A second person was wearing 'military colored' coveralls. The third person was outfitted in typical Viet Cong apparel. The first two men carried water pistols. One of them would yell, 'Be an able American,' and then they would shoot the Viet Cong with their pistols. The pistols expelled a red liquid which, when it struck the victim, created the impression that he was bleeding. Once the victim fell down the other two would walk up to him and exclaim, 'My God, this is a pregnant woman.' Without noticeable variation this skit was reenacted several times during the morning of the demonstration."

#### I.

Our previous cases would seem to make it clear that 18 U.S.C. §702, making it an offense to wear our military uniforms without authority is, standing alone, a valid statute on its face. *See, e. g., United States v. O'Brien* (1968). But the general prohibition of 18 U.S.C. §702 cannot always stand alone in view of 10 U.S.C. §772, which authorizes the wearing of military uniforms under certain conditions and circumstances including the circumstance of an actor portraying a member of the armed services in a "theatrical production." 10 U.S.C. §772(f). The Government's argument in this case seems to imply that

somehow what these amateur actors did in Houston should not be treated as a "theatrical production" within the meaning of §772(f). We are unable to follow such a suggestion. Certainly theatrical productions need not always be performed in buildings or even on a defined area such as a conventional stage. Nor need they be performed by professional actors or be heavily financed or elaborately produced. Since time immemorial, outdoor theatrical performances, often performed by amateurs, have played an important part in the entertainment and the education of the people of the world. Here, the record shows without dispute the preparation and repeated presentation by amateur actors of a short play designed to create in the audience an understanding of and opposition to our participation in the Vietnam war. It may be that the performances were crude and amateurish and perhaps unappealing, but the same thing can be said about many theatrical performances. We cannot believe that when Congress wrote out a special exception for theatrical productions it intended to protect only a narrow and limited category of professionally produced plays. Of course, we need not decide here all the questions concerning what is and what is not within the scope of §772(f). We need only find, as we emphatically do, that the street skit in which Schacht participated was a "theatrical production" within the meaning of that section.

This brings us to petitioner's complaint that giving force and effect to the last clause of §772(f) would impose an unconstitutional restraint on his right of free speech. We agree. This clause on its face simply restricts §772(f)'s authorization to those dramatic portrayals that do not "tend to discredit" the military, but, when this restriction is read together with 18 U.S.C. §702, it becomes clear that Congress has in effect made it a crime for an actor wearing a military uniform to say things during his performance critical of the conduct or policies of the Armed Forces. An actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right openly to criticize the Government during a dramatic performance. The last clause of §772(f) denies this constitutional right to an actor who is wearing a military uniform by making it a crime for him to say things that tend to bring the military into discredit and disrepute. In the present case Schacht was free to participate in any skit at the demonstration that praised the Army, but under the final clause of §772(f) he could be convicted of a federal offense if his portrayal attacked the Army instead of praising it. In light of our earlier finding that the skit in which Schacht participated was a "theatrical production" within the meaning of §772(f), it follows that his conviction can be sustained only if he can be punished for speaking out against the role of our Army and our country in Vietnam. Clearly punishment for this reason would be an unconstitutional abridgment of freedom of speech. The final clause of §772(f), which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment. To preserve the constitutionality of §772(f) that final clause must be stricken from the section.

## II.

[omitted] [discusses a procedural issue]

CONCURRING OPINIONS [OMITTED].

## *United States v. Alvarez*

567 U.S. \_\_\_\_ (2012)

KENNEDY, J., ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED AN OPINION, IN WHICH ROBERTS, C. J., AND GINSBURG AND SOTOMAYOR, JJ., JOINED. BREYER, J., FILED AN OPINION CONCURRING IN THE JUDGMENT, IN WHICH KAGAN, J., JOINED. ALITO, J., FILED A DISSENTING OPINION, IN WHICH SCALIA AND THOMAS, JJ., JOINED.

JUSTICE KENNEDY ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED AN OPINION, IN WHICH THE CHIEF JUSTICE, JUSTICE GINSBURG, AND JUSTICE SOTOMAYOR JOIN.

Lying was his habit. Xavier Alvarez, the respondent here, lied when he said that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico. But when he lied in announcing he held the Congressional Medal of Honor, respondent ventured onto new ground; for that lie violates a federal criminal statute, the Stolen Valor Act of 2005. 18 U. S. C. §704.

In 2007, respondent attended his first public meeting as a board member of the Three Valley Water District Board. The board is a governmental entity with headquarters in Claremont, California. He introduced himself as follows: "I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy." None of this was true. For all the record shows, respondent's statements were but a pathetic attempt to gain respect that eluded him. The statements do not seem to have been made to secure employment or financial benefits or admission to privileges reserved for those who had earned the Medal.

Respondent was indicted under the Stolen Valor Act for lying about the Congressional Medal of Honor at the meeting. The United States District Court for the Central District of California rejected his claim that the statute is invalid under the First Amendment. Respondent pleaded guilty to one count, reserving the right to appeal on his First Amendment claim. The United States Court of Appeals for the Ninth Circuit, in a decision by a divided panel, found the Act invalid under the First Amendment and reversed the conviction. With further opinions on the issue, and over a dissent by seven judges, rehearing en banc was denied. This Court granted certiorari.

After certiorari was granted, and in an unrelated case, the United States Court of Appeals for the Tenth Circuit, also in a decision by a divided panel, found the Act constitutional. *United States v. Strandlof*, 667 F. 3d 1146 (2012). So there is now a conflict in the Courts of Appeals on the question of the Act's validity.

This is the second case in two Terms requiring the Court to consider speech that can disparage, or attempt to steal, honor that belongs to those who fought for this Nation in battle. See *Snyder v. Phelps* (2011) (hateful protests directed at the funeral of a serviceman who died in Iraq). Here the statement that the speaker held the Medal was an intended, undoubted lie.

It is right and proper that Congress, over a century ago, established an award so the Nation can hold in its highest respect and esteem those who, in the course of carrying out the "supreme and noble duty of contributing to the defense of the rights and honor of the nation," have acted with extraordinary honor. And it should be uncontested that this is a legitimate Government objective, indeed a most valued national aspiration and purpose. This does not end the inquiry, however. Fundamental constitutional principles require that laws enacted to honor the brave must be consistent with the precepts of the Constitution for which they fought.

The Government contends the criminal prohibition is a proper means to further its purpose in creating and awarding the Medal. When content-based speech regulation is in question, however, exacting scrutiny is required. Statutes suppressing or restricting speech must be judged by the sometimes inconvenient principles of the First Amendment. By this measure, the statutory provisions under which respondent was convicted must be held invalid, and his conviction must be set aside.

## I

Respondent's claim to hold the Congressional Medal of Honor was false. There is no room to argue about interpretation or shades of meaning. On this premise, respondent violated §704(b); and, because the lie concerned the Congressional Medal of Honor, he was subject to an enhanced penalty under subsection (c). Those statutory provisions are as follows:

"(b) False Claims About Receipt of Military Decorations or Medals.--Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . . shall be fined under this title, imprisoned not more than six months, or both.

"(c) Enhanced Penalty for Offenses Involving Congressional Medal of Honor.--

"(1) In General.--If a decoration or medal involved in an offense under subsection (a) or (b) is a Congressional Medal of Honor, in lieu of the punishment provided in that subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both."

Respondent challenges the statute as a content-based suppression of pure speech, speech not falling within any of the few categories of expression where content-based regulation is permissible. The Government defends the statute as necessary to preserve the integrity and purpose of the Medal, an integrity and purpose it contends are compromised and frustrated by the false statements the statute prohibits. It argues that false statements "have no First Amendment value in themselves," and thus "are protected only to the extent needed to avoid chilling fully protected speech." Although the statute covers respondent's speech, the Government argues that it leaves breathing room for protected speech, for example speech which might criticize the idea of the Medal or the importance of the military. The Government's arguments cannot suffice to save the statute.

## II

"[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union* (2002). As a result, the Constitution "demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality." *Ashcroft v. American Civil Liberties Union* (2004).

In light of the substantial and expansive threats to free expression posed by content-based restrictions, this Court has rejected as "startling and dangerous" a "free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits." *United States v. Stevens* (2010). Instead, content-based restrictions on speech have been permitted, as a general matter, only when confined to the few "historic and traditional categories [of expression] long familiar to the bar." Among these categories are advocacy intended, and likely, to incite imminent lawless action, see *Brandenburg v. Ohio* (1969) (per curiam); obscenity, see, e.g., *Miller v. California* (1973); defamation, see, e.g., *New York Times Co. v. Sullivan* (1964) (providing substantial protection for speech about public figures); *Gertz v. Robert Welch, Inc.* (imposing some limits on liability for defaming a private figure); speech integral to criminal conduct, see, e.g., *Giboney v. Empire Storage & Ice Co.* (1949); so-called "fighting words," see *Chaplinsky v. New Hampshire* (1942); child pornography, see *New York v. Ferber* (1982); fraud, see *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, (1976); true threats, see *Watts v. United States* (1969) (per curiam); and speech presenting some grave and imminent threat the government has the power to prevent, see *Near v. Minnesota ex rel. Olson* (1931), although a restriction under the last category is most difficult to sustain, see *New York Times Co. v. United States* (1971) (per curiam). These categories have a historical foundation in the Court's free speech tradition. The vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules.

Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee. See *Sullivan v. New York Times* ("Th[e] erroneous statement is inevitable in free debate").

The Government disagrees with this proposition. It cites language from some of this Court's precedents to support its contention that false statements have no value and hence no First Amendment protection. These isolated statements in some earlier decisions do not support the Government's submission that false statements, as a general rule, are beyond constitutional protection. That conclusion would take the quoted language far from its proper context. For instance, the Court has stated "[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas," *Hustler Magazine, Inc. v. Falwell* (1988), and that false statements "are not protected by the First Amendment in the same manner as truthful statements," *Brown v. Hartlage* (1982). See also, e.g., *Virginia Bd. of Pharmacy* ("Untruthful speech, commercial or otherwise, has never been

protected for its own sake"); *Herbert v. Lando* (1979) ("Spreading false information in and of itself carries no First Amendment credentials"); *Gertz*, ("[T]here is no constitutional value in false statements of fact"); *Garrison v. Louisiana* (1964) ("[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection").

These quotations all derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation. In those decisions the falsity of the speech at issue was not irrelevant to our analysis, but neither was it determinative. The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection. Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.

Even when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood.

The Government thus seeks to use this principle for a new purpose. It seeks to convert a rule that limits liability even in defamation cases where the law permits recovery for tortious wrongs into a rule that expands liability in a different, far greater realm of discourse and expression. That inverts the rationale for the exception. The requirements of a knowing falsehood or reckless disregard for the truth as the condition for recovery in certain defamation cases exists to allow more speech, not less. A rule designed to tolerate certain speech ought not blossom to become a rationale for a rule restricting it.

The Government then gives three examples of regulations on false speech that courts generally have found permissible: first, the criminal prohibition of a false statement made to a Government official, 18 U. S. C. §1001; second, laws punishing perjury; and third, prohibitions on the false representation that one is speaking as a Government official or on behalf of the Government, see, e.g., §912; §709. These restrictions, however, do not establish a principle that all proscriptions of false statements are exempt from exacting First Amendment scrutiny.

The federal statute prohibiting false statements to Government officials punishes "whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government . . . makes any materially false, fictitious, or fraudulent statement or representation." §1001. Section 1001's prohibition on false statements made to Government officials, in communications concerning official matters, does not lead to the broader proposition that false statements are unprotected when made to any person, at any time, in any context.

The same point can be made about what the Court has confirmed is the "unquestioned constitutionality of perjury statutes," both the federal statute, §1623, and its state-law equivalents. It is not simply because perjured statements are false that they lack First Amendment protection. Perjured testimony "is at war with justice" because it can cause a court to render a "judgment not resting on truth. Perjury undermines the function and province

of the law and threatens the integrity of judgments that are the basis of the legal system. Unlike speech in other contexts, testimony under oath has the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action, action that often affects the rights and liberties of others. Sworn testimony is quite distinct from lies not spoken under oath and simply intended to puff up oneself.

Statutes that prohibit falsely representing that one is speaking on behalf of the Government, or that prohibit impersonating a Government officer, also protect the integrity of Government processes, quite apart from merely restricting false speech. Title 18 U. S. C. §912, for example, prohibits impersonating an officer or employee of the United States. Even if that statute may not require proving an "actual financial or property loss" resulting from the deception, the statute is itself confined to "maintain[ing] the general good repute and dignity of . . . government . . . service itself." The same can be said for prohibitions on the unauthorized use of the names of federal agencies such as the Federal Bureau of Investigation in a manner calculated to convey that the communication is approved, see §709, or using words such as "Federal" or "United States" in the collection of private debts in order to convey that the communication has official authorization. These examples, to the extent that they implicate fraud or speech integral to criminal conduct, are inapplicable here.

As our law and tradition show, then, there are instances in which the falsity of speech bears upon whether it is protected. Some false speech may be prohibited even if analogous true speech could not be. This opinion does not imply that any of these targeted prohibitions are somehow vulnerable. But it also rejects the notion that false speech should be in a general category that is presumptively unprotected.

Although the First Amendment stands against any "freewheeling authority to declare new categories of speech outside the scope of the First Amendment," Stevens, the Court has acknowledged that perhaps there exist "some categories of speech that have been historically unprotected . . . but have not yet been specifically identified or discussed . . . in our case law." Before exempting a category of speech from the normal prohibition on content-based restrictions, however, the Court must be presented with "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription," *Brown v. Entertainment Merchants Assn.* (2011). The Government has not demonstrated that false statements generally should constitute a new category of unprotected speech on this basis.

### III

The probable, and adverse, effect of the Act on freedom of expression illustrates, in a fundamental way, the reasons for the Law's distrust of content-based speech prohibitions.

The Act by its plain terms applies to a false statement made at any time, in any place, to any person. It can be assumed that it would not apply to, say, a theatrical performance. Still, the sweeping, quite unprecedented reach of the statute puts it in conflict with the First Amendment. Here the lie was made in a public meeting, but the statute would apply with equal force to personal, whispered conversations within a home. The statute seeks to control and

suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain.

Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth. See G. ORWELL, *NINETEEN EIGHTY-FOUR* (1949) (Centennial ed. 2003). Were this law to be sustained, there could be an endless list of subjects the National Government or the States could single out. Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment. See, e.g., *Virginia Bd. of Pharmacy* (noting that fraudulent speech generally falls outside the protections of the First Amendment). But the Stolen Valor Act is not so limited in its reach. Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.

#### IV

The previous discussion suffices to show that the Act conflicts with free speech principles. But even when examined within its own narrow sphere of operation, the Act cannot survive. In assessing content-based restrictions on protected speech, the Court has not adopted a free-wheeling approach, but rather has applied the "most exacting scrutiny." Although the objectives the Government seeks to further by the statute are not without significance, the Court must, and now does, find the Act does not satisfy exacting scrutiny.

The Government is correct when it states military medals "serve the important public function of recognizing and expressing gratitude for acts of heroism and sacrifice in military service," and also "foste[r] morale, mission accomplishment and esprit de corps' among service members." General George Washington observed that an award for valor would "cherish a virtuous ambition in . . . soldiers, as well as foster and encourage every species of military merit." Time has not diminished this idea. In periods of war and peace alike public recognition of valor and noble sacrifice by men and women in uniform reinforces the pride and national resolve that the military relies upon to fulfill its mission.

These interests are related to the integrity of the military honors system in general, and the Congressional Medal of Honor in particular. Although millions have served with brave resolve, the Medal, which is the highest military award for valor against an enemy force, has been given just 3,476 times. Established in 1861, the Medal is reserved for those who have distinguished themselves "conspicuously by gallantry and intrepidity at the risk of his life above and

beyond the call of duty." \*\*\* The Government's interest in protecting the integrity of the Medal of Honor is beyond question.

But to recite the Government's compelling interests is not to end the matter. The First Amendment requires that the Government's chosen restriction on the speech at issue be "actually necessary" to achieve its interest. There must be a direct causal link between the restriction imposed and the injury to be prevented. The link between the Government's interest in protecting the integrity of the military honors system and the Act's restriction on the false claims of liars like respondent has not been shown. Although appearing to concede that "an isolated misrepresentation by itself would not tarnish the meaning of military honors," the Government asserts it is "common sense that false representations have the tendency to dilute the value and meaning of military awards." It must be acknowledged that when a pretender claims the Medal to be his own, the lie might harm the Government by demeaning the high purpose of the award, diminishing the honor it confirms, and creating the appearance that the Medal is awarded more often than is true. Furthermore, the lie may offend the true holders of the Medal. From one perspective it insults their bravery and high principles when falsehood puts them in the unworthy company of a pretender.

Yet these interests do not satisfy the Government's heavy burden when it seeks to regulate protected speech. The Government points to no evidence to support its claim that the public's general perception of military awards is diluted by false claims such as those made by Alvarez. As one of the Government's amici notes "there is nothing that charlatans such as Xavier Alvarez can do to stain [the Medal winners'] honor." Brief for Veterans of Foreign Wars of the United States et al. as Amici Curiae 1. This general proposition is sound, even if true holders of the Medal might experience anger and frustration.

The lack of a causal link between the Government's stated interest and the Act is not the only way in which the Act is not actually necessary to achieve the Government's stated interest. The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest. The facts of this case indicate that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie. Respondent lied at a public meeting. Even before the FBI began investigating him for his false statements "Alvarez was perceived as a phony." Once the lie was made public, he was ridiculed online, his actions were reported in the press, and a fellow board member called for his resignation. There is good reason to believe that a similar fate would befall other false claimants. See Brief for Reporters Committee for Freedom of the Press et al. as Amici Curiae 30-33 (listing numerous examples of public exposure of false claimants). Indeed, the outrage and contempt expressed for respondent's lies can serve to reawaken and reinforce the public's respect for the Medal, its recipients, and its high purpose. The acclaim that recipients of the Congressional Medal of Honor receive also casts doubt on the proposition that the public will be misled by the claims of charlatans or become cynical of those whose heroic deeds earned them the Medal by right.

The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth. See

*Whitney v. California* (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence"). The theory of our Constitution is "that the best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams v. United States* (1919) (Holmes, J., dissenting). The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.

Expressing its concern that counterspeech is insufficient, the Government responds that because "some military records have been lost . . . some claims [are] un-verifiable." This proves little, however; for without verifiable records, successful criminal prosecution under the Act would be more difficult in any event. So, in cases where public refutation will not serve the Government's interest, the Act will not either. In addition, the Government claims that "many [false claims] will remain unchallenged." The Government provides no support for the contention. And in any event, in order to show that public refutation is not an adequate alternative, the Government must demonstrate that unchallenged claims undermine the public's perception of the military and the integrity of its awards system. This showing has not been made.

It is a fair assumption that any true holders of the Medal who had heard of Alvarez's false claims would have been fully vindicated by the community's expression of outrage, showing as it did the Nation's high regard for the Medal. The same can be said for the Government's interest. The American people do not need the assistance of a government prosecution to express their high regard for the special place that military heroes hold in our tradition. Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication.

In addition, when the Government seeks to regulate protected speech, the restriction must be the "least restrictive means among available, effective alternatives." There is, however, at least one less speech-restrictive means by which the Government could likely protect the integrity of the military awards system. A Government-created database could list Congressional Medal of Honor winners. Were a database accessible through the Internet, it would be easy to verify and expose false claims. It appears some private individuals have already created databases similar to this, and at least one database of past winners is online and fully searchable, see Congressional Medal of Honor Society, Full Archive, <http://www.cmohs.org/recipient-archive.php>. The Solicitor General responds that although Congress and the Department of Defense investigated the feasibility of establishing a database in 2008, the Government "concluded that such a database would be impracticable and insufficiently comprehensive." Without more explanation, it is difficult to assess

the Government's claim, especially when at least one database of Congressional Medal of Honor winners already exists.

The Government may have responses to some of these criticisms, but there has been no clear showing of the necessity of the statute, the necessity required by exacting scrutiny.

The Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace. Though few might find respondent's statements anything but contemptible, his right to make those statements is protected by the Constitution's guarantee of freedom of speech and expression. The Stolen Valor Act infringes upon speech protected by the First Amendment.

The judgment of the Court of Appeals is *affirmed*.

*It is so ordered.*

JUSTICE BREYER, WITH WHOM JUSTICE KAGAN JOINS, CONCURRING IN THE JUDGMENT.

I agree with the plurality that the Stolen Valor Act of 2005 violates the First Amendment. But I do not rest my conclusion upon a strict categorical analysis. Rather, I base that conclusion upon the fact that the statute works First Amendment harm, while the Government can achieve its legitimate objectives in less restrictive ways. \*\*\*

JUSTICE ALITO, WITH WHOM JUSTICE SCALIA AND JUSTICE THOMAS JOIN, DISSENTING.

Only the bravest of the brave are awarded the Congressional Medal of Honor, but the Court today holds that every American has a constitutional right to claim to have received this singular award. The Court strikes down the Stolen Valor Act of 2005, which was enacted to stem an epidemic of false claims about military decorations. These lies, Congress reasonably concluded, were undermining our country's system of military honors and inflicting real harm on actual medal recipients and their families.

Building on earlier efforts to protect the military awards system, Congress responded to this problem by crafting a narrow statute that presents no threat to the freedom of speech. The statute reaches only knowingly false statements about hard facts directly within a speaker's personal knowledge. These lies have no value in and of themselves, and proscribing them does not chill any valuable speech.

By holding that the First Amendment nevertheless shields these lies, the Court breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest. I would adhere to that principle and would thus uphold the constitutionality of this valuable law.

I

\*\*\* Congress long ago made it a federal offense for anyone to wear, manufacture, or sell certain military decorations without authorization. See Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286 (codified as amended at 18 U. S. C.

§704(a)). Although this Court has never opined on the constitutionality of that particular provision, we have said that §702, which makes it a crime to wear a United States military uniform without authorization, is "a valid statute on its face." *Schacht v. United States* (1970).

Congress passed the Stolen Valor Act in response to a proliferation of false claims concerning the receipt of military awards. For example, in a single year, more than 600 Virginia residents falsely claimed to have won the Medal of Honor. An investigation of the 333 people listed in the online edition of Who's Who as having received a top military award revealed that fully a third of the claims could not be substantiated. When the Library of Congress compiled oral histories for its Veterans History Project, 24 of the 49 individuals who identified themselves as Medal of Honor recipients had not actually received that award. The same was true of 32 individuals who claimed to have been awarded the Distinguished Service Cross and 14 who claimed to have won the Navy Cross. Notorious cases brought to Congress' attention included the case of a judge who falsely claimed to have been awarded two Medals of Honor and displayed counterfeit medals in his courtroom; a television network's military consultant who falsely claimed that he had received the Silver Star; and a former judge advocate in the Marine Corps who lied about receiving the Bronze Star and a Purple Heart.

As Congress recognized, the lies proscribed by the Stolen Valor Act inflict substantial harm. In many instances, the harm is tangible in nature: Individuals often falsely represent themselves as award recipients in order to obtain financial or other material rewards, such as lucrative contracts and government benefits. An investigation of false claims in a single region of the United States, for example, revealed that 12 men had defrauded the Department of Veterans Affairs out of more than \$1.4 million in veteran's benefits. In other cases, the harm is less tangible, but nonetheless significant. The lies proscribed by the Stolen Valor Act tend to debase the distinctive honor of military awards. And legitimate award recipients and their families have expressed the harm they endure when an imposter takes credit for heroic actions that he never performed. One Medal of Honor recipient described the feeling as a " 'slap in the face of veterans who have paid the price and earned their medals.' "

It is well recognized in trademark law that the proliferation of cheap imitations of luxury goods blurs the " 'signal' given out by the purchasers of the originals." In much the same way, the proliferation of false claims about military awards blurs the signal given out by the actual awards by making them seem more common than they really are, and this diluting effect harms the military by hampering its efforts to foster morale and esprit de corps. Surely it was reasonable for Congress to conclude that the goal of preserving the integrity of our country's top military honors is at least as worthy as that of protecting the prestige associated with fancy watches and designer handbags. Cf. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U. S. 522, 539-541 (1987) (rejecting First Amendment challenge to law prohibiting certain unauthorized uses of the word "Olympic" and recognizing that such uses harm the U. S. Olympic Committee by "lessening the distinctiveness" of the term).

Both the plurality and Justice Breyer argue that Congress could have preserved the integrity of military honors by means other than a criminal prohibition, but Congress had ample reason to believe that alternative approaches would not be adequate. The chief alternative that is recommended is the compilation and release of a comprehensive list or database of actual medal recipients. If the public could readily access such a resource, it is argued, imposters would be quickly and easily exposed, and the proliferation of lies about military honors would come to an end.

This remedy, unfortunately, will not work. The Department of Defense has explained that the most that it can do is to create a database of recipients of certain top military honors awarded since 2001.

Because a sufficiently comprehensive database is not practicable, lies about military awards cannot be remedied by what the plurality calls "counterspeech." Without the requisite database, many efforts to refute false claims may be thwarted, and some legitimate award recipients may be erroneously attacked. In addition, a steady stream of stories in the media about the exposure of imposters would tend to increase skepticism among members of the public about the entire awards system. This would only exacerbate the harm that the Stolen Valor Act is meant to prevent.

The plurality and the concurrence also suggest that Congress could protect the system of military honors by enacting a narrower statute. The plurality recommends a law that would apply only to lies that are intended to "secure moneys or other valuable considerations." In a similar vein, the concurrence comments that "a more finely tailored statute might . . . insist upon a showing that the false statement caused specific harm." (opinion of Breyer, J.). But much damage is caused, both to real award recipients and to the system of military honors, by false statements that are not linked to any financial or other tangible reward. Unless even a small financial loss--say, a dollar given to a homeless man falsely claiming to be a decorated veteran--is more important in the eyes of the First Amendment than the damage caused to the very integrity of the military awards system, there is no basis for distinguishing between the Stolen Valor Act and the alternative statutes that the plurality and concurrence appear willing to sustain.

## II

### A

Time and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value.\*\*\*

Respondent and others who join him in attacking the Stolen Valor Act take a different view. Respondent's brief features a veritable paean to lying. According to respondent, his lie about the Medal of Honor was nothing out of the ordinary for 21st-century Americans. "Everyone lies," he says. "We lie all the time." "[H]uman beings are constantly forced to choose the persona we present to the world, and our choices nearly always involve intentional omissions and misrepresentations, if not outright deception." An academic amicus tells us that the First Amendment protects the right to construct "self-aggrandizing fabrications such as having been awarded a military decoration."

This radical interpretation of the First Amendment is not supported by any precedent of this Court. The lies covered by the Stolen Valor Act have no intrinsic value and thus merit no First Amendment protection unless their prohibition would chill other expression that falls within the Amendment's scope. I now turn to that question.

## B

While we have repeatedly endorsed the principle that false statements of fact do not merit First Amendment protection for their own sake, we have recognized that it is sometimes necessary to "exten[d] a measure of strategic protection" to these statements in order to ensure sufficient " 'breathing space' " for protected speech. *Gertz*. Thus, in order to prevent the chilling of truthful speech on matters of public concern, we have held that liability for the defamation of a public official or figure requires proof that defamatory statements were made with knowledge or reckless disregard of their falsity. This same requirement applies when public officials and figures seek to recover for the tort of intentional infliction of emotional distress. See *Falwell*. \*\*\*

[T]here are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat. The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth.

Even where there is a wide scholarly consensus concerning a particular matter, the truth is served by allowing that consensus to be challenged without fear of reprisal. Today's accepted wisdom sometimes turns out to be mistaken. And in these contexts, "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.' " *Sullivan* (quoting J. MILL, ON LIBERTY 15 (R. McCallum ed. 1947)).

Allowing the state to proscribe false statements in these areas also opens the door for the state to use its power for political ends. Statements about history illustrate this point. If some false statements about historical events may be banned, how certain must it be that a statement is false before the ban may be upheld? And who should make that calculation? While our cases prohibiting viewpoint discrimination would fetter the state's power to some degree, see *R. A. V. v. St. Paul* (1992) (explaining that the First Amendment does not permit the government to engage in viewpoint discrimination under the guise of regulating unprotected speech), the potential for abuse of power in these areas is simply too great.

In stark contrast to hypothetical laws prohibiting false statements about history, science, and similar matters, the Stolen Valor Act presents no risk at all that valuable speech will be suppressed. The speech punished by the Act is not only verifiably false and entirely lacking in intrinsic value, but it also fails to serve any instrumental purpose that the First Amendment might protect.

Tellingly, when asked at oral argument what truthful speech the Stolen Valor Act might chill, even respondent's counsel conceded that the answer is none.

### C

\*\*\* Neither of the two opinions endorsed by Justices in the majority claims that the false statements covered by the Stolen Valor Act possess either intrinsic or instrumental value. Instead, those opinions appear to be based on the distinct concern that the Act suffers from overbreadth.

The Stolen Valor Act is a narrow law enacted to address an important problem, and it presents no threat to freedom of expression. I would sustain the constitutionality of the Act, and I therefore respectfully dissent.

## Notes

1. *Schacht v. United States* is a rare explicit viewpoint discrimination case. The statute clearly allowed wearing the uniform in a theatrical production if it flattered the military and not if the portrayal was unflattering. Is there a way in which the Stolen Valor Act at issue in *United States v. Alvarez* might be analyzed as viewpoint discrimination?

2. In June 2013, President Obama signed the Stolen Valor Act of 2013 into law. Congress amended the law to include the type of “fraud” provision suggested in the plurality and concurring opinions. The law now subjects to criminal penalties whoever “with intent to obtain money, property, or other tangible benefit, fraudulently holds oneself out to be a recipient of a decoration or medal.” Pub.L. 113–12; 18 USC §704.

Additionally, there is now a government database listing military awards, <http://valor.defense.gov/>. (There are also a number of nongovernmental websites).

Do these developments undermine the arguments advanced in the dissenting opinion in *Alvarez*?

## Note: Developing a Structural Analysis of Free Speech Issues

Considering the cases in the first two chapters, can you develop a structure to analyze a free speech issue under the First Amendment? You might envision this as a flow chart, but it might be easier at first to simply posit a series of issues. Assuming there is state action, what would the first question be? What would the next questions be?

# Chapter Four: THE SPECIAL (OR NOT) STATUS OF THE PRESS

This chapter considers interpretations of the “free press” clause of the First Amendment: “Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .” An essential query is whether infringements on “the press” are analyzed in a different manner than infringements on “freedom of speech.” Or, as some argue, has “press” been subsumed into “speech” for purposes of First Amendment doctrine? Consider whether or not the Court’s rhetoric, reasoning, and conclusions are consistent with the textual inclusion of “press” in the First Amendment.

## Chapter Outline

### **I. Prior Restraint**

Near v. Minnesota  
New York Times Co. v. United States  
Notes

### **II. The Press as Guardian of the Public’s Right to Know?**

#### **A. The Press v. Criminal Defendants**

Sheppard v. Maxwell  
Nebraska Press Assn. v. Stuart  
Notes

#### **B. The Press as a Party in Civil Litigation**

Seattle Times Co. v. Rhinehart

#### **C. Access by the Press**

Note: “Public Proceedings”  
Houchins v. KQED, Inc.  
Notes

#### **D.(Un)lawful Information**

Note: Bartnicki v. Vopper

#### **E.Reporters’ “privilege”**

Branzburg v. Hayes  
Cohen v. Cowles Media Co.  
Notes

### **III. Direct Regulations of the Press**

The Florida Star v. B. J. F  
Miami Herald Publishing Co. v. Tornillo  
Notes  
Note: Taxation of the Press

### **IV. Freedom of the Press and Tort Actions**

#### **A. Defamation**

New York Times Co. v. Sullivan  
Gertz v. Robert Welch, Inc.  
Notes

#### **B. Other Torts**

Time, Inc. v. Hill  
Hustler Magazine v. Falwell  
Notes

## I. Prior Restraint

The notion of “censorship” is most akin to the doctrine of prior restraint, which as the term implies, is when the government acts to prevent speech before it can occur. In the context of the press, this is a pre-publication injunction or criminalization rather than post-publication damages.

The preeminent case involving prior restraint is *New York Times v. United States* (1971), often known as *The Pentagon Papers Case*. The earlier case of *Near v. Minnesota* (1931) is a landmark case setting out the principles.

### *Near v. Minnesota*

283 U.S. 697 (1931)

CHIEF JUSTICE HUGHES DELIVERED THE OPINION OF THE COURT, JOINED BY HOLMES, BRANDEIS, STONE, AND ROBERTS, J.J. JUSTICE BUTLER ISSUED A DISSENTING OPINION JOINED BY VAN DEVANTER, McREYNOLDS, AND SUTHERLAND, J.J.

CHIEF JUSTICE HUGHES DELIVERED THE OPINION OF THE COURT.

Chapter 285 of the Session Laws of Minnesota for the year 1925 provides for the abatement, as a public nuisance, of a 'malicious, scandalous and defamatory newspaper, magazine or other periodical.' Section 1 of the act is as follows:

'Section 1. Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away.

'(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or

'(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical,

-is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

Section 2 provides that, whenever any such nuisance is committed or exists, the county attorney \*\*\* the Attorney General, or, upon like failure or refusal of the latter, any citizen of the county, may maintain an action in the district court of the county in the name of the state to enjoin perpetually the persons committing or maintaining any such nuisance from further committing or maintaining it. \*\*\*

[In this case] the county attorney of Hennepin county brought this action to enjoin the publication of what was described as a 'malicious, scandalous and defamatory newspaper, magazine or other periodical,' known as “The Saturday Press” published by the defendants in the city of Minneapolis. \*\*\* Without

attempting to summarize the contents of the voluminous exhibits attached to the complaint, we deem it sufficient to say that the articles charged, in substance, that a Jewish gangster was in control of gambling, bootlegging, and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties. Most of the charges were directed against the chief of police; he was charged with gross neglect of duty, illicit relations with gangsters, and with participation in graft. The county attorney was charged with knowing the existing conditions and with failure to take adequate measures to remedy them. The mayor was accused of inefficiency and dereliction. One member of the grand jury was stated to be in sympathy with the gangsters. A special grand jury and a special prosecutor were demanded to deal with the situation in general, and, in particular, to investigate an attempt to assassinate one Guilford, one of the original defendants, who, it appears from the articles, was shot by gangsters after the first issue of the periodical had been published. There is no question but that the articles made serious accusations against the public officers named and others in connection with the prevalence of crimes and the failure to expose and punish them.

[A state district court found against the defendant, Jay Near, the publisher of "The Saturday Press"] and found that the defendants through these publications "did engage in the business of regularly and customarily producing, publishing and circulating a malicious, scandalous and defamatory newspaper," and that "the said publication" "under said name of The Saturday Press, or any other name, constitutes a public nuisance under the laws of the State." Judgment was thereupon entered adjudging that "the newspaper, magazine and periodical known as The Saturday Press," as a public nuisance, "be and is hereby abated." The judgment perpetually enjoined the defendants "from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law," and also "from further conducting said nuisance under the name and title of said The Saturday Press or any other name or title." \*\*\* [Near appealed to the Minnesota Supreme Court which affirmed].

This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. \*\*\* Liberty, in each of its phases, has its history and connotation, and, in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty.

\*\*\* It is thus important to note precisely the purpose and effect of the statute as the state court has construed it.

*First.* The statute is not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected. \*\*\*

*Second.* The statute is directed not simply at the circulation of scandalous and defamatory statements with regard to private citizens, but at the continued

publication by newspapers and periodical of charges against public officers of corruption, malfeasance in office, or serious neglect of duty.\*\*\*

*Third.* The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical.\*\*\*

*Fourth.* The statute not only operates to suppress the offending newspaper or periodical, but to put the publisher under an effective censorship. When a newspaper or periodical is found to be "malicious, scandalous and defamatory," and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment. \*\*\*

If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter- - - in particular that the matter consists of charges against public officers of official dereliction- - - and, unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.' 4 Bl. Com. 151, 152. See Story on the Constitution, 1884, 1889. The distinction was early pointed out between the extent of the freedom with respect to censorship under our constitutional system and that enjoyed in England. Here, as Madison said, 'the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also.' REPORT ON THE VIRGINIA RESOLUTIONS, MADISON'S WORKS, vol. IV, p. 543. This Court said, in *Patterson v. Colorado* (1907) : 'In the first place, the main purpose of such constitutional provisions is 'to prevent all such previous restraints upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true

as to the false. This was the law of criminal libel apart from statute in most cases, if not in all.

\*\*\* The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Schenck v. United States* (1919). No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not "protect a man from an injunction against uttering words that may have all the effect of force." These limitations are not applicable here. \*\*\*

The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship. The conception of the liberty of the press in this country had broadened with the exigencies of the colonial period and with the efforts to secure freedom from oppressive administration. That liberty was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct. \*\*\* Madison, who was the leading spirit in the preparation of the First Amendment of the Federal Constitution, thus described the practice and sentiment which led to the guaranties of liberty of the press in State Constitutions:

"In every State, probable, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands. ... Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness? Had 'Sedition Acts,' forbidding every publication that might bring the constituted agents into contempt or

disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?"

The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. \*\*\* The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions.

The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the Legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details), and required to produce proof of the truth of his publication, or of what he intended to publish and of his motives, or stand enjoined. If this can be done, the Legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship. \*\*\*

\*\*\* For these reasons we hold the statute, so far as it authorized the proceedings in this action under clause (b) of section 1, to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. We should add that this decision rests upon the operation and effect of the statute, without regard to the question of the truth of the charges contained in the particular periodical. The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication.

*Judgment reversed.*

[DISSENTING OPINION BY BUTLER, J. JOINED BY VAN DEVANTER, MCREYNOLDS, AND SUTHERLAND, J.J., OMITTED].

## *New York Times Co. v. United States*

403 U.S. 713 (1971)

PER CURIAM

We granted certiorari in these cases in which the United States seeks to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled “History of U.S. Decision-Making Process on Viet Nam Policy.” [“The Pentagon Papers”]

“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” The Government “thus carries a heavy burden of showing justification for the imposition of such a restraint.” The District Court for the Southern District of New York in the New York Times case and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit in the Washington Post case held that the Government had not met that burden. We agree.

\*\*\* The stays entered June 25, 1971, by the Court are vacated. The judgments shall issue forthwith.

MR. JUSTICE BLACK, WITH WHOM MR. JUSTICE DOUGLAS JOINS, CONCURRING.

I adhere to the view that the Government's case against the Washington Post should have been dismissed and that the injunction against the New York Times should have been vacated without oral argument when the cases were first presented to this Court. I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment. \*\*\* In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment.

Our Government was launched in 1789 with the adoption of the Constitution. The Bill of Rights, including the First Amendment, followed in 1791. Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says, but rather means that the Government can halt the publication of current news of vital importance to the people of this country.

In seeking injunctions against these newspapers and in its presentation to the Court, the Executive Branch seems to have forgotten the essential purpose and history of the First Amendment.\*\*\*

In other words, we are asked to hold that despite the First Amendment's emphatic command, the Executive Branch, the Congress, and the Judiciary can make laws enjoining publication of current news and abridging freedom of the press in the name of “national security.” The Government does not even attempt to rely on any act of Congress. Instead it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to “make” a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress

have adhered to the command of the First Amendment and refused to make such a law.\*\*\*

The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged.

MR. JUSTICE DOUGLAS, WITH WHOM MR. JUSTICE BLACK JOINS, CONCURRING.

\*\*\* The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be. The present cases will, I think, go down in history as the most dramatic illustration of that principle. A debate of large proportions goes on in the Nation over our posture in Vietnam. That debate antedated the disclosure of the contents of the present documents. The latter are highly relevant to the debate in progress.

Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be "uninhibited, robust, and wide-open" debate. *New York Times Co. v. Sullivan* (1964).

The stays in these cases that have been in effect for more than a week constitute a flouting of the principles of the First Amendment as interpreted in *Near v. Minnesota* (1931).

MR. JUSTICE BRENNAN, CONCURRING.

\*\*\* The error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise. The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result. Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation "is at war," *Schenck v. United States* (1919), during which times "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Near v. Minnesota* (1931). Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently

available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature. "[T]he chief purpose of [the First Amendment's] guaranty [is] to prevent previous restraints upon publication." *Near v. Minnesota*. Thus, only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary. And therefore, every restraint issued in this case, whatever its form, has violated the First Amendment - and not less so because that restraint was justified as necessary to afford the courts an opportunity to examine the claim more thoroughly. Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue.

MR. JUSTICE WHITE, WITH WHOM MR. JUSTICE STEWART JOINS, CONCURRING.

I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system. I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations. Nor, after examining the materials the Government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosure will have that result. But I nevertheless agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these.

The Government's position is simply stated: The responsibility of the Executive for the conduct of the foreign affairs and for the security of the Nation is so basic that the President is entitled to an injunction against publication of a newspaper story whenever he can convince a court that the information to be revealed threatens "grave and irreparable" injury to the public interest; and the injunction should issue whether or not the material to be published is classified, whether or not publication would be lawful under relevant criminal statutes enacted by Congress, and regardless of the circumstances by which the newspaper came into possession of the information.

[The remainder of Justice White's concurring opinion, like the concurring opinion of Justice Stewart, joined by Justice White, and the concurring opinion of Justice Marshall discuss the separation of powers issues rather than the First Amendment issues.]

MR. CHIEF JUSTICE BURGER, DISSENTING.

So clear are the constitutional limitations on prior restraint against expression, that from the time of *Near v. Minnesota* (1931) \*\*\* we have had little occasion to be concerned with cases involving prior restraints against news reporting on matters of public interest. There is, therefore, little variation among the members of the Court in terms of resistance to prior restraints against publication. Adherence to this basic constitutional principle, however, does not make these cases simple. In these cases, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the Executive. Only those who view the First Amendment as an absolute in all circumstances - a view I respect, but reject - can find such cases as these to be simple or easy.

These cases are not simple for another and more immediate reason. We do not know the facts of the cases. No District Judge knew all the facts. No Court of Appeals judge knew all the facts. No member of this Court knows all the facts.

\*\*\* It is not disputed that the Times has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the Times, presumably in its capacity as trustee of the public's "right to know," has held up publication for purposes it considered proper and thus public knowledge was delayed. No doubt this was for a good reason; the analysis of 7,000 pages of complex material drawn from a vastly greater volume of material would inevitably take time and the writing of good news stories takes time. But why should the United States Government, from whom this information was illegally acquired by someone, along with all the counsel, trial judges, and appellate judges be placed under needless pressure? After these months of deferral, the alleged "right to know" has somehow and suddenly become a right that must be vindicated instantaneously.

[The dissenting opinions of Justice Harlan and of Justice Blackmun are omitted.]

## Notes

1. In their respective dissenting opinions in *New York Times v. United States*, both Justice Harlan (joined by Chief Justice Burger and Justice Blackmun) and Justice Blackmun quote a passage from Justice Oliver Wendell Holmes:

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

*Northern Securities Co. v. United States*, 193 U.S. 197, 400-401 (1904). Holmes was dissenting in a closely divided case that did not involve the First Amendment but a monopoly.

Is *New York Times v. United States* still a “great” case, as even the dissenters seemed to think? Has the “immediate interest” of the case faded? Is its status as a high-water mark of First Amendment recognition for the press an “accident”?

2. Reconsider the role of Justice Holmes, previously discussed in a note in light of the fact that Justice Holmes proved popular with the dissenting Justices in *New York Times v. United States*. In addition to the “great cases” make “bad law” quote above, two dissenting opinions specifically invoked Justice Holmes’ writing in *Schenck v. United States* (1919). (While Justice Brennan also quotes *Schenck*, he does not use Holmes’ name).

Justice Blackmun’s individual dissenting opinion states that “Mr. Justice Holmes gave us a suggestion” of “situations where restraint is in order and is constitutional” by writing in *Schenck*:

When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

Chief Justice Burger’s dissenting opinion invoked Holmes and alluded to *Schenck* without specific citation:

Of course, the First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout “fire” in a crowded theater if there was no fire.

Would the Holmes of *Abrams v. United States* (1919) have agreed with the dissenters?

3. The doctrine of “prior restraint” is not limited to the press, but appears in speech cases as well. The doctrine of prior restraint when it involves the press need not involve the government (as in *New York Times*) or government officials (as in *Near*); the next section includes “prior restraint” cases as well as “punishment” (damages) cases. Consider whether prior restraint is always more of an infringement than punishment.

## II. The Press as Guardian of the Public's Right to Know?

The Court has struggled to balance the freedom of the press against rights of criminal defendants and civil litigants, as well as considering whether the press should have a right of access to information or should be protected in its news-gathering activities.

### A. The Press v. Criminal Defendants

Consider how the balance between press access and the rights of criminal defendants is crafted and what tools trial judges have at their disposal to balance the rights.

#### *Sheppard v. Maxwell*

384 U.S. 333 (1966)

JUSTICE CLARK DELIVERED THE OPINION OF THE COURT [JUSTICE BLACK DISSENTED WITHOUT OPINION].

This federal habeas corpus application involves the question whether Sheppard was deprived of a fair trial in his state conviction for the second-degree murder of his wife because of the trial judge's failure to protect Sheppard sufficiently from the massive, pervasive and prejudicial publicity that attended his prosecution. The United States District Court held that he was not afforded a fair trial \*\*\* The Court of Appeals for the Sixth Circuit reversed by a divided vote. We granted certiorari. We have concluded that Sheppard did not receive a fair trial consistent with the Due Process Clause of the Fourteenth Amendment and, therefore, reverse the judgment.

#### I.

Marilyn Sheppard, petitioner's pregnant wife, was bludgeoned to death in the upstairs bedroom of their lakeshore home in Bay Village, Ohio, a suburb of Cleveland. \*\*\* [on July 4, 1954].

From the outset officials focused suspicion on [Dr. Sam] Sheppard. After a search of the house and premises on the morning of the tragedy, Dr. Gerber, the Coroner, is reported - and it is undenied - to have told his men, "Well, it is evident the doctor did this, so let's go get the confession out of him." \*\*\*Until the Coroner's inquest on July 22, at which time he was subpoenaed, Sheppard made himself available for frequent and extended questioning without the presence of an attorney.

On July 7, the day of Marilyn Sheppard's funeral, a newspaper story appeared in which Assistant County Attorney Mahon - later the chief prosecutor of Sheppard - sharply criticized the refusal of the Sheppard family to permit his immediate questioning. From there on headline stories repeatedly stressed

Sheppard's lack of cooperation with the police and other officials. Under the headline "Testify Now In Death, Bay Doctor Is Ordered," one story described a visit by Coroner Gerber and four police officers to the hospital on July 8. When Sheppard insisted that his lawyer be present, the Coroner wrote out a subpoena and served it on him. Sheppard then agreed to submit to questioning without counsel and the subpoena was torn up. The officers questioned him for several hours. On July 9, Sheppard, at the request of the Coroner, re-enacted the tragedy at his home before the Coroner, police officers, and a group of newsmen, who apparently were invited by the Coroner. The home was locked so that Sheppard was obliged to wait outside until the Coroner arrived. Sheppard's performance was reported in detail by the news media along with photographs. The newspapers also played up Sheppard's refusal to take a lie detector test and "the protective ring" thrown up by his family. Front-page newspaper headlines announced on the same day that "Doctor Balks At Lie Test; Retells Story." A column opposite that story contained an "exclusive" interview with Sheppard headlined: "'Loved My Wife, She Loved Me,' Sheppard Tells News Reporter." The next day, another headline story disclosed that Sheppard had "again late yesterday refused to take a lie detector test" and quoted an Assistant County Attorney as saying that "at the end of a nine-hour questioning of Dr. Sheppard, I felt he was now ruling [a test] out completely." But subsequent newspaper articles reported that the Coroner was still pushing Sheppard for a lie detector test. More stories appeared when Sheppard would not allow authorities to inject him with "truth serum."

On the 20th, the "editorial artillery" opened fire with a front-page charge that somebody is "getting away with murder." The editorial attributed the ineptness of the investigation to "friendships, relationships, hired lawyers, a husband who ought to have been subjected instantly to the same third-degree to which any other person under similar circumstances is subjected . . . ." The following day, July 21, another page-one editorial was headed: "Why No Inquest? Do It Now, Dr. Gerber." The Coroner called an inquest the same day and subpoenaed Sheppard. It was staged the next day in a school gymnasium; the Coroner presided with the County Prosecutor as his advisor and two detectives as bailiffs. In the front of the room was a long table occupied by reporters, television and radio personnel, and broadcasting equipment. The hearing was broadcast with live microphones placed at the Coroner's seat and the witness stand. A swarm of reporters and photographers attended. Sheppard was brought into the room by police who searched him in full view of several hundred spectators. Sheppard's counsel were present during the three-day inquest but were not permitted to participate. When Sheppard's chief counsel attempted to place some documents in the record, he was forcibly ejected from the room by the Coroner, who received cheers, hugs, and kisses from ladies in the audience. Sheppard was questioned for five and one-half hours about his actions on the night of the murder, his married life, and a love affair with Susan Hayes. At the end of the hearing the Coroner announced that he "could" order Sheppard held for the grand jury, but did not do so.

Throughout this period the newspapers emphasized evidence that tended to incriminate Sheppard and pointed out discrepancies in his statements to authorities. At the same time, Sheppard made many public statements to the press and wrote feature articles asserting his innocence. During the inquest on

July 26, a headline in large type stated: "Kerr [Captain of the Cleveland Police] Urges Sheppard's Arrest." In the story, Detective McArthur "disclosed that scientific tests at the Sheppard home have definitely established that the killer washed off a trail of blood from the murder bedroom to the downstairs section," a circumstance casting doubt on Sheppard's accounts of the murder. No such evidence was produced at trial. The newspapers also delved into Sheppard's personal life. Articles stressed his extramarital love affairs as a motive for the crime. The newspapers portrayed Sheppard as a Lothario, fully explored his relationship with Susan Hayes, and named a number of other women who were allegedly involved with him. The testimony at trial never showed that Sheppard had any illicit relationships besides the one with Susan Hayes.

On July 28, an editorial entitled "Why Don't Police Quiz Top Suspect" demanded that Sheppard be taken to police headquarters. It described him in the following language:

"Now proved under oath to be a liar, still free to go about his business, shielded by his family, protected by a smart lawyer who has made monkeys of the police and authorities, carrying a gun part of the time, left free to do whatever he pleases . . . ."

A front-page editorial on July 30 asked: "Why Isn't Sam Sheppard in Jail?" It was later titled "Quit Stalling - Bring Him In." After calling Sheppard "the most unusual murder suspect ever seen around these parts" the article said that "[e]xcept for some superficial questioning during Coroner Sam Gerber's inquest he has been scot-free of any official grilling . . . ." It asserted that he was "surrounded by an iron curtain of protection [and] concealment."

That night at 10 o'clock Sheppard was arrested at his father's home on a charge of murder. He was taken to the Bay Village City Hall where hundreds of people, newscasters, photographers and reporters were awaiting his arrival. He was immediately arraigned - having been denied a temporary delay to secure the presence of counsel - and bound over to the grand jury.

The publicity then grew in intensity until his indictment on August 17. Typical of the coverage during this period is a front-page interview entitled: "DR. SAM: 'I Wish There Was Something I Could Get Off My Chest - but There Isn't.'" Unfavorable publicity included items such as a cartoon of the body of a sphinx with Sheppard's head and the legend below: "I Will Do Everything In My Power to Help Solve This Terrible Murder.' - Dr. Sam Sheppard." Headlines announced, inter alia, that: "Doctor Evidence is Ready for Jury," "Corrigan Tactics Stall Quizzing," "Sheppard 'Gay Set' Is Revealed By Houk," "Blood Is Found In Garage," "New Murder Evidence Is Found, Police Claim," "Dr. Sam Faces Quiz At Jail On Marilyn's Fear Of Him." On August 18, an article appeared under the headline "Dr. Sam Writes His Own Story." And reproduced across the entire front page was a portion of the typed statement signed by Sheppard: "I am not guilty of the murder of my wife, Marilyn. How could I, who have been trained to help people and devoted my life to saving life, commit such a terrible and revolting crime?" We do not detail the coverage further. There are five volumes filled with similar clippings from each of the three Cleveland newspapers covering the period from the murder until Sheppard's conviction in December 1954. The record includes no excerpts from newscasts on radio and television

but since space was reserved in the courtroom for these media we assume that their coverage was equally large.

## II.

With this background the case came on for trial two weeks before the November general election at which the chief prosecutor was a candidate for common pleas judge and the trial judge, Judge Blythin, was a candidate to succeed himself. Twenty-five days before the case was set, 75 veniremen were called as prospective jurors. All three Cleveland newspapers published the names and addresses of the veniremen. As a consequence, anonymous letters and telephone calls, as well as calls from friends, regarding the impending prosecution were received by all of the prospective jurors. The selection of the jury began on October 18, 1954.

The courtroom in which the trial was held measured 26 by 48 feet. A long temporary table was set up inside the bar, in back of the single counsel table. It ran the width of the courtroom, parallel to the bar railing, with one end less than three feet from the jury box. Approximately 20 representatives of newspapers and wire services were assigned seats at this table by the court. Behind the bar railing there were four rows of benches. These seats were likewise assigned by the court for the entire trial. The first row was occupied by representatives of television and radio stations, and the second and third rows by reporters from out-of-town newspapers and magazines. One side of the last row, which accommodated 14 people, was assigned to Sheppard's family and the other to Marilyn's. The public was permitted to fill vacancies in this row on special passes only. Representatives of the news media also used all the rooms on the courtroom floor, including the room where cases were ordinarily called and assigned for trial. Private telephone lines and telegraphic equipment were installed in these rooms so that reports from the trial could be speeded to the papers. Station WSRS was permitted to set up broadcasting facilities on the third floor of the courthouse next door to the jury room, where the jury rested during recesses in the trial and deliberated. Newscasts were made from this room throughout the trial, and while the jury reached its verdict.

On the sidewalk and steps in front of the courthouse, television and newsreel cameras were occasionally used to take motion pictures of the participants in the trial, including the jury and the judge. Indeed, one television broadcast carried a staged interview of the judge as he entered the courthouse. In the corridors outside the courtroom there was a host of photographers and television personnel with flash cameras, portable lights and motion picture cameras. This group photographed the prospective jurors during selection of the jury. After the trial opened, the witnesses, counsel, and jurors were photographed and televised whenever they entered or left the courtroom. Sheppard was brought to the courtroom about 10 minutes before each session began; he was surrounded by reporters and extensively photographed for the newspapers and television. A rule of court prohibited picture-taking in the courtroom during the actual sessions of the court, but no restraints were put on photographers during recesses, which were taken once each morning and afternoon, with a longer period for lunch.

All of these arrangements with the news media and their massive coverage of the trial continued during the entire nine weeks of the trial. The courtroom remained crowded to capacity with representatives of news media. Their movement in and out of the courtroom often caused so much confusion that, despite the loud-speaker system installed in the courtroom, it was difficult for the witnesses and counsel to be heard. Furthermore, the reporters clustered within the bar of the small courtroom made confidential talk among Sheppard and his counsel almost impossible during the proceedings. They frequently had to leave the courtroom to obtain privacy. And many times when counsel wished to raise a point with the judge out of the hearing of the jury it was necessary to move to the judge's chambers. Even then, news media representatives so packed the judge's anteroom that counsel could hardly return from the chambers to the courtroom. The reporters vied with each other to find out what counsel and the judge had discussed, and often these matters later appeared in newspapers accessible to the jury.

The daily record of the proceedings was made available to the newspapers and the testimony of each witness was printed verbatim in the local editions, along with objections of counsel, and rulings by the judge. Pictures of Sheppard, the judge, counsel, pertinent witnesses, and the jury often accompanied the daily newspaper and television accounts. At times the newspapers published photographs of exhibits introduced at the trial, and the rooms of Sheppard's house were featured along with relevant testimony.

The jurors themselves were constantly exposed to the news media. Every juror, except one, testified at voir dire to reading about the case in the Cleveland papers or to having heard broadcasts about it. Seven of the 12 jurors who rendered the verdict had one or more Cleveland papers delivered in their home; the remaining jurors were not interrogated on the point. Nor were there questions as to radios or television sets in the jurors' homes, but we must assume that most of them owned such conveniences. As the selection of the jury progressed, individual pictures of prospective members appeared daily. During the trial, pictures of the jury appeared over 40 times in the Cleveland papers alone. The court permitted photographers to take pictures of the jury in the box, and individual pictures of the members in the jury room. One newspaper ran pictures of the jurors at the Sheppard home when they went there to view the scene of the murder. Another paper featured the home life of an alternate juror. The day before the verdict was rendered - while the jurors were at lunch and sequestered by two bailiffs - the jury was separated into two groups to pose for photographs which appeared in the newspapers.

### III.

We now reach the conduct of the trial. While the intense publicity continued unabated, it is sufficient to relate only the more flagrant episodes:

1. On October 9, 1954, nine days before the case went to trial, an editorial in one of the newspapers criticized defense counsel's random poll of people on the streets as to their opinion of Sheppard's guilt or innocence in an effort to use the resulting statistics to show the necessity for change of venue. The article said the survey "smacks of mass jury tampering," called on defense counsel to drop it, and stated that the bar association should do something about it. It

characterized the poll as "non-judicial, non-legal, and nonsense." The article was called to the attention of the court but no action was taken.

2. On the second day of voir dire examination a debate was staged and broadcast live over WHK radio. The participants, newspaper reporters, accused Sheppard's counsel of throwing roadblocks in the way of the prosecution and asserted that Sheppard conceded his guilt by hiring a prominent criminal lawyer. Sheppard's counsel objected to this broadcast and requested a continuance, but the judge denied the motion. When counsel asked the court to give some protection from such events, the judge replied that "WHK doesn't have much coverage," and that "[a]fter all, we are not trying this case by radio or in newspapers or any other means. We confine ourselves seriously to it in this courtroom and do the very best we can."

3. While the jury was being selected, a two-inch headline asked: "But Who Will Speak for Marilyn?" The front-page story spoke of the "perfect face" of the accused. "Study that face as long as you want. Never will you get from it a hint of what might be the answer . . . ." The two brothers of the accused were described as "Prosperous, poised. His two sisters-in law. Smart, chic, well-groomed. His elderly father. Courtly, reserved. A perfect type for the patriarch of a staunch clan." The author then noted Marilyn Sheppard was "still off stage," and that she was an only child whose mother died when she was very young and whose father had no interest in the case. But the author - through quotes from Detective Chief James McArthur - assured readers that the prosecution's exhibits would speak for Marilyn. "Her story," McArthur stated, "will come into this courtroom through our witnesses." The article ends:

"Then you realize how what and who is missing from the perfect setting will be supplied.

"How in the Big Case justice will be done.

"Justice to Sam Sheppard.

"And to Marilyn Sheppard."

4. As has been mentioned, the jury viewed the scene of the murder on the first day of the trial. Hundreds of reporters, cameramen and onlookers were there, and one representative of the news media was permitted to accompany the jury while it inspected the Sheppard home. The time of the jury's visit was revealed so far in advance that one of the newspapers was able to rent a helicopter and fly over the house taking pictures of the jurors on their tour.

5. On November 19, a Cleveland police officer gave testimony that tended to contradict details in the written statement Sheppard made to the Cleveland police. Two days later, in a broadcast heard over Station WHK in Cleveland, Robert Considine likened Sheppard to a perjurer and compared the episode to Alger Hiss' confrontation with Whittaker Chambers. Though defense counsel asked the judge to question the jury to ascertain how many heard the broadcast, the court refused to do so. The judge also overruled the motion for continuance based on the same ground, saying:

"Well, I don't know, we can't stop people, in any event, listening to it. It is a matter of free speech, and the court can't control everybody. . . . We are not going to harass the jury every morning. . . . It is getting to the point where if we

do it every morning, we are suspecting the jury. I have confidence in this jury . . . ."

6. On November 24, a story appeared under an eight-column headline: "Sam Called A `Jekyll-Hyde' By Marilyn, Cousin To Testify." It related that Marilyn had recently told friends that Sheppard was a "Dr. Jekyll and Mr. Hyde" character. No such testimony was ever produced at the trial. The story went on to announce: "The prosecution has a `bombshell witness' on tap who will testify to Dr. Sam's display of fiery temper - countering the defense claim that the defendant is a gentle physician with an even disposition." Defense counsel made motions for change of venue, continuance and mistrial, but they were denied. No action was taken by the court.

7. When the trial was in its seventh week, Walter Winchell broadcast over WXEL television and WJW radio that Carole Beasley, who was under arrest in New York City for robbery, had stated that, as Sheppard's mistress, she had borne him a child. The defense asked that the jury be queried on the broadcast. Two jurors admitted in open court that they had heard it. The judge asked each: "Would that have any effect upon your judgment?" Both replied, "No." This was accepted by the judge as sufficient; he merely asked the jury to "pay no attention whatever to that type of scavenging. . . . Let's confine ourselves to this courtroom, if you please." In answer to the motion for mistrial, the judge said:

"Well, even, so, Mr. Corrigan, how are you ever going to prevent those things, in any event? I don't justify them at all. I think it is outrageous, but in a sense, it is outrageous even if there were no trial here. The trial has nothing to do with it in the Court's mind, as far as its outrage is concerned, but -

"Mr. CORRIGAN: I don't know what effect it had on the mind of any of these jurors, and I can't find out unless inquiry is made.

"The COURT: How would you ever, in any jury, avoid that kind of a thing?"

8. On December 9, while Sheppard was on the witness stand he testified that he had been mistreated by Cleveland detectives after his arrest. Although he was not at the trial, Captain Kerr of the Homicide Bureau issued a press statement denying Sheppard's allegations which appeared under the headline: "`Bare-faced Liar,' Kerr Says of Sam." Captain Kerr never appeared as a witness at the trial.

9. After the case was submitted to the jury, it was sequestered for its deliberations, which took five days and four nights. After the verdict, defense counsel ascertained that the jurors had been allowed to make telephone calls to their homes every day while they were sequestered at the hotel. Although the telephones had been removed from the jurors' rooms, the jurors were permitted to use the phones in the bailiffs' rooms. The calls were placed by the jurors themselves; no record was kept of the jurors who made calls, the telephone numbers or the parties called. The bailiffs sat in the room where they could hear only the jurors' end of the conversation. The court had not instructed the bailiffs to prevent such calls. By a subsequent motion, defense counsel urged that this ground alone warranted a new trial, but the motion was overruled and no evidence was taken on the question.

#### IV.

The principle that justice cannot survive behind walls of silence has long been reflected in the "Anglo-American distrust for secret trials." A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for "[w]hat transpires in the court room is public property." The "unqualified prohibitions laid down by the framers were intended to give to liberty of the press . . . the broadest scope that could be countenanced in an orderly society." *Bridges v. California* (1941). And where there was "no threat or menace to the integrity of the trial," we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism.

But the Court has also pointed out that "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges v. California*. And the Court has insisted that no one be punished for a crime without "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." "Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." But it must not be allowed to divert the trial from the "very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures." Among these "legal procedures" is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. \*\*\*

Moreover, "the burden of showing essential unfairness . . . as a demonstrable reality," need not be undertaken when television has exposed the community "repeatedly and in depth to the spectacle of [the accused] personally confessing in detail to the crimes with which he was later to be charged." In *Turner v. Louisiana* (1965), two key witnesses were deputy sheriffs who doubled as jury shepherds during the trial. The deputies swore that they had not talked to the jurors about the case, but the Court nonetheless held that,

"even if it could be assumed that the deputies never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association . . . ."

Only last Term in *Estes v. Texas* (1965), we set aside a conviction despite the absence of any showing of prejudice. We said there:

"It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." \*\*\*

#### V.

It is clear that the totality of circumstances in this case also warrants such an approach. Unlike Estes, Sheppard was not granted a change of venue to a locale away from where the publicity originated; nor was his jury sequestered. The Estes jury saw none of the television broadcasts from the courtroom. On the contrary, the Sheppard jurors were subjected to newspaper, radio and television coverage of the trial while not taking part in the proceedings. They were allowed to go their separate ways outside of the courtroom, without adequate directions not to read or listen to anything concerning the case. The judge's "admonitions" at the beginning of the trial are representative:

"I would suggest to you and caution you that you do not read any newspapers during the progress of this trial, that you do not listen to radio comments nor watch or listen to television comments, insofar as this case is concerned. You will feel very much better as the trial proceeds . . . . I am sure that we shall all feel very much better if we do not indulge in any newspaper reading or listening to any comments whatever about the matter while the case is in progress. After it is all over, you can read it all to your heart's content . . . ."

At intervals during the trial, the judge simply repeated his "suggestions" and "requests" that the jurors not expose themselves to comment upon the case. Moreover, the jurors were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers. The numerous pictures of the jurors, with their addresses, which appeared in the newspapers before and during the trial itself exposed them to expressions of opinion from both cranks and friends. The fact that anonymous letters had been received by prospective jurors should have made the judge aware that this publicity seriously threatened the jurors' privacy.

The press coverage of the Estes trial was not nearly as massive and pervasive as the attention given by the Cleveland newspapers and broadcasting stations to Sheppard's prosecution. Sheppard stood indicted for the murder of his wife; the State was demanding the death penalty. For months the virulent publicity about Sheppard and the murder had made the case notorious. Charges and countercharges were aired in the news media besides those for which Sheppard was called to trial. In addition, only three months before trial, Sheppard was examined for more than five hours without counsel during a three-day inquest which ended in a public brawl. The inquest was televised live from a high school gymnasium seating hundreds of people. Furthermore, the trial began two weeks before a hotly contested election at which both Chief Prosecutor Mahon and Judge Blythin were candidates for judgeships.

While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the court's later rulings must be considered against the setting in which the trial was held. In light of this background, we believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of that "judicial serenity and calm to which [he] was entitled." The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. At a temporary table within a few feet of the jury box and counsel table sat some 20 reporters staring at Sheppard and taking notes. The erection of a press table for reporters inside the bar is unprecedented. The bar of the

court is reserved for counsel, providing them a safe place in which to keep papers and exhibits, and to confer privately with client and co-counsel. It is designed to protect the witness and the jury from any distractions, intrusions or influences, and to permit bench discussions of the judge's rulings away from the hearing of the public and the jury. Having assigned almost all of the available seats in the courtroom to the news media the judge lost his ability to supervise that environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial. And the record reveals constant commotion within the bar. Moreover, the judge gave the throng of newsmen gathered in the corridors of the courthouse absolute free rein. Participants in the trial, including the jury, were forced to run a gantlet of reporters and photographers each time they entered or left the courtroom. The total lack of consideration for the privacy of the jury was demonstrated by the assignment to a broadcasting station of space next to the jury room on the floor above the courtroom, as well as the fact that jurors were allowed to make telephone calls during their five-day deliberation.

## VI.

There can be no question about the nature of the publicity which surrounded Sheppard's trial. We agree, as did the Court of Appeals, with the findings in Judge Bell's opinion for the Ohio Supreme Court:

"Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. . . . In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life."

Indeed, every court that has considered this case, save the court that tried it, has deplored the manner in which the news media inflamed and prejudiced the public.

Much of the material printed or broadcast during the trial was never heard from the witness stand, such as the charges that Sheppard had purposely impeded the murder investigation and must be guilty since he had hired a prominent criminal lawyer; that Sheppard was a perjurer; that he had sexual relations with numerous women; that his slain wife had characterized him as a "Jekyll-Hyde"; that he was "a bare-faced liar" because of his testimony as to police treatment; and, finally, that a woman convict claimed Sheppard to be the father of her illegitimate child. As the trial progressed, the newspapers summarized and interpreted the evidence, devoting particular attention to the material that incriminated Sheppard, and often drew unwarranted inferences from testimony. At one point, a front-page picture of Mrs. Sheppard's blood-stained pillow was published after being "doctored" to show more clearly an alleged imprint of a surgical instrument.

Nor is there doubt that this deluge of publicity reached at least some of the jury. On the only occasion that the jury was queried, two jurors admitted in open court to hearing the highly inflammatory charge that a prison inmate claimed Sheppard as the father of her illegitimate child. Despite the extent and nature of the publicity to which the jury was exposed during trial, the judge refused

defense counsel's other requests that the jurors be asked whether they had read or heard specific prejudicial comment about the case, including the incidents we have previously summarized. In these circumstances, we can assume that some of this material reached members of the jury.

## VII.

The court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial. From the very inception of the proceedings the judge announced that neither he nor anyone else could restrict prejudicial news accounts. And he reiterated this view on numerous occasions. Since he viewed the news media as his target, the judge never considered other means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influence. We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial and so do not consider what sanctions might be available against a recalcitrant press nor the charges of bias now made against the state trial judge.

The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court. As we stressed in *Estes*, the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged. Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested. The number of reporters in the courtroom itself could have been limited at the first sign that their presence would disrupt the trial. They certainly should not have been placed inside the bar. Furthermore, the judge should have more closely regulated the conduct of newsmen in the courtroom. For instance, the judge belatedly asked them not to handle and photograph trial exhibits lying on the counsel table during recesses.

Secondly, the court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony. A typical example was the publication of numerous statements by Susan Hayes, before her appearance in court, regarding her love affair with Sheppard. Although the witnesses were barred from the courtroom during the trial the full verbatim testimony was available to them in the press. This completely nullified the judge's imposition of the rule.

Thirdly, the court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion. That the judge was aware of his responsibility in this respect may be seen from his warning to Steve Sheppard, the accused's brother, who had apparently made public statements in an attempt to discredit testimony for the prosecution. \*\*\*

Defense counsel immediately brought to the court's attention the tremendous amount of publicity in the Cleveland press that "misrepresented entirely the testimony" in the case. Under such circumstances, the judge should have at least warned the newspapers to check the accuracy of their accounts. And it is obvious that the judge should have further sought to alleviate this problem by

imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers. The prosecution repeatedly made evidence available to the news media which was never offered in the trial. Much of the "evidence" disseminated in this fashion was clearly inadmissible. The exclusion of such evidence in court is rendered meaningless when news media make it available to the public. For example, the publicity about Sheppard's refusal to take a lie detector test came directly from police officers and the Coroner. The story that Sheppard had been called a "Jekyll-Hyde" personality by his wife was attributed to a prosecution witness. No such testimony was given. The further report that there was "a 'bombshell witness' on tap" who would testify as to Sheppard's "fiery temper" could only have emanated from the prosecution. Moreover, the newspapers described in detail clues that had been found by the police, but not put into the record.

The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action. Effective control of these sources - concededly within the court's power - might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity, at least after Sheppard's indictment.

More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. Being advised of the great public interest in the case, the mass coverage of the press, and the potential prejudicial impact of publicity, the court could also have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees. In addition, reporters who wrote or broadcast prejudicial stories, could have been warned as to the impropriety of publishing material not introduced in the proceedings. The judge was put on notice of such events by defense counsel's complaint about the WHK broadcast on the second day of trial. In this manner, Sheppard's right to a trial free from outside interference would have been given added protection without corresponding curtailment of the news media. Had the judge, the other officers of the court, and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom - not pieced together from extrajudicial statements.

From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is

a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised sua sponte with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

Since the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom, we must reverse the denial of the habeas petition. The case is remanded to the District Court with instructions to issue the writ and order that Sheppard be released from custody unless the State puts him to its charges again within a reasonable time.

*It is so ordered.*

## ***Nebraska Press Assn. v. Stuart***

427 U.S. 539 (1976)

CHIEF JUSTICE BURGER DELIVERED THE OPINION OF THE COURT. WHITE, J., FILED A CONCURRING OPINION. POWELL, J., FILED A CONCURRING OPINION. BRENNAN, J., FILED A CONCURRING OPINION, IN WHICH STEWART AND MARSHALL, J.J., JOINED. STEVENS FILED A CONCURRING OPINION.

MR. CHIEF JUSTICE BURGER DELIVERED THE OPINION OF THE COURT.

The respondent State District Judge entered an order restraining the petitioners from publishing or broadcasting accounts of confessions or admissions made by the accused or facts "strongly implicative" of the accused in a widely reported murder of six persons. We granted certiorari to decide whether the entry of such an order on the showing made before the state court violated the constitutional guarantee of freedom of the press.

### I

On the evening of October 18, 1975, local police found the six members of the Henry Kellie family murdered in their home in Sutherland, Neb., a town of about 850 people. Police released the description of a suspect, Erwin Charles Simants, to the reporters who had hastened to the scene of the crime. Simants was arrested and arraigned in Lincoln County Court the following morning, ending a tense night for this small rural community.

The crime immediately attracted widespread news coverage, by local, regional, and national newspapers, radio and television stations. \*\*\* [A broad initial order prohibiting reporting was later amended by the Nebraska Supreme Court and] prohibited reporting of only three matters: (a) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers, (b) any confessions or admissions made to any third parties, except members of the press, and (c) other facts "strongly implicative" of the accused. The Nebraska Supreme Court did not rely on the Nebraska Bar-Press Guidelines. After construing Nebraska law to permit closure in certain circumstances, the court remanded the case to the District Judge for reconsideration of the issue whether pretrial hearings should be closed to the press and public.

We granted certiorari to address the important issues raised by the District Court order as modified by the Nebraska Supreme Court, but we denied the motion to expedite review or to stay entirely the order of the State District Court pending Simants' trial. We are informed by the parties that since we granted certiorari, Simants has been convicted of murder and sentenced to death. His appeal is pending in the Nebraska Supreme Court.

## II

The order at issue in this case expired by its own terms when the jury was impaneled on January 7, 1976. There were no restraints on publication once the jury was selected, and there are now no restrictions on what may be spoken or written about the Simants case. Intervenor Simants argues that for this reason the case is moot. \*\*\* [We] conclude that this case is not moot, and proceed to the merits.

## III

The problems presented by this case are almost as old as the Republic. Neither in the Constitution nor in contemporaneous writings do we find that the conflict between these two important rights was anticipated, yet it is inconceivable that the authors of the Constitution were unaware of the potential conflicts between the right to an unbiased jury and the guarantee of freedom of the press. The unusually able lawyers who helped write the Constitution and later drafted the Bill of Rights were familiar with the historic episode in which John Adams defended British soldiers charged with homicide for firing into a crowd of Boston demonstrators; they were intimately familiar with the clash of the adversary system and the part that passions of the populace sometimes play in influencing potential jurors. They did not address themselves directly to the situation presented by this case; their chief concern was the need for freedom of expression in the political arena and the dialogue in ideas. But they recognized that there were risks to private rights from an unfettered press. \*\*\*

[Jefferson, for example, writing from Paris in 1786 concerning press attacks on John Jay \*\*\*; The trial of Aaron Burr in 1807 presented Mr. Chief Justice Marshall, presiding as a trial judge, with acute problems in selecting an unbiased jury\*\*\*]

The speed of communication and the pervasiveness of the modern news media have exacerbated these problems, however, as numerous appeals demonstrate.

The trial of Bruno Hauptmann in a small New Jersey community for the abduction and murder of the Charles Lindberghs' infant child probably was the most widely covered trial up to that time, and the nature of the coverage produced widespread public reaction. Criticism was directed at the "carnival" atmosphere that pervaded the community and the courtroom itself. Responsible leaders of press and the legal profession - including other judges - pointed out that much of this sorry performance could have been controlled by a vigilant trial judge and by other public officers subject to the control of the court.

The excesses of press and radio and lack of responsibility of those in authority in the Hauptmann case and others of that era led to efforts to develop voluntary guidelines for courts, lawyers, press, and broadcasters. The effort was renewed in 1965 when the American Bar Association embarked on a project to develop standards for all aspects of criminal justice, including guidelines to accommodate the right to a fair trial and the rights of a free press. See Powell, *The Right to a Fair Trial*, 51 A. B. A. J. 534 (1965) [Lewis Powell was then president of the ABA; he joined the Court as an Associate Justice in 1972]. The resulting standards, approved by the Association in 1968, received support from most of the legal profession. American Bar Association Project on Standards for Criminal Justice, Fair Trial and Free Press (Approved Draft 1968). Other groups have undertaken similar studies. \*\*\*

In practice, of course, even the most ideal guidelines are subjected to powerful strains when a case such as Simants' arises, with reporters from many parts of the country on the scene. Reporters from distant places are unlikely to consider themselves bound by local standards. They report to editors outside the area covered by the guidelines, and their editors are likely to be guided only by their own standards. To contemplate how a state court can control acts of a newspaper or broadcaster outside its jurisdiction, even though the newspapers and broadcasts reach the very community from which jurors are to be selected, suggests something of the practical difficulties of managing such guidelines.

The problems presented in this case have a substantial history outside the reported decisions of courts, in the efforts of many responsible people to accommodate the competing interests. We cannot resolve all of them, for it is not the function of this Court to write a code. We look instead to this particular case and the legal context in which it arises.

#### IV

The Sixth Amendment in terms guarantees "trial, by an impartial jury . . ." in federal criminal prosecutions. Because "trial by jury in criminal cases is fundamental to the American scheme of justice," the Due Process Clause of the Fourteenth Amendment guarantees the same right in state criminal prosecutions. *Duncan v. Louisiana* (1968). \*\*\*

In the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to this important right. But when the case is a "sensational" one tensions develop between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment. \*\*\*

[Our cases demonstrate that] pretrial publicity - even pervasive, adverse publicity - does not inevitably lead to an unfair trial. The capacity of the jury

eventually impaneled to decide the case fairly is influenced by the tone and extent of the publicity, which is in part, and often in large part, shaped by what attorneys, police, and other officials do to precipitate news coverage. The trial judge has a major responsibility. What the judge says about a case, in or out of the courtroom, is likely to appear in newspapers and broadcasts. More important, the measures a judge takes or fails to take to mitigate the effects of pretrial publicity - the measures described in Sheppard - may well determine whether the defendant receives a trial consistent with the requirements of due process. That this responsibility has not always been properly discharged is apparent from the decisions just reviewed.

\*\*\* The state trial judge in the case before us acted responsibly, out of a legitimate concern, in an effort to protect the defendant's right to a fair trial. What we must decide is not simply whether the Nebraska courts erred in seeing the possibility of real danger to the defendant's rights, but whether in the circumstances of this case the means employed were foreclosed by another provision of the Constitution.

## V

The First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press," and it is "no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." *Near v. Minnesota ex rel. Olson* (1931). The Court has interpreted these guarantees to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary - orders that impose a "previous" or "prior" restraint on speech. None of our decided cases on prior restraint involved restrictive orders entered to protect a defendant's right to a fair and impartial jury, but the opinions on prior restraint have a common thread relevant to this case. \*\*\*

The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.

A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.

The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment. For the same reasons the protection against prior restraint should have particular force as applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct. \*\*\*

The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly - a duty widely acknowledged but not always observed by editors and publishers. It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors.

Of course, the order at issue - like the order requested in *New York Times* - does not prohibit but only postpones publication. Some news can be delayed and most commentary can even more readily be delayed without serious injury, and there often is a self-imposed delay when responsible editors call for verification of information. But such delays are normally slight and they are self-imposed. Delays imposed by governmental authority are a different matter. \*\*\*

The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. In this case, the petitioners would have us declare the right of an accused subordinate to their right to publish in all circumstances. But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do. It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances. Yet it is nonetheless clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it. The history of even wartime suspension of categorical guarantees, such as habeas corpus or the right to trial by civilian courts, see *Ex parte Milligan* (1867), cautions against suspending explicit guarantees. \*\*\*

## VI

We turn now to the record in this case \*\*\* and must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important. We must then consider whether the record supports the entry of a prior restraint on publication, one of the most extraordinary remedies known to our jurisprudence.

## A

In assessing the probable extent of publicity, the trial judge had before him newspapers demonstrating that the crime had already drawn intensive news coverage, and the testimony of the County Judge, who had entered the initial restraining order based on the local and national attention the case had attracted. The District Judge was required to assess the probable publicity that would be given these shocking crimes prior to the time a jury was selected and sequestered. He then had to examine the probable nature of the publicity and determine how it would affect prospective jurors.

Our review of the pretrial record persuades us that the trial judge was justified in concluding that there would be intense and pervasive pretrial publicity concerning this case. He could also reasonably conclude, based on common human experience, that publicity might impair the defendant's right to a fair trial. He did not purport to say more, for he found only "a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial." (Emphasis added.) His conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, dealing as he was with factors unknown and unknowable.

#### B

We find little in the record that goes to another aspect of our task, determining whether measures short of an order restraining all publication would have insured the defendant a fair trial. Although the entry of the order might be read as a judicial determination that other measures would not suffice, the trial court made no express findings to that effect; the Nebraska Supreme Court referred to the issue only by implication. \*\*\*

We have therefore examined this record to determine the probable efficacy of the measures short of prior restraint on the press and speech. There is no finding that alternative measures would not have protected Simants' rights, and the Nebraska Supreme Court did no more than imply that such measures might not be adequate. Moreover, the record is lacking in evidence to support such a finding.

#### C

We must also assess the probable efficacy of prior restraint on publication as a workable method of protecting Simants' right to a fair trial, and we cannot ignore the reality of the problems of managing and enforcing pretrial restraining orders. The territorial jurisdiction of the issuing court is limited by concepts of sovereignty, *see, e. g., Hanson v. Denckla* (1958); *Pennoyer v. Neff* (1878). The need for in personam jurisdiction also presents an obstacle to a restraining order that applies to publication at large as distinguished from restraining publication within a given jurisdiction. \*\*\*

Finally, we note that the events disclosed by the record took place in a community of 850 people. It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it.

Given these practical problems, it is far from clear that prior restraint on publication would have protected Simants' rights.

#### D

Finally, another feature of this case leads us to conclude that the restrictive order entered here is not supportable. \*\*\* [The final order] enjoined reporting of (1) "[c]onfessions or admissions against interest made by the accused to law enforcement officials"; (2) "[c]onfessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements,

if any, made by the accused to representatives of the news media"; and (3) all "[o]ther information strongly implicative of the accused as the perpetrator of the slayings."

To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated settled principles: "[T]here is nothing that proscribes the press from reporting events that transpire in the courtroom." The County Court could not know that closure of the preliminary hearing was an alternative open to it until the Nebraska Supreme Court so construed state law; but once a public hearing had been held, what transpired there could not be subject to prior restraint.

The third prohibition of the order was defective in another respect as well. As part of a final order, entered after plenary review, this prohibition regarding "implicative" information is too vague and too broad to survive the scrutiny we have given to restraints on First Amendment rights. The third phase of the order entered falls outside permissible limits.

#### E

The record demonstrates, as the Nebraska courts held, that there was indeed a risk that pretrial news accounts, true or false, would have some adverse impact on the attitudes of those who might be called as jurors. But on the record now before us it is not clear that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court. We cannot say on this record that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary. Nor can we conclude that the restraining order actually entered would serve its intended purpose. Reasonable minds can have few doubts about the gravity of the evil pretrial publicity can work, but the probability that it would do so here was not demonstrated with the degree of certainty our cases on prior restraint require.

Of necessity our holding is confined to the record before us. But our conclusion is not simply a result of assessing the adequacy of the showing made in this case; it results in part from the problems inherent in meeting the heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied. The practical problems of managing and enforcing restrictive orders will always be present. In this sense, the record now before us is illustrative rather than exceptional. It is significant that when this Court has reversed a state conviction because of prejudicial publicity, it has carefully noted that some course of action short of prior restraint would have made a critical difference. However difficult it may be, we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint. This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed.

Our analysis ends as it began, with a confrontation between prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak and publish shall not be abridged. We

reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact. We hold that, with respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings held in public, the barriers have not been overcome; to the extent that this order restrained publication of such material, it is clearly invalid. To the extent that it prohibited publication based on information gained from other sources, we conclude that the heavy burden imposed as a condition to securing a prior restraint was not met and the judgment of the Nebraska Supreme Court is therefore

*Reversed.*

[CONCURRING OPINIONS OMITTED].

## Notes

1. Why did the framers not assess the relative values of the First and Sixth (or Fifth) Amendments? In general, do you think the First Amendment should “trump” defendants’ rights?

2. Both *Sheppard* and *Stuart* raise issues about the ethics of the press. How does a hierarchy of “press” entities play into the opinions? What contemporary definitions of “press” are implicated by the opinions?

3. In addition to “prior restraint” of publication, a state could regulate attorney speech to the press through its professional responsibility rules as imposed upon lawyers. In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), a very fractured Court considered a disciplinary rule which prohibited lawyers from making extrajudicial statements to the press that they know or reasonably should know will have a “substantial likelihood of materially prejudicing” an adjudicative proceeding, although it also provided that “notwithstanding” this provision lawyers “may state without elaboration . . . the general nature of the . . . defense.” The Court found that the rule and its exception were void for vagueness, concluding that it creates a trap for the wary as well as the unwary. However, the Court found that the rule’s language prohibiting “substantial likelihood of materially prejudicing” statements by attorneys was a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State’s interest in fair trials.

Do you know the professional responsibility rules in the state where you intend to practice regarding interactions with the press? Do you feel confident you could abide by them? Do you have personal values regarding dealing with the press as an attorney? How would you define “press” in these instances?

## B. The Press as a Party in Civil Litigation

### *Seattle Times Co. v. Rhinehart*

467 U.S. 20 (1984)

POWELL, J., DELIVERED THE OPINION FOR A UNANIMOUS COURT. BRENNAN, J., FILED A CONCURRING OPINION, IN WHICH MARSHALL, J., JOINED.

JUSTICE POWELL DELIVERED THE OPINION OF THE COURT.

This case presents the issue whether parties to civil litigation have a First Amendment right to disseminate, in advance of trial, information gained through the pretrial discovery process.

#### I

Respondent Rhinehart is the spiritual leader of a religious group, the Aquarian Foundation. The Foundation has fewer than 1,000 members, most of whom live in the State of Washington. Aquarian beliefs include life after death and the ability to communicate with the dead through a medium. Rhinehart is the primary Aquarian medium.

In recent years, the Seattle Times and the Walla Walla Union-Bulletin have published stories about Rhinehart and the Foundation. Altogether 11 articles appeared in the newspapers during the years 1973, 1978, and 1979. The five articles that appeared in 1973 focused on Rhinehart and the manner in which he operated the Foundation. They described seances conducted by Rhinehart in which people paid him to put them in touch with deceased relatives and friends. The articles also stated that Rhinehart had sold magical "stones" that had been "expelled" from his body. One article referred to Rhinehart's conviction, later vacated, for sodomy. The four articles that appeared in 1978 concentrated on an "extravaganza" sponsored by Rhinehart at the Walla Walla State Penitentiary. The articles stated that he had treated 1,100 inmates to a 6-hour-long show, during which he gave away between \$35,000 and \$50,000 in cash and prizes. One article described a "chorus line of girls [who] shed their gowns and bikinis and sang . . . ." The two articles that appeared in 1979 referred to a purported connection between Rhinehart and Lou Ferrigno, star of the popular television program, "The Incredible Hulk."

#### II

Rhinehart brought this action in the Washington Superior Court on behalf of himself and the Foundation against the Seattle Times, the Walla Walla Union-Bulletin, the authors of the articles, and the spouses of the authors. Five female members of the Foundation who had participated in the presentation at the penitentiary joined the suit as plaintiffs. The complaint alleges that the articles contained statements that were "fictional and untrue," and that the defendants - petitioners here - knew, or should have known, they were false. According to the complaint, the articles "did and were calculated to hold [Rhinehart] up to

public scorn, hatred and ridicule, and to impeach his honesty, integrity, virtue, religious philosophy, reputation as a person and in his profession as a spiritual leader." With respect to the Foundation, the complaint also states: "[T]he articles have, or may have had, the effect of discouraging contributions by the membership and public and thereby diminished the financial ability of the Foundation to pursue its corporate purposes." The complaint alleges that the articles misrepresented the role of the Foundation's "choir" and falsely implied that female members of the Foundation had "stripped off all their clothes and wantonly danced naked . . . ." The complaint requests \$14,100,000 in damages for the alleged defamation and invasions of privacy.

Petitioners filed an answer, denying many of the allegations of the complaint and asserting affirmative defenses. Petitioners promptly initiated extensive discovery. They deposed Rhinehart, requested production of documents pertaining to the financial affairs of Rhinehart and the Foundation, and served extensive interrogatories on Rhinehart and the other respondents. Respondents turned over a number of financial documents, including several of Rhinehart's income tax returns. Respondents refused, however, to disclose certain financial information, 4 the identity of the Foundation's donors during the preceding 10 years, and a list of its members during that period.

Petitioners filed a motion under the State's Civil Rule 37 requesting an order compelling discovery. In their supporting memorandum, petitioners recognized that the principal issue as to discovery was respondents'"refusa[l] to permit any effective inquiry into their financial affairs, such as the source of their donations, their financial transactions, uses of their wealth and assets, and their financial condition in general." Respondents opposed the motion, arguing in particular that compelled production of the identities of the Foundation's donors and members would violate the First Amendment rights of members and donors to privacy, freedom of religion, and freedom of association. Respondents also moved for a protective order preventing petitioners from disseminating any information gained through discovery. Respondents noted that petitioners had stated their intention to continue publishing articles about respondents and this litigation, and their intent to use information gained through discovery in future articles.

In a lengthy ruling, the trial court initially granted the motion to compel and ordered respondents to identify all donors who made contributions during the five years preceding the date of the complaint, along with the amounts donated. \*\*\* Respondents filed a motion for reconsideration in which they renewed their motion for a protective order. They submitted affidavits of several Foundation members to support their request. \*\*\* In general, the affidavits averred that public release of the donor lists would adversely affect Foundation membership and income and would subject its members to additional harassment and reprisals.

Persuaded by these affidavits, the trial court issued a protective order covering all information obtained through the discovery process that pertained to "the financial affairs of the various plaintiffs, the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients, or donors to any of the various plaintiffs." The order prohibited petitioners from publishing, disseminating, or

using the information in any way except where necessary to prepare for and try the case. By its terms, the order did not apply to information gained by means other than the discovery process. In an accompanying opinion, the trial court recognized that the protective order would restrict petitioners' right to publish information obtained by discovery, but the court reasoned that the restriction was necessary to avoid the "chilling effect" that dissemination would have on "a party's willingness to bring his case to court."

Respondents appealed from the trial court's production order, and petitioners appealed from the protective order. The Supreme Court of Washington affirmed both. \*\*\* The Supreme Court of Washington recognized that its holding conflicts with the holdings of the United States Court of Appeals for the District of Columbia Circuit \*\*\* and applies a different standard from that of the Court of Appeals for the First Circuit \*\*\* . We granted certiorari to resolve the conflict. We affirm.

### III

Most States, including Washington, have adopted discovery provisions modeled on Rules 26 through 37 of the Federal Rules of Civil Procedure. Rule 26(b)(1) provides that a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." It further provides that discovery is not limited to matters that will be admissible at trial so long as the information sought "appears reasonably calculated to lead to the discovery of admissible evidence."

The Rules do not differentiate between information that is private or intimate and that to which no privacy interests attach. Under the Rules, the only express limitations are that the information sought is not privileged, and is relevant to the subject matter of the pending action. Thus, the Rules often allow extensive intrusion into the affairs of both litigants and third parties. If a litigant fails to comply with a request for discovery, the court may issue an order directing compliance that is enforceable by the court's contempt powers.

Petitioners argue that the First Amendment imposes strict limits on the availability of any judicial order that has the effect of restricting expression. They contend that civil discovery is not different from other sources of information, and that therefore the information is "protected speech" for First Amendment purposes. Petitioners assert the right in this case to disseminate any information gained through discovery. They do recognize that in limited circumstances, not thought to be present here, some information may be restrained. They submit, however: "When a protective order seeks to limit expression, it may do so only if the proponent shows a compelling governmental interest. Mere speculation and conjecture are insufficient. Any restraining order, moreover, must be narrowly drawn and precise. Finally, before issuing such an order a court must determine that there are no alternatives which intrude less directly on expression."

We think the rule urged by petitioners would impose an unwarranted restriction on the duty and discretion of a trial court to oversee the discovery process.

### IV

It is, of course, clear that information obtained through civil discovery authorized by modern rules of civil procedure would rarely, if ever, fall within the classes of unprotected speech identified by decisions of this Court. In this case, as petitioners argue, there certainly is a public interest in knowing more about respondents. This interest may well include most - and possibly all - of what has been discovered as a result of the court's order under Rule 26(b)(1). It does not necessarily follow, however, that a litigant has an unrestrained right to disseminate information that has been obtained through pretrial discovery. For even though the broad sweep of the First Amendment seems to prohibit all restraints on free expression, this Court has observed that "[f]reedom of speech . . . does not comprehend the right to speak on any subject at any time."

The critical question that this case presents is whether a litigant's freedom comprehends the right to disseminate information that he has obtained pursuant to a court order that both granted him access to that information and placed restraints on the way in which the information might be used. In addressing that question it is necessary to consider whether the "practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression" and whether "the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved."

#### A

At the outset, it is important to recognize the extent of the impairment of First Amendment rights that a protective order, such as the one at issue here, may cause. As in all civil litigation, petitioners gained the information they wish to disseminate only by virtue of the trial court's discovery processes. As the Rules authorizing discovery were adopted by the state legislature, the processes thereunder are a matter of legislative grace. A litigant has no First Amendment right of access to information made available only for purposes of trying his suit. Thus, continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations.

Moreover, pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law and, in general, they are conducted in private as a matter of modern practice. Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

Finally, it is significant to note that an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny. As in this case, such a protective order prevents a party from disseminating only that information obtained through use of the discovery process. Thus, the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes. In sum, judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far

lesser extent than would restraints on dissemination of information in a different context. Therefore, our consideration of the provision for protective orders contained in the Washington Civil Rules takes into account the unique position that such orders occupy in relation to the First Amendment.

## B

Rule 26(c) furthers a substantial governmental interest unrelated to the suppression of expression. The Washington Civil Rules enable parties to litigation to obtain information "relevant to the subject matter involved" that they believe will be helpful in the preparation and trial of the case. Rule 26, however, must be viewed in its entirety. Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes. Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c). It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties. The Rules do not distinguish between public and private information. Nor do they apply only to parties to the litigation, as relevant information in the hands of third parties may be subject to discovery.

There is an opportunity, therefore, for litigants to obtain - incidentally or purposefully - information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes. \*\*\* The prevention of the abuse that can attend the coerced production of information under a State's discovery rule is sufficient justification for the authorization of protective orders.

## C

We also find that the provision for protective orders in the Washington Rules requires, in itself, no heightened First Amendment scrutiny. To be sure, Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required. The Legislature of the State of Washington, following the example of the Congress in its approval of the Federal Rules of Civil Procedure, has determined that such discretion is necessary, and we find no reason to disagree. The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.

## V

The facts in this case illustrate the concerns that justifiably may prompt a court to issue a protective order. As we have noted, the trial court's order allowing discovery was extremely broad. It compelled respondents - among other things - to identify all persons who had made donations over a 5-year period to Rhinehart and the Aquarian Foundation, together with the amounts donated. In effect the order would compel disclosure of membership as well as sources of financial support. The Supreme Court of Washington found that dissemination

of this information would "result in annoyance, embarrassment and even oppression." It is sufficient for purposes of our decision that the highest court in the State found no abuse of discretion in the trial court's decision to issue a protective order pursuant to a constitutional state law. We therefore hold that where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.

The judgment accordingly is

*Affirmed.*

JUSTICE BRENNAN, WITH WHOM JUSTICE MARSHALL JOINS, CONCURRING [OMITTED].

## C. Access by the Press

### **Note: "Public Proceedings"**

In fractured opinions in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the Court was nevertheless clear that there is a right of the public and press to attend criminal trials. But this raises questions about whether or not particular criminal proceedings or particular civil proceedings are included in the definition of "trial."

Whether or not a particular proceeding qualifies as "public" is often analyzed with resort to the "complimentary" factors of

"experience" - whether the public has historically been granted access to the place or process and

"logic" - whether access enhances the functioning of the particular process in question,

as derived from the "*Press-Enterprise*" cases.

In *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"), the Court held voir dire examinations in criminal jury trial should generally be public). In *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"), the Court held that preliminary hearings in criminal trial should generally be public).

Are executions "public" proceedings? Considering this issue, a district judge in Oklahoma applied the *Press-Enterprise* cases and found that while there were many public executions and hangings, the trend since 1915 has been to have such events occur within the prison. See

Oklahoma Observer v. Patton, No. CIV-14-0905-HE, 2014 WL 7335317 (W.D. Okla. Dec. 19, 2014).

The next case considers press access to prisons and imprisoned persons.

### *Houchins v. KQED, Inc.*

438 U.S. 1 (1978)

CHIEF JUSTICE BURGER ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED AN OPINION, IN WHICH WHITE AND REHNQUIST, JJ., JOINED. STEWART, J., FILED AN OPINION CONCURRING IN THE JUDGMENT. STEVENS, J., FILED A DISSIDENTING OPINION, IN WHICH BRENNAN AND POWELL, JJ., JOINED. MARSHALL AND BLACKMUN, JJ., TOOK NO PART IN THE CONSIDERATION OR DECISION OF THE CASE.

CHIEF JUSTICE BURGER ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED AN OPINION, IN WHICH WHITE AND REHNQUIST, JJ., JOINED.

The question presented is whether the news media have a constitutional right of access to a county jail, over and above that of other persons, to interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio, and television.

#### I

Petitioner Houchins, as Sheriff of Alameda County, Cal., controls all access to the Alameda County Jail at Santa Rita. Respondent KQED operates licensed television and radio broadcasting stations which have frequently reported newsworthy events relating to penal institutions in the San Francisco Bay Area. On March 31, 1975, KQED reported the suicide of a prisoner in the Greystone portion of the Santa Rita jail. The report included a statement by a psychiatrist that the conditions at the Greystone facility were responsible for the illnesses of his patient-prisoners there, and a statement from petitioner denying that prison conditions were responsible for the prisoners' illnesses.

KQED requested permission to inspect and take pictures within the Greystone facility. After permission was refused, KQED and the Alameda and Oakland branches of the National Association for the Advancement of Colored People (NAACP) filed suit under 42 U.S.C. 1983. They alleged that petitioner had violated the First Amendment by refusing to permit media access and failing to provide any effective means by which the public could be informed of conditions prevailing in the Greystone facility or learn of the prisoners' grievances. Public access to such information was essential, they asserted, in order for NAACP members to participate in the public debate on jail conditions in Alameda County. They further asserted that television coverage of the conditions in the cells and facilities was the most effective way of informing the public of prison conditions.

The complaint requested a preliminary and permanent injunction to prevent petitioner from "excluding KQED news personnel from the Greystone cells and Santa Rita facilities and generally preventing full and accurate news coverage of the conditions prevailing therein." On June 17, 1975, when the complaint was filed, there appears to have been no formal policy regarding public access to the Santa Rita jail. However, according to petitioner, he had been in the process of planning a program of regular monthly tours since he took office six months earlier. On July 8, 1975, he announced the program and invited all interested persons to make arrangements for the regular public tours. News media were given notice in advance of the public and presumably could have made early reservations.

Six monthly tours were planned and funded by the county at an estimated cost of \$1,800. The first six scheduled tours were filled within a week after the July 8 announcement. A KQED reporter and several other reporters were on the first tour on July 14, 1975.

Each tour was limited to 25 persons and permitted only limited access to the jail. The tours did not include the disciplinary cells or the portions of the jail known as "Little Greystone," the scene of alleged rapes, beatings, and adverse physical conditions. Photographs of some parts of the jail were made available, but no cameras or tape recorders were allowed on the tours. Those on the tours were not permitted to interview inmates, and inmates were generally removed from view.

In support of the request for a preliminary injunction, respondents presented testimony and affidavits stating that other penal complexes had permitted media interviews of inmates and substantial media access without experiencing significant security or administrative problems. They contended that the monthly public tours at Santa Rita failed to provide adequate access to the jail for two reasons: (a) once the scheduled tours had been filled, media representatives who had not signed up for them had no access and were unable to cover newsworthy events at the jail; (b) the prohibition on photography and tape recordings, the exclusion of portions of the jail from the tours, and the practice of keeping inmates generally removed from view substantially reduced the usefulness of the tours to the media.

In response, petitioner admitted that Santa Rita had never experimented with permitting media access beyond that already allowed; he did not claim that disruption had been caused by media access to other institutions. He asserted, however, that unregulated access by the media would infringe inmate privacy, and tend to create "jail celebrities," who in turn tend to generate internal problems and undermine jail security. He also contended that unscheduled media tours would disrupt jail operations.

Petitioner filed an affidavit noting the various means by which information concerning the jail could reach the public. Attached to the affidavit were the current prison mail, visitation, and phone call regulations. The regulations allowed inmates to send an unlimited number of letters to judges, attorneys, elected officials, the Attorney General, petitioner, jail officials, or probation officers, all of which could be sealed prior to mailing. Other letters were subject

to inspection for contraband but the regulations provided that no inmate mail would be read.

With few exceptions, all persons, including representatives of the media, who knew a prisoner could visit him. Media reporters could interview inmates awaiting trial with the consent of the inmate, his attorney, the district attorney, and the court. Social services officers were permitted to contact "relatives, community agencies, employers, etc.," by phone to assist in counseling inmates with vocational, educational, or personal problems. Maximum-security inmates were free to make unmonitored collect telephone calls from designated areas of the jail without limit.

After considering the testimony, affidavits, and documentary evidence presented by the parties, the District Court preliminarily enjoined petitioner from denying KQED news personnel and "responsible representatives" of the news media access to the Santa Rita facilities, including Greystone, "at reasonable times and hours" and "from preventing KQED news personnel and responsible representatives of the news media from utilizing photographic and sound equipment or from utilizing inmate interviews in providing full and accurate coverage of the Santa Rita facilities."

The District Court rejected petitioner's contention that the media policy then in effect was necessary to protect inmate privacy or minimize security and administrative problems. It found that the testimony of officials involved with other jails indicated that a "more flexible press policy at Santa Rita [was] both desirable and attainable." The District Court concluded that the respondents had "demonstrated irreparable injury, absence of an adequate remedy at law, probability of success on the merits, a favorable public interest, and a balance of hardships" in their favor.

On interlocutory appeal from the District Court's order, petitioner invoked *Pell v. Procunier* (1974), where this Court held that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded to the general public." He contended that the District Court had departed from *Pell* and abused its discretion because it had ordered that he give the media greater access to the jail than he gave to the general public. The Court of Appeals rejected petitioner's argument that *Pell* and *Saxbe v. Washington Post Co.* (1974), were controlling. It concluded, albeit in three separate opinions, that the public and the media had a First and Fourteenth Amendment right of access to prisons and jails, and sustained the District Court's order.

## II

Notwithstanding our holding in *Pell v. Procunier* respondents assert that the right recognized by the Court of Appeals flows logically from our decisions construing the First Amendment. They argue that there is a constitutionally guaranteed right to gather news under *Pell v. Procunier* and *Branzburg v. Hayes* (1972). From the right to gather news and the right to receive information, they argue for an implied special right of access to government-controlled sources of information. This right, they contend, compels access as a constitutional matter. Respondents suggest further support for this implicit First Amendment right in the language of *Grosjean v. American Press Co.* (1936), and *Mills v. Alabama* (1966), which notes the importance of an informed public as a safeguard

against "misgovernment" and the crucial role of the media in providing information. Respondents contend that public access to penal institutions is necessary to prevent officials from concealing prison conditions from the voters and impairing the public's right to discuss and criticize the prison system and its administration.

### III

We can agree with many of the respondents' generalized assertions; conditions in jails and prisons are clearly matters "of great public importance." Penal facilities are public institutions which require large amounts of public funds, and their mission is crucial in our criminal justice system. Each person placed in prison becomes, in effect, a ward of the state for whom society assumes broad responsibility. It is equally true that with greater information, the public can more intelligently form opinions about prison conditions. Beyond question, the role of the media is important; acting as the "eyes and ears" of the public, they can be a powerful and constructive force, contributing to remedial action in the conduct of public business. They have served that function since the beginning of the Republic, but like all other components of our society media representatives are subject to limits.

The media are not a substitute for or an adjunct of government and, like the courts, they are "ill equipped" to deal with problems of prison administration. We must not confuse the role of the media with that of government; each has special, crucial functions, each complementing - and sometimes conflicting with - the other.

The public importance of conditions in penal facilities and the media's role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes. This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control. Nor does the rationale of the decisions upon which respondents rely lead to the implication of such a right.

*Grosjean v. American Press Co.*, and *Mills v. Alabama* emphasized the importance of informed public opinion and the traditional role of a free press as a source of public information. But an analysis of those cases reveals that the Court was concerned with the freedom of the media to communicate information once it is obtained; neither case intimated that the Constitution compels the government to provide the media with information or access to it on demand. *Grosjean* involved a challenge to a state tax on advertising revenues of newspapers, the "plain purpose" of which was to penalize the publishers and curtail the publication of a selected group of newspapers. The Court summarized the familiar but important history of the attempts to prevent criticism of the Crown in England by the infamous licensing requirements and special taxes on the press, and concluded that the First Amendment had been designed to prevent similar restrictions or any other "form of previous restraint upon printed publications, or their circulation."

In discussing the importance of an "untrammelled press," the Court in *Grosjean* readily acknowledged the need for "informed public opinion" as a restraint upon misgovernment. It also criticized the tax at issue because it limited " the

circulation of information to which the public [was] entitled." But nothing in the Court's holding implied a special privilege of access to information as distinguished from a right to publish information which has been obtained; Grosjean dealt only with government attempts to burden and restrain a newspaper's communication with the public. The reference to a public entitlement to information meant no more than that the government cannot restrain communication of whatever information the media acquire - and which they elect to reveal. \*\*\*

The right to receive ideas and information is not the issue in this case. The issue is a claimed special privilege of access which the Court rejected in *Pell* and *Saxbe*, a right which is not essential to guarantee the freedom to communicate or publish.

#### IV

The respondents' argument is flawed, not only because it lacks precedential support and is contrary to statements in this Court's opinions, but also because it invites the Court to involve itself in what is clearly a legislative task which the Constitution has left to the political processes. Whether the government should open penal institutions in the manner sought by respondents is a question of policy which a legislative body might appropriately resolve one way or the other.

A number of alternatives are available to prevent problems in penal facilities from escaping public attention. The early penal reform movements in this country and England gained impetus as a result of reports from citizens and visiting committees who volunteered or received commissions to visit penal institutions and make reports. See T. ERIKSSON, *THE REFORMERS* 32-42, 69 (Djurklou translation 1976); W. CRAWFORD, *REPORT ON THE PENITENTIARIES OF THE UNITED STATES* vii-viii, xiii-xv, 10-11, App. 9 (1969 ed.); B. MCKELVEY, *AMERICAN PRISONS* 52-56, 193 (1936). Citizen task forces and prison visitation committees continue to play an important role in keeping the public informed on deficiencies of prison systems and need for reforms. Grand juries, with the potent subpoena power - not available to the media - traditionally concern themselves with conditions in public institutions; a prosecutor or judge may initiate similar inquiries, and the legislative power embraces an arsenal of weapons for inquiry relating to tax-supported institutions. In each case, these public bodies are generally compelled to publish their findings and, if they default, the power of the media is always available to generate public pressure for disclosure. But the choice as to the most effective and appropriate method is a policy decision to be resolved by legislative decision. We must not confuse what is "good," "desirable," or "expedient" with what is constitutionally commanded by the First Amendment. To do so is to trivialize constitutional adjudication.

Unarticulated but implicit in the assertion that media access to the jail is essential for informed public debate on jail conditions is the assumption that media personnel are the best qualified persons for the task of discovering malfeasance in public institutions. But that assumption finds no support in the decisions of this Court or the First Amendment. Editors and newsmen who inspect a jail may decide to publish or not to publish what information they acquire. Public bodies and public officers, on the other hand, may be coerced by

public opinion to disclose what they might prefer to conceal. No comparable pressures are available to anyone to compel publication by the media of what they might prefer not to make known.

There is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information. Because the Constitution affords no guidelines, absent statutory standards, hundreds of judges would, under the Court of Appeals' approach, be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems "desirable" or "expedient." We, therefore, reject the Court of Appeals' conclusory assertion that the public and the media have a First Amendment right to government information regarding the conditions of jails and their inmates and presumably all other public facilities such as hospitals and mental institutions.

\*\*\*

Petitioner cannot prevent respondents from learning about jail conditions in a variety of ways, albeit not as conveniently as they might prefer. Respondents have a First Amendment right to receive letters from inmates criticizing jail officials and reporting on conditions. Respondents are free to interview those who render the legal assistance to which inmates are entitled. They are also free to seek out former inmates, visitors to the prison, public officials, and institutional personnel, as they sought out the complaining psychiatrist here.

Moreover, California statutes currently provide for a prison Board of Corrections that has the authority to inspect jails and prisons and must provide a public report at regular intervals. Health inspectors are required to inspect prisons and provide reports to a number of officials, including the State Attorney General and the Board of Corrections. Fire officials are also required to inspect prisons. Following the reports of the suicide at the jail involved here, the County Board of Supervisors called for a report from the County Administrator; held a public hearing on the report, which was open to the media; and called for further reports when the initial report failed to describe the conditions in the cells in the Greystone portion of the jail.

Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control. Under our holdings \*\*\* until the political branches decree otherwise, as they are free to do, the media have no special right of access to the Alameda County Jail different from or greater than that accorded the public generally.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

*Reversed and remanded.*

JUSTICE STEWART, CONCURRING IN THE JUDGMENT.

I agree that the preliminary injunction issued against the petitioner was unwarranted, and therefore concur in the judgment. In my view, however, KQED was entitled to injunctive relief of more limited scope.

The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors. Accordingly, I agree substantially with what the opinion of The Chief Justice has to say on that score.

We part company, however, in applying these abstractions to the facts of this case. Whereas he appears to view "equal access" as meaning access that is identical in all respects, I believe that the concept of equal access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public.

When on assignment, a journalist does not tour a jail simply for his own edification. He is there to gather information to be passed on to others, and his mission is protected by the Constitution for very specific reasons. \*\*\*

That the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively. A person touring Santa Rita jail can grasp its reality with his own eyes and ears. But if a television reporter is to convey the jail's sights and sounds to those who cannot personally visit the place, he must use cameras and sound equipment. In short, terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.

Under these principles, KQED was clearly entitled to some form of preliminary injunctive relief. At the time of the District Court's decision, members of the public were permitted to visit most parts of the Santa Rita jail, and the First and Fourteenth Amendments required the Sheriff to give members of the press effective access to the same areas. The Sheriff evidently assumed that he could fulfill this obligation simply by allowing reporters to sign up for tours on the same terms as the public. I think he was mistaken in this assumption, as a matter of constitutional law. \*\*\*

I would not foreclose the possibility of further relief for KQED on remand. In my view, the availability and scope of future permanent injunctive relief must depend upon the extent of access then permitted the public, and the decree must be framed to accommodate equitably the constitutional role of the press and the institutional requirements of the jail.

JUSTICE STEVENS, WITH WHOM BRENNAN AND POWELL, JJ., JOIN, DISSENTING.

The Court holds that the scope of press access to the Santa Rita jail required by the preliminary injunction issued against petitioner is inconsistent with the holding in *Pell v. Procunier* that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public" and

therefore the injunction was an abuse of the District Court's discretion. I respectfully disagree. \*\*\*

For two reasons, which will be discussed separately, the decisions in *Pell* and *Saxbe* do not control the propriety of the District Court's preliminary injunction. First, the unconstitutionality of petitioner's policies which gave rise to this litigation does not rest on the premise that the press has a greater right of access to information regarding prison conditions than do other members of the public. Second, relief tailored to the needs of the press may properly be awarded to a representative of the press which is successful in proving that it has been harmed by a constitutional violation and need not await the grant of relief to members of the general public who may also have been injured by petitioner's unconstitutional access policy but have not yet sought to vindicate their rights.

## I

This litigation grew out of petitioner's refusal to allow representatives of the press access to the inner portions of the Santa Rita facility. Following those refusals and the institution of this suit, certain remedial action was taken by petitioner. The mail censorship was relaxed and an experimental tour program was initiated. \*\*\*

Here, the broad restraints on access to information regarding operation of the jail that prevailed on the date this suit was instituted are plainly disclosed by the record. The public and the press had consistently been denied any access to those portions of the Santa Rita facility where inmates were confined and there had been excessive censorship of inmate correspondence. Petitioner's no-access policy, modified only in the wake of respondents' resort to the courts, could survive constitutional scrutiny only if the Constitution affords no protection to the public's right to be informed about conditions within those public institutions where some of its members are confined because they have been charged with or found guilty of criminal offenses.

## II

The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution. It is for this reason that the First Amendment protects not only the dissemination but also the receipt of information and ideas. Thus, in *Procunier v. Martinez*, the Court invalidated prison regulations authorizing excessive censorship of outgoing inmate correspondence because such censorship abridged the rights of the intended recipients. So here, petitioner's prelitigation prohibition on mentioning the conduct of jail officers in outgoing correspondence must be considered an impingement on the noninmate correspondent's interest in receiving the intended communication.

In addition to safeguarding the right of one individual to receive what another elects to communicate, the First Amendment serves an essential societal function. Our system of self-government assumes the existence of an informed citizenry. As Madison wrote:

"A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will

forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."

9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910).

It is not sufficient, therefore, that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance.

For that reason information gathering is entitled to some measure of constitutional protection. As this Court's decisions clearly indicate, however, this protection is not for the private benefit of those who might qualify as representatives of the "press" but to insure that the citizens are fully informed regarding matters of public interest and importance.

In *Grosjean v. American Press Co.* representatives of the "press" challenged a state tax on the advertising revenues of newspapers. In the Court's words, the issue raised by the tax went "to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests." The opinion described the long struggle in England against the stamp tax and tax on advertisements - the so-called "taxes on knowledge":

"[I]n the adoption of the [taxes] the dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs. . . . The aim of the struggle [against those taxes] was . . . to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government. Upon the correctness of this conclusion the very characterization of the exactions as 'taxes on knowledge' sheds a flood of corroborative light. In the ultimate, an informed and enlightened public opinion was the thing at stake."

Noting the familiarity of the Framers with this struggle, the Court held:

"[S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad . . . because, in light of its history and of its present setting, it is seen to be a deliberate and calculated device . . . to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties."

A recognition that the "underlying right is the right of the public generally" is also implicit in the doctrine that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." *Pell v. Procunier*. In *Pell* it was unnecessary to consider the extent of the public's right of access to information regarding the prison and its inmates in order to adjudicate the press claim to a particular form of access, since the record demonstrated that the flow of information to the public, both directly and through the press, was adequate to survive constitutional challenge; institutional considerations justified denying the single, additional mode of access sought by the press in that case.

Here, in contrast, the restrictions on access to the inner portions of the Santa Rita jail that existed on the date this litigation commenced concealed from the general public the conditions of confinement within the facility. The question is whether petitioner's policies, which cut off the flow of information at its source, abridged the public's right to be informed about those conditions.

The answer to that question does not depend upon the degree of public disclosure which should attend the operation of most governmental activity. Such matters involve questions of policy which generally must be resolved by the political branches of government. Moreover, there are unquestionably occasions when governmental activity may properly be carried on in complete secrecy. For example, the public and the press are commonly excluded from "grand jury proceedings, our own conferences, [and] the meetings of other official bodies gathered in executive session . . ." *Branzburg v. Hayes*. In addition, some functions of government - essential to the protection of the public and indeed our country's vital interests - necessarily require a large measure of secrecy, subject to appropriate legislative oversight. In such situations the reasons for withholding information from the public are both apparent and legitimate.

In this case, however, "[r]espondents do not assert a right to force disclosure of confidential information or to invade in any way the decisionmaking processes of governmental officials." They simply seek an end to petitioner's policy of concealing prison conditions from the public. Those conditions are wholly without claim to confidentiality. While prison officials have an interest in the time and manner of public acquisition of information about the institutions they administer, there is no legitimate penological justification for concealing from citizens the conditions in which their fellow citizens are being confined.

\*\*\* The reasons which militate in favor of providing special protection to the flow of information to the public about prisons relate to the unique function they perform in a democratic society. Not only are they public institutions, financed with public funds and administered by public servants, they are an integral component of the criminal justice system. The citizens confined therein are temporarily, and sometimes permanently, deprived of their liberty as a result of a trial which must conform to the dictates of the Constitution. By express command of the Sixth Amendment the proceeding must be a "public trial." It is important not only that the trial itself be fair, but also that the community at large have confidence in the integrity of the proceeding. That public interest survives the judgment of conviction and appropriately carries over to an interest in how the convicted person is treated during his period of punishment and hoped-for rehabilitation. While a ward of the State and subject to its stern discipline, he retains constitutional protections against cruel and unusual punishment, a protection which may derive more practical support from access to information about prisons by the public than by occasional litigation in a busy court.

Some inmates - in Santa Rita, a substantial number - are pretrial detainees. Though confined pending trial, they have not been convicted of an offense against society and are entitled to the presumption of innocence. Certain penological objectives, i. e., punishment, deterrence, and rehabilitation, which are legitimate in regard to convicted prisoners, are inapplicable to pretrial

detainees. Society has a special interest in ensuring that unconvicted citizens are treated in accord with their status.

In this case, the record demonstrates that both the public and the press had been consistently denied any access to the inner portions of the Santa Rita jail, that there had been excessive censorship of inmate correspondence, and that there was no valid justification for these broad restraints on the flow of information. \*\*\*

### III

The preliminary injunction entered by the District Court granted relief to KQED without providing any specific remedy for other members of the public. Moreover, it imposed duties on petitioner that may not be required by the Constitution itself. The injunction was not an abuse of discretion for either of these reasons. \*\*\*

I would affirm the judgment of the Court of Appeals.

## Notes

1. How effective do you think the Court's suggested alternatives to press access to the prison would be? Do you think that the current prison conditions would be improved - - - or at least different - - - had the Court reached a different conclusion in *KQED*?

2. Press access to military operations is similarly contested. In *Nation Magazine v. U.S. Dep't of Def.*, 762 F. Supp. 1558 (S.D.N.Y. 1991), a district judge rejected the claim of a number of publications that the press has a First Amendment right to unlimited access to a foreign arena in which American military forces are engaged. The plaintiffs had urged that the Department of Defense (DOD) "pooling" regulations, which limit access to the battlefield to a specified number of press representatives and subject them to certain restrictions, infringe on news gathering privileges accorded by the First Amendment. The plaintiffs - - -including *The Nation*, *Mother Jones*, *The Progressive Magazine*, *The Village Voice*, and *Pacifica Radio News* - - - also contended that the DOD preferences for certain news organizations and reporters discriminated in favor of particular viewpoints, but the court found that this claim was not adequately supported.

The subsequent process of "embedding" reporters is also subject to First Amendment concerns, including discrimination and distortion of the news. For an excellent discussion see Student Note, Elana J. Zeide, *In Bed with the Military: First Amendment Implications of Embedded Journalism*, 80 N.Y.U. L. REV. 1309 (2005).

## D. (Un)lawful Information

Members of the press routinely use statutory or regulatory provisions such as the federal Freedom of Information Act, 5 U.S.C. § 552, and its state counterparts to obtain “public” information.

They also use other means, including the receipt of anonymous information which may have been gathered through unlawful means.

### *Note: Bartnicki v. Vopper*

In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the Court held that a statutory wiretapping prohibition could not be constitutionally applied to a radio host who played a tape of an intercepted conversation on his radio show. The host received the tape anonymously, but had reason to know that the conversation had been illegally intercepted. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, generally prohibited the interception of wire, electronic, and oral communications. Title 18 U.S.C. § 2511(1)(a) applies to the person who willfully intercepts such communications and subsection (c) to any person who, knowing or having reason to know that the communication was obtained through an illegal interception, willfully discloses its contents.

The Court’s opinion, authored by Justice Stevens, stated:

The Government identifies two interests served by the statute — first, the interest in removing an incentive for parties to intercept private conversations, and second, the interest in minimizing the harm to persons whose conversations have been illegally intercepted. We assume that those interests adequately justify the prohibition in § 2511(1)(d) against the interceptor’s own use of information that he or she acquired by violating § 2511(1)(a), but it by no means follows that punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality is an acceptable means of serving those ends.

The Court considered the first interest not served by prohibiting third parties from disclosing the information, but took the second interest more seriously. The Court concluded, however, that in this case - - - involving a conversation between members of a teachers’ union in negotiations and a possible strike - - - an application of the anti-wiretap statute “implicates the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern.”

The months of negotiations over the proper level of compensation for teachers at the Wyoming Valley West High School were unquestionably a matter of public concern, and respondents were clearly engaged in

debate about that concern. That debate may be more mundane than the Communist rhetoric that inspired Justice Brandeis' classic opinion in *Whitney v. California* (1919), but it is no less worthy of constitutional protection.

In these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance.

## E. Reporters' "privilege"

### *Branzburg v. Hayes*

480 U.S. 665 (1972)

WHITE, J., WROTE THE OPINION OF THE COURT, IN WHICH BURGER, C.J., AND BLACKMUN, POWELL, AND REHNQUIST, JJ., JOINED. POWELL, J., FILED A CONCURRING OPINION. DOUGLAS, J., FILED A DISSENTING OPINION. STEWART, J., FILED A DISSENTING OPINION, IN WHICH BRENNAN AND MARSHALL, JJ., JOINED.

OPINION OF THE COURT BY MR. JUSTICE WHITE, ANNOUNCED BY THE CHIEF JUSTICE

The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment. We hold that it does not.

[There were three consolidated cases: Branzburg was a reporter for the Louisville, Kentucky newspaper the Courier-Journal, who published articles including his observations of people "synthesizing hashish from marihuana" and the "drug scene" in Kentucky; Pappas was a television reporter-photographer in Providence, Rhode Island who gained entrance to a Black Panther headquarters waiting for a police raid that did not occur and did not write about the incident; and Caldwell was a "reporter for the New York Times assigned to cover the Black Panther Party" in Northern California. All three were subpoenaed by grand juries].

Petitioners Branzburg and Pappas and respondent Caldwell press First Amendment claims that may be simply put: that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment. Although the newsmen in these cases do not claim an absolute privilege against official interrogation in all circumstances, they assert that the reporter should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the

need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure. Principally relied upon are prior cases emphasizing the importance of the First Amendment guarantees to individual development and to our system of representative government, decisions requiring that official action with adverse impact on First Amendment rights be justified by a public interest that is "compelling" or "paramount," and those precedents establishing the principle that justifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association. The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information.

We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. But these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence. The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them.

\*\*\*The prevailing view is that the press is not free to publish with impunity everything and anything it desires to publish. Although it may deter or regulate what is said or published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution. \*\*\*

Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of

crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal. \*\*\*

It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation. At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury. \*\*\*

A number of States have provided newsmen a statutory privilege of varying breadth, but the majority have not done so, and none has been provided by federal statute. Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. \*\*\*

MR. JUSTICE POWELL, CONCURRING.

I add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding. The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. Certainly, we do not hold, as suggested in Mr. Justice Stewart's dissenting opinion, that state and federal authorities are free to "annex" the news media as "an investigative arm of government." The solicitude repeatedly shown by this Court for First Amendment freedoms should be sufficient assurance against any such effort, even if one seriously believed that the media - properly free and untrammelled in the fullest sense of these terms - were not able to protect themselves.

As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions. [Footnote\*]

In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

[ Footnote \* ] It is to be remembered that Caldwell asserts a constitutional privilege not even to appear before the grand jury unless a court decides that the Government has made a showing that meets the three preconditions specified in the dissenting opinion of Mr. Justice Stewart. To be sure, this would require a "balancing" of interests by the court, but under circumstances and constraints significantly different from the balancing that will be appropriate under the court's decision. The newsman witness, like all other witnesses, will have to appear; he will not be in a position to litigate at the threshold the State's very authority to subpoena him. Moreover, absent the constitutional preconditions that Caldwell and that dissenting opinion would impose as heavy burdens of proof to be carried by the State, the court - when called upon to protect a newsman from improper or prejudicial questioning - would be free to balance the competing interests on their merits in the particular case. The new constitutional rule endorsed by that dissenting opinion would, as a practical matter, defeat such a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated.

MR. JUSTICE DOUGLAS, DISSENTING.

\*\*\* The starting point for decision pretty well marks the range within which the end result lies. The New York Times, whose reporting functions are at issue here, takes the amazing position that First Amendment rights are to be balanced against other needs or conveniences of government. My belief is that all of the "balancing" was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated the timid, watered-down, emasculated versions of the First Amendment which both the Government and the New York Times advance in the case. \*\*\*

I see no way of making mandatory the disclosure of a reporter's confidential source of the information on which he bases his news story. \*\*\* The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people, to paraphrase Alexander Meiklejohn. Knowledge is essential to informed decisions. \*\*\*

\*\*\*A reporter is no better than his source of information. Unless he has a privilege to withhold the identity of his source, he will be the victim of governmental intrigue or aggression. If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended. If what the Court sanctions today becomes settled law, then the reporter's main function in American society will be to pass on to the public the press releases which the various departments of government issue.\*\*\*

MR. JUSTICE STEWART, WITH WHOM MR. JUSTICE BRENNAN AND MR. JUSTICE MARSHALL JOIN, DISSENTING.

The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society. The question whether a reporter has a constitutional right to a confidential relationship with his source is of first impression here, but the principles that should guide our decision are as basic as any to be found in the Constitution. While Mr. Justice Powell's enigmatic concurring opinion gives some hope of a more flexible view in the future, the Court in these cases holds that a newsman

has no First Amendment right to protect his sources when called before a grand jury. The Court thus invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government. Not only will this decision impair performance of the press' constitutionally protected functions, but it will, I am convinced, in the long run harm rather than help the administration of justice.

I respectfully dissent. \*\*\*

\*\*\* [W]hen a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.

## *Cohen v. Cowles Media Co.*

501 U.S. 663 (1991)

WHITE, J., DELIVERED THE OPINION OF THE COURT, IN WHICH REHNQUIST, C.J., AND STEVENS, SCALIA, AND KENNEDY, JJ., JOINED. BLACKMUN, J., FILED A DISSENTING OPINION, IN WHICH MARSHALL AND SOUTER, JJ., JOINED, SOUTER, J., FILED A DISSENTING OPINION, IN WHICH MARSHALL, BLACKMUN, AND O'CONNOR, JJ., JOINED.

JUSTICE WHITE DELIVERED THE OPINION OF THE COURT.

The question before us is whether the First Amendment prohibits a plaintiff from recovering damages, under state promissory estoppel law, for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information. We hold that it does not.

During the closing days of the 1982 Minnesota gubernatorial race, Dan Cohen, an active Republican associated with Wheelock Whitney's Independent-Republican gubernatorial campaign, approached reporters from the St. Paul Pioneer Press Dispatch (Pioneer Press) and the Minneapolis Star and Tribune (Star Tribune) and offered to provide documents relating to a candidate in the upcoming election. Cohen made clear to the reporters that he would provide the information only if he was given a promise of confidentiality. Reporters from both papers promised to keep Cohen's identity anonymous, and Cohen turned over copies of two public court records concerning Marlene Johnson, the Democratic-Farmer-Labor candidate for Lieutenant Governor. The first record indicated that Johnson had been charged in 1969 with three counts of unlawful assembly, and the second that she had been convicted in 1970 of petit theft. Both newspapers interviewed Johnson for her explanation, and one reporter tracked down the person who had found the records for Cohen. As it turned out, the unlawful assembly charges arose out of Johnson's participation in a protest of an alleged failure to hire minority workers on municipal construction

projects, and the charges were eventually dismissed. The petit theft conviction was for leaving a store without paying for \$6.00 worth of sewing materials. The incident apparently occurred at a time during which Johnson was emotionally distraught, and the conviction was later vacated.

After consultation and debate, the editorial staffs of the two newspapers independently decided to publish Cohen's name as part of their stories concerning Johnson. In their stories, both papers identified Cohen as the source of the court records, indicated his connection to the Whitney campaign, and included denials by Whitney campaign officials of any role in the matter. The same day the stories appeared, Cohen was fired by his employer.

Cohen sued respondents, the publishers of the Pioneer Press and Star Tribune, in Minnesota state court, alleging fraudulent misrepresentation and breach of contract. The trial court rejected respondents' argument that the First Amendment barred Cohen's lawsuit. A jury returned a verdict in Cohen's favor, awarding him \$200,000 in compensatory damages and \$500,000 in punitive damages. The Minnesota Court of Appeals, in a split decision, reversed the award of punitive damages after concluding that Cohen had failed to establish a fraud claim, the only claim which would support such an award. However, the court upheld the finding of liability for breach of contract and the \$200,000 compensatory damage award.

A divided Minnesota Supreme Court reversed the compensatory damages award. After affirming the Court of Appeals' determination that Cohen had not established a claim for fraudulent misrepresentation, the court considered his breach of contract claim and concluded that "a contract cause of action is inappropriate for these particular circumstances." The court then went on to address the question whether Cohen could establish a cause of action under Minnesota law on a promissory estoppel theory. \*\*\* In addressing the promissory estoppel question, the court decided that the most problematic element in establishing such a cause of action here was whether injustice could be avoided only by enforcing the promise of confidentiality made to Cohen. The court stated "Under a promissory estoppel analysis, there can be no neutrality towards the First Amendment. In deciding whether it would be unjust not to enforce the promise, the court must necessarily weigh the same considerations that are weighed for whether the First Amendment has been violated. The court must balance the constitutional rights of a free press against the common law interest in protecting a promise of anonymity." After a brief discussion, the court concluded that "in this case, enforcement of the promise of confidentiality under a promissory estoppel theory would violate defendants' First Amendment rights."

We granted certiorari to consider the First Amendment implications of this case.

There can be little doubt that the Minnesota doctrine of promissory estoppel is a law of general applicability. It does not target or single out the press. Rather, insofar as we are advised, the doctrine is generally applicable to the daily transactions of all the citizens of Minnesota. The First Amendment does not forbid its application to the press.

Respondents and *amici* argue that permitting Cohen to maintain a cause of action for promissory estoppel will inhibit truthful reporting because news

organizations will have legal incentives not to disclose a confidential source's identity even when that person's identity is itself newsworthy. Justice Souter [in dissent] makes a similar argument. But if this is the case, it is no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them. Although we conclude that the First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law, we reject Cohen's request that, in reversing the Minnesota Supreme Court's judgment, we reinstate the jury verdict awarding him \$200,000 in compensatory damages. The Minnesota Supreme Court's incorrect conclusion that the First Amendment barred Cohen's claim may well have truncated its consideration of whether a promissory estoppel claim had otherwise been established under Minnesota law, and whether Cohen's jury verdict could be upheld on a promissory estoppel basis. Or perhaps the State Constitution may be construed to shield the press from a promissory estoppel cause of action such as this one. These are matters for the Minnesota Supreme Court to address and resolve in the first instance on remand. Accordingly, the judgment of the Minnesota Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

JUSTICE SOUTER, WITH WHOM JUSTICE MARSHALL, JUSTICE BLACKMUN AND JUSTICE O'CONNOR JOIN, DISSENTING.

\*\*\* Because I do not believe the fact of general applicability to be dispositive, I find it necessary to articulate, measure, and compare the competing interests involved in any given case to determine the legitimacy of burdening constitutional interests, and such has been the Court's recent practice in publication cases.

Nor can I accept the majority's position that we may dispense with balancing because the burden on publication is in a sense "self-imposed" by the newspaper's voluntary promise of confidentiality. This suggests both the possibility of waiver, the requirements for which have not been met here as well as a conception of First Amendment rights as those of the speaker alone, with a value that may be measured without reference to the importance of the information to public discourse. But freedom of the press is ultimately founded on the value of enhancing such discourse for the sake of a citizenry better informed, and thus more prudently self-governed.

\*\*\*The importance of this public interest is integral to the balance that should be struck in this case. There can be no doubt that the fact of Cohen's identity expanded the universe of information relevant to the choice faced by Minnesota voters in that State's 1982 gubernatorial election, the publication of which was thus of the sort quintessentially subject to strict First Amendment protection. The propriety of his leak to respondents could be taken to reflect on his character, which in turn could be taken to reflect on the character of the candidate who had retained him as an adviser. An election could turn on just such a factor; if it should, I am ready to assume that it would be to the greater public good, at least over the long run.

This is not to say that the breach of such a promise of confidentiality could never give rise to liability. One can conceive of situations in which the injured party is a private individual whose identity is of less public concern than that of the petitioner; liability there might not be constitutionally prohibited. Nor do I mean to imply that the circumstances of acquisition are irrelevant to the balance although they may go only to what balances against, and not to diminish, the First Amendment value of any particular piece of information.

Because I believe the State's interest in enforcing a newspaper's promise of confidentiality insufficient to outweigh the interest in unfettered publication of the information revealed in this case, I respectfully dissent.

## Notes

1. On remand in *Cohen v. Cowles*, the Minnesota Supreme Court declined to provide broader protection under its state constitutional provision than the United States Supreme Court recognized under the First Amendment, although recognizing it was free to do so. Its reasoning in part was based on the novelty of the issue: “The enforceability of promises of confidentiality given a news source is an issue of first impression, and this case presents only one variation of such promises. The full First Amendment implications of this new issue may not yet have surfaced.” The court upheld the award of \$200,000 on the theory of promissory estoppel. *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 391(Minn. 1992).

2. The meaning of *Branzburg* is hotly debated. In its sharply divided opinion in *United States v. Sterling*, 724 F.3d 482 (4th Cir. 2013) *cert. denied sub nom. Risen v. United States*, 134 S. Ct. 2696, 189 L. Ed. 2d 739 (2014), the Fourth Circuit majority held:

There is no First Amendment testimonial privilege, absolute or qualified, that protects a reporter from being compelled to testify by the prosecution or the defense in criminal proceedings about criminal conduct that the reporter personally witnessed or participated in, absent a showing of bad faith, harassment, or other such non-legitimate motive, even though the reporter promised confidentiality to his source. In *Branzburg v. Hayes* (1972), the Supreme Court “in no uncertain terms rejected the existence of such a privilege.” *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1146 (D.C.Cir.2006).

However, the dissenting judge argued:

The full import of Justice Powell's concurrence continues to be debated. Some analogize the *Branzburg* majority opinion to a plurality opinion, and therefore assert Justice Powell's concurrence as the narrowest opinion is controlling. See *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1148 (D.C.Cir.2006) (describing appellants' argument that in a five-to-four decision, “the opinion of the least encompassing justice [ ] determines the precedent set by the decision”). Others, like my good friends in the majority, treat Justice Powell's concurrence as ancillary, and simply rejoin that “the meaning of a majority opinion is to be found within the opinion itself.”

Given this confusion, appellate courts have subsequently hewed closer to Justice Powell's concurrence—and Justice Stewart's dissent—than to the majority opinion, and a number of courts have since recognized a qualified reporter's privilege, often utilizing a three-part balancing test. See, e.g., *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir.1986) (applying the reporter's privilege in the criminal context); *United States v. Burke*, 700 F.2d 70, 76–77 (2d Cir.1983) (recognizing the qualified privilege in criminal cases); *Zerilli v. Smith*, 656 F.2d 705, 711–13 (D.C.Cir.1981) (applying the reporter's privilege in a civil case). Indeed, a mere five years after *Branzburg*, a federal court of appeals confidently asserted that the existence of a qualified reporter's privilege was “no longer in doubt.” *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir.1977). In short, Justice Powell's concurrence and the subsequent appellate history have made the lessons of *Branzburg* about as clear as mud.

3. The cases involving a First Amendment reporter's privilege also discuss whether there is a common law right. Additionally, many states have reporter's shield laws. There has also long been pending legislation in Congress to adopt a federal reporter's shield law, see Free Flow of Information Act, SB 987 (available at: <https://www.congress.gov/congressional-report/113th-congress/senate-report/118/1>).

Do you think a statutory remedy is a good idea? Why or why not?

### III. Direct Regulations of the Press

#### *The Florida Star v. B. J. F*

491 U.S. 524 (1989)

MARSHALL, J., DELIVERED THE OPINION OF THE COURT, IN WHICH BRENNAN, BLACKMUN, STEVENS, AND KENNEDY, JJ., JOINED. SCALIA, J., FILED AN OPINION CONCURRING IN PART AND CONCURRING IN THE JUDGMENT, WHITE, J., FILED A DISSENTING OPINION, IN WHICH REHNQUIST, C. J., AND O'CONNOR, J., JOINED.

JUSTICE MARSHALL DELIVERED THE OPINION OF THE COURT.

Florida Stat. § 794.03 (1987) makes it unlawful to "print, publish, or broadcast . . . in any instrument of mass communication" the name of the victim of a sexual offense. Pursuant to this statute, appellant *The Florida Star* was found civilly liable for publishing the name of a rape victim which it had obtained from a publicly released police report. The issue presented here is whether this result comports with the First Amendment. We hold that it does not.

*The Florida Star* is a weekly newspaper which serves the community of Jacksonville, Florida, and which has an average circulation of approximately 18,000 copies. A regular feature of the newspaper is its "Police Reports" section. That section, typically two to three pages in length, contains brief articles describing local criminal incidents under police investigation.

On October 20, 1983, appellee B. J. F. reported to the Duval County, Florida, Sheriff's Department (Department) that she had been robbed and sexually assaulted by an unknown assailant. The Department prepared a report on the incident which identified B. J. F. by her full name. The Department then placed the report in its pressroom. The Department does not restrict access either to the pressroom or to the reports made available therein.

A *Florida Star* reporter-trainee sent to the pressroom copied the police report verbatim, including B. J. F.'s full name, on a blank duplicate of the Department's forms. A *Florida Star* reporter then prepared a one-paragraph article about the crime, derived entirely from the trainee's copy of the police report. The article included B. J. F.'s full name. It appeared in the "Robberies" subsection of the "Police Reports" section on October 29, 1983, one of 54 police blotter stories in that day's edition. \*\*\*

[B. J. F. filed suit against the Sheriff's Department and The *Florida Star*, alleging that these parties negligently violated § 794.03. The Department settled with B. J. F. for \$2,500. After a trial, a jury awarded B. J. F. \$75,000 in compensatory damages and \$25,000 in punitive damages against The *Florida Star*. An appellate court affirmed. The *Florida Star*'s First Amendment arguments during trial and on appeal were rejected.]

We \*\*\* now reverse.

The tension between the right which the First Amendment accords to a free press, on the one hand, and the protections which various statutes and common-law doctrines accord to personal privacy against the publication of truthful information, on the other, is a subject we have addressed several times in recent years. Our decisions in cases involving government attempts to sanction the accurate dissemination of information as invasive of privacy, have not, however, exhaustively considered this conflict. On the contrary, although our decisions have without exception upheld the press' right to publish, we have emphasized each time that we were resolving this conflict only as it arose in a discrete factual context. \*\*\*

The parties to this case frame their contentions in light of a trilogy of cases which have presented, in different contexts, the conflict between truthful reporting and state-protected privacy interests. In *Cox Broadcasting Corp. v. Cohn* (1975), we found unconstitutional a civil damages award entered against a television station for broadcasting the name of a rape-murder victim which the station had obtained from courthouse records. In *Oklahoma Publishing Co. v. Oklahoma County District Court* (1977), we found unconstitutional a state court's pretrial order enjoining the media from publishing the name or photograph of an 11-year-old boy in connection with a juvenile proceeding involving that child which reporters had attended. Finally, in *Smith v. Daily Mail Publishing Co.* (1979), we found unconstitutional the indictment of two newspapers for violating a state statute forbidding newspapers to publish, without written approval of the juvenile court, the name of any youth charged as a juvenile offender. The papers had learned about a shooting by monitoring a police band radio frequency and had obtained the name of the alleged juvenile assailant from witnesses, the police, and a local prosecutor.

\*\*\* We conclude that imposing damages on appellant for publishing B. J. F.'s name violates the First Amendment, although not for either of the reasons appellant urges. Despite the strong resemblance this case bears to *Cox Broadcasting*, that case cannot fairly be read as controlling here. The name of the rape victim in that case was obtained from courthouse records that were open to public inspection, a fact which Justice White's opinion for the Court repeatedly noted. Significantly, one of the reasons we gave in *Cox Broadcasting* for invalidating the challenged damages award was the important role the press plays in subjecting trials to public scrutiny and thereby helping guarantee their fairness. That role is not directly compromised where, as here, the information in question comes from a police report prepared and disseminated at a time at which not only had no adversarial criminal proceedings begun, but no suspect had been identified.

Nor need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment. Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily. \*\*\* Respecting the fact that press freedom and privacy rights are both "plainly rooted in the traditions and significant concerns of our society," we instead focused on the less sweeping issue "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records — more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection." We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case. \*\*\*

Our holding today is limited. We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability under § 794.03 to appellant under the facts of this case. The decision below is therefore

*Reversed.*

JUSTICE SCALIA, CONCURRING IN PART AND CONCURRING IN THE JUDGMENT [OMITTED]

JUSTICE WHITE, WITH WHOM THE CHIEF JUSTICE AND JUSTICE O'CONNOR JOIN, DISSENTING.

"Short of homicide, [rape] is the `ultimate violation of self.'" For B. J. F., however, the violation she suffered at a rapist's knifepoint marked only the beginning of her ordeal. A week later, while her assailant was still at large, an account of this assault — identifying by name B. J. F. as the victim — was published by The Florida Star. As a result, B. J. F. received harassing phone calls, required mental health counseling, was forced to move from her home, and was even

threatened with being raped again. Yet today, the Court holds that a jury award of \$75,000 to compensate B. J. F. for the harm she suffered due to the Star's negligence is at odds with the First Amendment. I do not accept this result. \*\*\*

At issue in this case is whether there is any information about people, which — thought true — may not be published in the press. By holding that only "a state interest of the highest order" permits the State to penalize the publication of truthful information, and by holding that protecting a rape victim's right to privacy is not among those state interests of the highest order, the Court accepts appellant's invitation to obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts. Even if the Court's opinion does not say as much today, such obliteration will follow inevitably from the Court's conclusion here. If the First Amendment prohibits wholly private persons (such as B. J. F.) from recovering for the publication of the fact that she was raped, I doubt that there remain any "private facts" which persons may assume will not be published in the newspapers or broadcast on television.

Of course, the right to privacy is not absolute. Even the article widely relied upon in cases vindicating privacy rights, Warren Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), recognized that this right inevitably conflicts with the public's right to know about matters of general concern — and that sometimes, the latter must trump the former. Resolving this conflict is a difficult matter, and I fault the Court not for attempting to strike an appropriate balance between the two, but rather, fault it for according too little weight to B. J. F.'s side of equation, and too much on the other. \*\*\*

Ironically, this Court, too, had occasion to consider this same balance just a few weeks ago, in *United States Department of Justice v. Reporters Committee for Freedom of Press* (1989). There, we were faced with a press request, under the Freedom of Information Act, for a "rap sheet" on a person accused of bribing a Congressman — presumably, a person whose privacy rights would be far less than B. J. F.'s. Yet this Court rejected the media's request for disclosure of the "rap sheet," \*\*\* [concluding] that disclosure of rap sheets "categorical[ly]" constitutes an "unwarranted" invasion of privacy. The same surely must be true — indeed, much more so — for the disclosure of a rape victim's name.

I do not suggest that the Court's decision today is a radical departure from a previously charted course. The Court's ruling has been foreshadowed. In *Time, Inc. v. Hill* (1967), we observed that — after a brief period early in this century where Brandeis' view was ascendant — the trend in "modern" jurisprudence has been to eclipse an individual's right to maintain private any truthful information that the press wished to publish. More recently, in *Cox Broadcasting*, we acknowledged the possibility that the First Amendment may prevent a State from ever subjecting the publication of truthful but private information to civil liability. Today, we hit the bottom of the slippery slope.

I would find a place to draw the line higher on the hillside: a spot high enough to protect B. J. F.'s desire for privacy and peace-of-mind in the wake of a horrible personal tragedy. There is no public interest in publishing the names, addresses, and phone numbers of persons who are the victims of crime — and no public interest in immunizing the press from liability in the rare cases where

a State's efforts to protect a victim's privacy have failed. Consequently, I respectfully dissent.

## *Miami Herald Publishing Co. v. Tornillo*

418 U.S. 241 (1974)

CHIEF JUSTICE BURGER DELIVERED THE OPINION OF THE [UNANIMOUS] COURT. BRENNAN, J., FILED A CONCURRING OPINION IN WHICH REHNQUIST, J., JOINED. WHITE, J., FILED A CONCURRING OPINION.

BURGER, C.J., FOR THE COURT.

The issue in this case is whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees of a free press.

### I

In the fall of 1972, appellee, Executive Director of the Classroom Teachers Association, apparently a teachers' collective-bargaining agent, was a candidate for the Florida House of Representatives. On September 20, 1972, and again on September 29, 1972, appellant printed editorials critical of appellee's candidacy. In response to these editorials appellee demanded that appellant print verbatim his replies, defending the role of the Classroom Teachers Association and the organization's accomplishments for the citizens of Dade County. Appellant declined to print the appellee's replies, and appellee brought suit in Circuit Court, Dade County, seeking declaratory and injunctive relief and actual and punitive damages in excess of \$5,000. The action was premised on Florida Statute §104.38 (1973), a "right of reply" statute which provides that if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges. The reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply, provided it does not take up more space than the charges. Failure to comply with the statute constitutes a first-degree misdemeanor.

Appellant sought a declaration that §104.38 was unconstitutional. After an emergency hearing requested by appellee, the Circuit Court denied injunctive relief because, absent special circumstances, no injunction could properly issue against the commission of a crime, and held that 104.38 was unconstitutional as an infringement on the freedom of the press under the First and Fourteenth Amendments to the Constitution. The Circuit Court concluded that dictating what a newspaper must print was no different from dictating what it must not print. The Circuit Judge viewed the statute's vagueness as serving "to restrict and stifle protected expression." Appellee's cause was dismissed with prejudice.

On direct appeal, the Florida Supreme Court reversed, holding that 104.38 did not violate constitutional guarantees. It held that free speech was enhanced and not abridged by the Florida right-of-reply statute, which in that court's view,

furthered the "broad societal interest in the free flow of information to the public." It also held that the statute is not impermissibly vague; the statute informs "those who are subject to it as to what conduct on their part will render them liable to its penalties." Civil remedies, including damages, were held to be available under this statute; the case was remanded to the trial court for further proceedings not inconsistent with the Florida Supreme Court's opinion.

We postponed consideration of the question of jurisdiction to the hearing of the case on the merits.

## II

[jurisdictional discussion omitted]

## III

### A

The challenged statute creates a right to reply to press criticism of a candidate for nomination or election. The statute was enacted in 1913, and this is only the second recorded case decided under its provisions.

Appellant contends the statute is void on its face because it purports to regulate the content of a newspaper in violation of the First Amendment. Alternatively it is urged that the statute is void for vagueness since no editor could know exactly what words would call the statute into operation. It is also contended that the statute fails to distinguish between critical comment which is and which is not defamatory.

### B

The appellee and supporting advocates of an enforceable right of access to the press vigorously argue that government has an obligation to ensure that a wide variety of views reach the public. The contentions of access proponents will be set out in some detail. It is urged that at the time the First Amendment to the Constitution was ratified in 1791 as part of our Bill of Rights the press was broadly representative of the people it was serving. While many of the newspapers were intensely partisan and narrow in their views, the press collectively presented a broad range of opinions to readers. Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers. A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.

Access advocates submit that although newspapers of the present are superficially similar to those of 1791 the press of today is in reality very different from that known in the early years of our national existence. In the past half century a communications revolution has seen the introduction of radio and television into our lives, the promise of a global community through the use of communications satellites, and the specter of a "wired" nation by means of an expanding cable television network with two-way capabilities. The printed press, it is said, has not escaped the effects of this revolution. Newspapers have become big business and there are far fewer of them to serve a larger literate population. Chains of newspapers, national newspapers,

national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events. Major metropolitan newspapers have collaborated to establish news services national in scope. Such national news organizations provide syndicated "interpretive reporting" as well as syndicated features and commentary, all of which can serve as part of the new school of "advocacy journalism."

The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretive analysis. The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues. The monopoly of the means of communication allows for little or no critical analysis of the media except in professional journals of very limited readership.

\*\*\*

The obvious solution, which was available to dissidents at an earlier time when entry into publishing was relatively inexpensive, today would be to have additional newspapers. But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible. It is urged that the claim of newspapers to be "surrogates for the public" carries with it a concomitant fiduciary obligation to account for that stewardship. From this premise it is reasoned that the only effective way to insure fairness and accuracy and to provide for some accountability is for government to take affirmative action. The First Amendment interest of the public in being informed is said to be in peril because the "marketplace of ideas" is today a monopoly controlled by the owners of the market.

Proponents of enforced access to the press take comfort from language in several of this Court's decisions which suggests that the First Amendment acts as a sword as well as a shield, that it imposes obligations on the owners of the press in addition to protecting the press from government regulation. \*\*\*

#### IV

However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the

express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years. \*\*\*

We see that \*\*\* the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which "reason" tells them should not be published" is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.

Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because "the statute in question here has not prevented the Miami Herald from saying anything it wished" begs the core question. Compelling editors or publishers to publish that which "reason" tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate," *New York Times Co. v. Sullivan* (1964). \*\*\*

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is *reversed*.

*It is so ordered.*

BRENNAN, J., WITH WHOM REHNQUIST, J., JOINS, CONCURRING.

I join the Court's opinion which, as I understand it, addresses only "right of reply" statutes and implies no view upon the constitutionality of "retraction" statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction. See generally Note, *Vindication of the Reputation of a Public Official*, 80 HARV. L. REV. 1730, 1739-1747 (1967).

WHITE, J., CONCURRING [OMITTED].

## Notes

1. How have the concerns raised in *B.J.F.* and *Tornillo* been altered by the change in media landscape in the "information age" of the internet?
2. Consider the First Amendment arguments against so-called "paparazzi" laws meant to limit members of the press from invading the privacy of celebrities.

For example, California Vehicle Code § 40008 entitled "Intent to capture image, recording or impression for a commercial purpose," passed in 2011, provides in part:

a) Notwithstanding any other provision of law, except as otherwise provided in subdivision (c) [providing for multiple penalties], any person who violates Section 21701[Interference with driver or mechanism] 21703 [Following too closely], or 23103[Reckless driving] with the intent to capture any type of visual image, sound recording, or other physical impression of another person for a commercial purpose, is guilty of a misdemeanor and not an infraction and shall be punished by imprisonment in a county jail for not more than six months and by a fine of not more than two thousand five hundred dollars (\$2,500).

In 2014, California Civil Code §1708.8 was amended to provide:

(a) A person is liable for physical invasion of privacy when the defendant knowingly enters onto the land of another person without permission or otherwise committed a trespass in order to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity and the invasion occurs in a manner that is offensive to a reasonable person.

(b) A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.

Do you think such laws would be upheld as constitutional?

## **Note: Taxation of the Press**

Taxing the press, especially as a means of regulation, restraint, and control of speech rather than the raising of revenue, has roots in English Acts, and was arguably disfavored by the framers of the First Amendment.

The general key in these cases is not that the press or media is subject to tax, but that this tax is somehow discriminatory or aimed at their speech.

The United States Supreme Court's most famous press-taxing case is *Grosjean v. American Press Co.*, 297 US 233 (1936), in which a unanimous Court held unconstitutional a Louisiana statute taxing at 2% of gross receipts all publications with a circulation of over 20,000 copies per week. While the Court discussed the history of taxing the press and waxed eloquent on press freedom - - - and some of this language is quoted in subsequent cases - - - the Court found the form of the tax "suspicious." What is not apparent from the published opinion, but is well-documented in the briefs and other discussions of the case, is that the tax was passed with the encouragement of Governor Huey Long, known as the "Kingfisher," and that the larger media outlets in the state who were being subject to the tax were opposed to the Governor.

In *Minneapolis Star & Tribune Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575 (1983), the Court held unconstitutional a "use tax" on the cost of paper and ink products consumed in the production of such a publication, exempting the first \$100,000 worth of paper and ink consumed in any calendar year. Although there was no indication of a bad motive as in *Grosjean*, Minnesota's singling out the press for special treatment, with a tax that was not structured similar to any other state tax, suggested that the goal of the tax is not unrelated to suppression of expression, and such goal is presumptively unconstitutional.

In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 22 (1987), the Court held unconstitutional a tax scheme that taxed general interest magazines, but exempted newspapers and religious, professional, trade, and sports journals. Again, there was no *Grosjean* bad motive, but the Court applied strict scrutiny finding there was content discrimination.

However, in *Leathers v. Medlock*, 499 U.S. 439 (1991), the Court upheld the Arkansas taxing scheme that exempted print media from sales tax but did not exempt cable television. The Court held that although cable television, which provides news, information, and entertainment to its subscribers, is engaged in "speech" and is part of the "press" in much of its operation, the fact that it is taxed differently from other media does not by itself raise First Amendment concerns. Here, the Court found it important that there was no evidence of censorious intent and there was

no discrimination based on content; discrimination based on speakers, without more, did not merit strict scrutiny.

## IV. Freedom of the Press and Tort Actions

The “constitutionalization” of defamation and other torts is often viewed as integral to not abridging freedom of the press. Consider how First Amendment doctrine and tort doctrine become intertwined.

### A. Defamation

#### *New York Times Co. v. Sullivan*

376 U.S. 254 (1964)

BRENNAN J., FOR THE UNANIMOUS COURT. BLACK, J., ISSUED A CONCURRING OPINION JOINED BY DOUGLAS, J. GOLDBERG, J., ISSUED A CONCURRING OPINION JOINED BY DOUGLAS, J.

MR. JUSTICE BRENNAN DELIVERED THE OPINION OF THE COURT.

We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.

Respondent L. B. Sullivan is one of the three elected Commissioners of the City of Montgomery, Alabama. He testified that he was "Commissioner of Public Affairs and the duties are supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales." He brought this civil libel action against the four individual petitioners, who are Negroes and Alabama clergymen, and against petitioner the New York Times Company, a New York corporation which publishes the New York Times, a daily newspaper. A jury in the Circuit Court of Montgomery County awarded him damages of \$500,000, the full amount claimed, against all the petitioners, and the Supreme Court of Alabama affirmed.

Respondent's complaint alleged that he had been libeled by statements in a full-page advertisement that was carried in the New York Times on March 29, 1960. Entitled "Heed Their Rising Voices," the advertisement began by stating that "As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights." It went on to charge that "in their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those

who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . ." Succeeding paragraphs purported to illustrate the "wave of terror" by describing certain alleged events. The text concluded with an appeal for funds for three purposes: support of the student movement, "the struggle for the right-to-vote," and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery.

The text appeared over the names of 64 persons, many widely known for their activities in public affairs, religion, trade unions, and the performing arts. Below these names, and under a line reading "We in the south who are struggling daily for dignity and freedom warmly endorse this appeal," appeared the names of the four individual petitioners and of 16 other persons, all but two of whom were identified as clergymen in various Southern cities. The advertisement was signed at the bottom of the page by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," and the officers of the Committee were listed.

Of the 10 paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel. They read as follows:

Third paragraph:

"In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission."

Sixth paragraph:

"Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times - for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury' - a felony under which they could imprison him for ten years. . . ."

Although neither of these statements mentions respondent by name, he contended that the word "police" in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of "ringing" the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission. 2 As to the sixth paragraph, he contended that since arrests are ordinarily made by the police, the statement "They have arrested [Dr. King] seven times" would be read as referring to him; he further contended that the "They" who did the arresting would be equated with the "They" who committed the other described acts and with the "Southern violators." Thus, he argued, the paragraph would

be read as accusing the Montgomery police, and hence him, of answering Dr. King's protests with "intimidation and violence," bombing his home, assaulting his person, and charging him with perjury. Respondent and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.

It is uncontroverted that some of the statements contained in the paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro students staged a demonstration on the State Capitol steps, they sang the National Anthem and not "My Country, 'Tis of Thee." Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time "ring" the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.

On the premise that the charges in the sixth paragraph could be read as referring to him, respondent was allowed to prove that he had not participated in the events described. Although Dr. King's home had in fact been bombed twice when his wife and child were there, both of these occasions antedated respondent's tenure as Commissioner, and the police were not only not implicated in the bombings, but had made every effort to apprehend those who were. Three of Dr. King's four arrests took place before respondent became Commissioner. Although Dr. King had in fact been indicted (he was subsequently acquitted) on two counts of perjury, each of which carried a possible five-year sentence, respondent had nothing to do with procuring the indictment.

Respondent made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel. \*\*\* The trial judge submitted the case to the jury under instructions that the statements in the advertisement were "libelous per se" and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made "of and concerning" respondent. The jury was instructed that, because the statements were libelous per se, "the law . . . implies legal injury from the bare fact of publication itself," "falsity and malice are presumed," "general damages need not be alleged or proved but are presumed," and "punitive damages may be awarded by the jury even though the amount of actual

damages is neither found nor shown." An award of punitive damages - as distinguished from "general" damages, which are compensatory in nature - apparently requires proof of actual malice under Alabama law, and the judge charged that "mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages." He refused to charge, however, that the jury must be "convinced" of malice, in the sense of "actual intent" to harm or "gross negligence and recklessness," to make such an award, and he also refused to require that a verdict for respondent differentiate between compensatory and punitive damages. The judge rejected petitioners' contention that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments.

[The jury found for the plaintiff and the Supreme Court of Alabama affirmed]. Because of the importance of the constitutional issues involved, we granted the separate petitions for certiorari of the individual petitioners and of the Times. We reverse the judgment. We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct. We further hold that under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for respondent.

[The Court first held that there was state action and that the publication was not a "commercial" advertisement unprotected by the First Amendment because it "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."]

Under Alabama law as applied in this case, a publication is "libelous per se" if the words "tend to injure a person . . . in his reputation" or to "bring [him] into public contempt." \*\*\* Once "libel per se" has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. \*\*\*

The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the first and Fourteenth Amendments. \*\*\*In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. \*\*\*

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth - whether administered by judges, juries, or administrative officials - and especially one that puts the burden of proving truth on the speaker. The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." As Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." \*\*\*

[E]rroneous statement is inevitable in free debate, and \*\*\*must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive."

Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. This is true even though the utterance contains "half-truths" and "misinformation." Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. If judges are to be treated as "men of fortitude, able to thrive in a hardy climate," surely the same must be true of other government officials, such as elected city commissioners. Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798 which first crystallized a national awareness of the central meaning of the First Amendment. That statute made it a crime, punishable by a \$5,000 fine and five years in prison, "if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress. . . , or the President . . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite

against them, or either or any of them, the hatred of the good people of the United States." The Act allowed the defendant the defense of truth, and provided that the jury were to be judges both of the law and the facts. Despite these qualifications, the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison. \*\*\*

Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. \*\*\* [There is] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment. \*\*\* There is no force in respondent's argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress and not to the States. \*\*\* [T]his distinction was eliminated with the adoption of the Fourteenth Amendment and the application to the States of the First Amendment's restrictions.

What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. \*\*\* The judgment awarded in this case - without the need for any proof of actual pecuniary loss - was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication. Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."

The state rule of law is not saved by its allowance of the defense of truth. \*\*\*

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions - and to do so on pain of libel judgments virtually unlimited in amount - leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" - that is, with knowledge that it was false or with reckless disregard of whether it was false or not. \*\*\*

Such a privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen. \*\*\* Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer. \*\*\* We conclude that such a privilege is required by the First and Fourteenth Amendments.

We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable. While Alabama law apparently requires proof of actual malice for an award of punitive damages, where general damages are concerned malice is "presumed." Such a presumption is inconsistent with the federal rule.\*\*\* Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned. Because of this uncertainty, the judgment must be reversed and the case remanded.

Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." We must "make an independent examination of the whole record," so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. \*\*\* [T]here is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times "knew" the advertisement was false, since the state of mind required for actual malice would have to be brought

home to the persons in the Times' organization having responsibility for the publication of the advertisement. With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, known to them as a responsible individual, certifying that the use of the names was authorized. There was testimony that the persons handling the advertisement saw nothing in it that would render it unacceptable under the Times' policy of rejecting advertisements containing "attacks of a personal character"; their failure to reject it on this ground was not unreasonable. We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.

We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" respondent. \*\*\* There was no reference to respondent in the advertisement, either by name or official position. A number of the allegedly libelous statements - the charges that the dining hall was padlocked and that Dr. King's home was bombed, his person assaulted, and a perjury prosecution instituted against him - did not even concern the police; despite the ingenuity of the arguments which would attach this significance to the word "They," it is plain that these statements could not reasonably be read as accusing respondent of personal involvement in the acts in question. The statements upon which respondent principally relies as referring to him are the two allegations that did concern the police or police functions: that "truckloads of police . . . ringed the Alabama State College Campus" after the demonstration on the State Capitol steps, and that Dr. King had been "arrested . . . seven times." These statements were false only in that the police had been "deployed near" the campus but had not actually "ringed" it and had not gone there in connection with the State Capitol demonstration, and in that Dr. King had been arrested only four times. The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems, but we need not consider them here. Although the statements may be taken as referring to the police, they did not on their face make even an oblique reference to respondent as an individual. Support for the asserted reference must, therefore, be sought in the testimony of respondent's witnesses. But none of them suggested any basis for the belief that respondent himself was attacked in the advertisement beyond the bare fact that he was in overall charge of the Police Department and thus bore official responsibility for police conduct; to the extent that some of the witnesses thought respondent to have been charged with ordering or approving the conduct or otherwise being personally involved in it, they based this notion not on any statements in the advertisement, and not on any evidence that he had in fact been so involved, but solely on the unsupported assumption that, because of his official position, he must have been. \*\*\* Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression. We hold that such a proposition may not constitutionally be utilized

to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. Since it was relied on exclusively here, and there was no other evidence to connect the statements with respondent, the evidence was constitutionally insufficient to support a finding that the statements referred to respondent.

The judgment of the Supreme Court of Alabama is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

MR. JUSTICE BLACK, WITH WHOM MR. JUSTICE DOUGLAS JOINS, CONCURRING.

I concur in reversing this half-million-dollar judgment against the New York Times Company and the four individual defendants. In reversing the Court holds that "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely "delimit" a State's power to award damages to "public officials against critics of their official conduct" but completely prohibit a State from exercising such a power. The Court goes on to hold that a State can subject such critics to damages if "actual malice" can be proved against them. "Malice," even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment. Unlike the Court, therefore, I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials. \*\*\*

We would, I think, more faithfully interpret the First Amendment by holding that at the very least it leaves the people and the press free to criticize officials and discuss public affairs with impunity. This Nation of ours elects many of its important officials; so do the States, the municipalities, the counties, and even many precincts. These officials are responsible to the people for the way they perform their duties. While our Court has held that some kinds of speech and writings, such as "obscenity," *Roth v. United States* (1957) and "fighting words," *Chaplinsky v. New Hampshire* (1942) are not expression within the protection of the First Amendment, freedom to discuss public affairs and public officials is unquestionably, as the Court today holds, the kind of speech the First Amendment was primarily designed to keep within the area of free discussion. To punish the exercise of this right to discuss public affairs or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed. This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials. "For a

representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it." An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment. I regret that the Court has stopped short of this holding indispensable to preserve our free press from destruction.

MR. JUSTICE GOLDBERG, WITH WHOM MR. JUSTICE DOUGLAS JOINS, CONCURRING.

The Court today announces a constitutional standard which prohibits "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The Court thus rules that the Constitution gives citizens and newspapers a "conditional privilege" immunizing nonmalicious misstatements of fact regarding the official conduct of a government officer. The impressive array of history and precedent marshaled by the Court, however, confirms my belief that the Constitution affords greater protection than that provided by the Court's standard to citizen and press in exercising the right of public criticism.

In my view, the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses.\*\*\*

### *Gertz v. Robert Welch, Inc.*

418 U.S. 323 (1974)

POWELL, J., DELIVERED THE OPINION OF THE COURT, IN WHICH WHITE, MARSHALL, BLACKMUN, AND REHNQUIST, JJ., JOINED. BLACKMUN, J., FILED A CONCURRING OPINION. BURGER, C.J., DOUGLAS, J., BRENNAN, J., AND WHITE, J., FILED DISSENTING OPINIONS.

JUSTICE POWELL DELIVERED THE OPINION OF THE COURT.

This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort. We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen.

In 1968 a Chicago policeman named Nuccio shot and killed a youth named Nelson. The state authorities prosecuted Nuccio for the homicide and ultimately obtained a conviction for murder in the second degree. The Nelson family retained petitioner Elmer Gertz, a reputable attorney, to represent them in civil litigation against Nuccio.

Respondent publishes *American Opinion*, a monthly outlet for the views of the John Birch Society. Early in the 1960's the magazine began to warn of a nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a Communist dictatorship. As part of the continuing effort to alert the public to this assumed danger, the managing editor of *American Opinion* commissioned an article on the murder trial of Officer Nuccio. For this purpose he engaged a regular contributor to the magazine. In March 1969 respondent published the resulting article under the title "FRAME-UP: Richard Nuccio and The War On Police." The article purports to demonstrate that the testimony against Nuccio at his criminal trial was false and that his prosecution was part of the Communist campaign against the police.

In his capacity as counsel for the Nelson family in the civil litigation, petitioner attended the coroner's inquest into the boy's death and initiated actions for damages, but he neither discussed Officer Nuccio with the press nor played any part in the criminal proceeding. Notwithstanding petitioner's remote connection with the prosecution of Nuccio, respondent's magazine portrayed him as an architect of the "frame-up." According to the article, the police file on petitioner took "a big, Irish cop to lift." The article stated that petitioner had been an official of the "Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government." It labeled Gertz a "Leninist" and a "Communist-fronter." It also stated that Gertz had been an officer of the National Lawyers Guild, described as a Communist organization that "probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democratic Convention."

These statements contained serious inaccuracies. The implication that petitioner had a criminal record was false. Petitioner had been a member and officer of the National Lawyers Guild some 15 years earlier, but there was no evidence that he or that organization had taken any part in planning the 1968 demonstrations in Chicago. There was also no basis for the charge that petitioner was a "Leninist" or a "Communist-fronter." And he had never been a member of the "Marxist League for Industrial Democracy" or the "Intercollegiate Socialist Society."

The managing editor of *American Opinion* made no effort to verify or substantiate the charges against petitioner. Instead, he appended an editorial introduction stating that the author had "conducted extensive research into the Richard Nuccio Case." And he included in the article a photograph of petitioner and wrote the caption that appeared under it: "Elmer Gertz of Red Guild harrasses Nuccio." Respondent placed the issue of *American Opinion*

containing the article on sale at newsstands throughout the country and distributed reprints of the article on the streets of Chicago.

Petitioner filed a diversity action for libel in the United States District Court for the Northern District of Illinois. He claimed that the falsehoods published by respondent injured his reputation as a lawyer and a citizen. \*\*\* After answering the complaint, respondent filed a pretrial motion for summary judgment, claiming a constitutional privilege against liability for defamation. It asserted that petitioner was a public official or a public figure and that the article concerned an issue of public interest and concern. For these reasons, respondent argued, it was entitled to invoke the privilege enunciated in *New York Times Co. v. Sullivan* (1964). Under this rule respondent would escape liability unless petitioner could prove publication of defamatory falsehood "with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Respondent claimed that petitioner could not make such a showing and submitted a supporting affidavit by the magazine's managing editor. The editor denied any knowledge of the falsity of the statements concerning petitioner and stated that he had relied on the author's reputation and on his prior experience with the accuracy and authenticity of the author's contributions to *American Opinion*.

The District Court denied respondent's motion for summary judgment \*\*\*. The court did not dispute respondent's claim to the protection of the *New York Times* standard. \*\*\* It thought that respondent's claim to the protection of the constitutional privilege depended on the contention that petitioner was either a public official under the *New York Times* decision \*\*\* apparently discounting the argument that a privilege would arise from the presence of a public issue. After all the evidence had been presented but before submission of the case to the jury, the court ruled in effect that petitioner was neither a public official nor a public figure. \*\*\* The jury awarded \$50,000 to petitioner.

Following the jury verdict and on further reflection, the District Court concluded that the *New York Times* standard should govern this case even though petitioner was not a public official or public figure. It accepted respondent's contention that that privilege protected discussion of any public issue without regard to the status of a person defamed therein. Accordingly, the court entered judgment for respondent notwithstanding the jury's verdict. \*\*\*

Petitioner appealed to contest the applicability of the *New York Times* standard to this case. Although the Court of Appeals for the Seventh Circuit doubted the correctness of the District Court's determination that petitioner was not a public figure, it did not overturn that finding. It agreed with the District Court that respondent could assert the constitutional privilege because the article concerned a matter of public interest \*\*\* After reviewing the record, the Court of Appeals endorsed the District Court's conclusion that petitioner had failed to show by clear and convincing evidence that respondent had acted with "actual malice" as defined by *New York Times*. There was no evidence that the managing editor of *American Opinion* knew of the falsity of the accusations made in the article. In fact, he knew nothing about petitioner except what he

learned from the article. The court correctly noted that mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth. \*\*\* The Court of Appeals therefore affirmed. For the reasons stated below, we reverse.

## II

The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements. \*\*\*

## III

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co. v. Sullivan*. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire* (1942).

Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. As James Madison pointed out in the Report on the Virginia Resolutions of 1798: "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION OF 1787, p. 571 (1876). And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties. As the Court stated in *New York Times Co. v. Sullivan*: "Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred." The First Amendment requires that we protect some falsehood in order to protect speech that matters.

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet

absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. \*\*\*

Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. As Mr. Justice Harlan stated, "some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy." *Curtis Publishing Co. v. Butts*. In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise. *NAACP v. Button* (1963). To that end this Court has extended a measure of strategic protection to defamatory falsehood.

The *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of a public person. Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test. Despite this substantial abridgment of the state law right to compensation for wrongful hurt to one's reputation, the Court has concluded that the protection of the *New York Times* privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures. We think that these decisions are correct, but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity from liability. Rather, we believe that the *New York Times* rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons. For the reasons stated below, we conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.

Theoretically, of course, the balance between the needs of the press and the individual's claim to compensation for wrongful injury might be struck on a case-by-case basis. \*\*\* But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of

general application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.

With that caveat we have no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim of defamation is self-help - using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties. As the Court pointed out in *Garrison v. Louisiana*, the public's interest extends to "anything which might touch on an official's fitness for office . . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character."

Those classed as public figures stand in a similar position. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an "influential role in ordering society." He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to

injury than public officials and public figures; they are also more deserving of recovery.

For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual. \*\*\* Nor does the Constitution require us to draw so thin a line between the drastic alternatives of the New York Times privilege and the common law of strict liability for defamatory error. The "public or general interest" test for determining the applicability of the New York Times standard to private defamation actions inadequately serves both of the competing values at stake. On the one hand, a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of New York Times. This is true despite the factors that distinguish the state interest in compensating private individuals from the analogous interest involved in the context of public persons. On the other hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions. And liability may far exceed compensation for any actual injury to the plaintiff, for the jury may be permitted to presume damages without proof of loss and even to award punitive damages.

We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. 10 This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. At least this conclusion obtains where, as here, the substance of the defamatory statement "makes substantial danger to reputation apparent." This phrase places in perspective the conclusion we announce today. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. Such a case is not now before us, and we intimate no view as to its proper resolution.

IV  
[omitted]  
V

Notwithstanding our refusal to extend the *New York Times* privilege to defamation of private individuals, respondent contends that we should affirm the judgment below on the ground that petitioner is either a public official or a public figure. There is little basis for the former assertion. Several years prior to the present incident, petitioner had served briefly on housing committees appointed by the mayor of Chicago, but at the time of publication he had never

held any remunerative governmental position. Respondent admits this but argues that petitioner's appearance at the coroner's inquest rendered him a "de facto public official." Our cases recognize no such concept. Respondent's suggestion would sweep all lawyers under the New York Times rule as officers of the court and distort the plain meaning of the "public official" category beyond all recognition. We decline to follow it.

Respondent's characterization of petitioner as a public figure raises a different question. That designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Petitioner has long been active in community and professional affairs. He has served as an officer of local civic groups and of various professional organizations, and he has published several books and articles on legal subjects. Although petitioner was consequently well known in some circles, he had achieved no general fame or notoriety in the community. None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical of the local population. We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

In this context it is plain that petitioner was not a public figure. He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation.

We therefore conclude that the *New York Times* standard is inapplicable to this case and that the trial court erred in entering judgment for respondent. Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury, a new trial is necessary. We reverse and remand for further proceedings in accord with this opinion.

*It is so ordered.*

DOUGLAS, J., DISSENTING.

The Court describes this case as a return to the struggle of "defin[ing] the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." It is indeed a struggle, once described by Mr. Justice Black as "the same quagmire" in which the Court "is now helplessly struggling in the field of obscenity." I would suggest that the struggle is a quite hopeless one, for, in light of the command of the First Amendment, no "accommodation" of its freedoms can be "proper" except those made by the Framers themselves.

Unlike the right of privacy which, by the terms of the Fourth Amendment, must be accommodated with reasonable searches and seizures and warrants issued by magistrates, the rights of free speech and of a free press were protected by the Framers in verbiage whose proscription seems clear. I have stated before my view that the First Amendment would bar Congress from passing any libel law. This was the view held by Thomas Jefferson and it is one Congress has never challenged through enactment of a civil libel statute. The sole congressional attempt at this variety of First Amendment muzzle was in the Sedition Act of 1798 - a criminal libel act never tested in this Court and one which expired by its terms three years after enactment. As President, Thomas Jefferson pardoned those who were convicted under the Act, and fines levied in its prosecution were repaid by Act of Congress. The general consensus was that the Act constituted a regrettable legislative exercise plainly in violation of the First Amendment. \*\*\*

There can be no doubt that a State impinges upon free and open discussion when it sanctions the imposition of damages for such discussion through its civil libel laws. Discussion of public affairs is often marked by highly charged emotions, and jurymen, not unlike us all, are subject to those emotions. It is indeed this very type of speech which is the reason for the First Amendment since speech which arouses little emotion is little in need of protection. The vehicle for publication in this case was the American Opinion, a most controversial periodical which disseminates the views of the John Birch Society, an organization which many deem to be quite offensive. The subject matter involved "Communist plots," "conspiracies against law enforcement agencies," and the killing of a private citizen by the police. With any such amalgam of controversial elements pressing upon the jury, a jury determination, unpredictable in the most neutral circumstances, becomes for those who venture to discuss heated issues, a virtual roll of the dice separating them from liability for often massive claims of damage.

It is only the hardy publisher who will engage in discussion in the face of such risk, and the Court's preoccupation with proliferating standards in the area of libel increases the risks. It matters little whether the standard be articulated as "malice" or "reckless disregard of the truth" or "negligence," for jury determinations by any of those criteria are virtually unreviewable. This Court, in its continuing delineation of variegated mantles of First Amendment protection, is, like the potential publisher, left with only speculation on how jury findings were influenced by the effect the subject matter of the publication

had upon the minds and viscera of the jury. The standard announced today leaves the States free to "define for themselves the appropriate standard of liability for a publisher or broadcaster" in the circumstances of this case. This of course leaves the simple negligence standard as an option, with the jury free to impose damages upon a finding that the publisher failed to act as "a reasonable man." With such continued erosion of First Amendment protection, I fear that it may well be the reasonable man who refrains from speaking.

Since in my view the First and Fourteenth Amendments prohibit the imposition of damages upon respondent for this discussion of public affairs, I would affirm the judgment below.

[THE CONCURRING OPINION OF BLACKMUN, J., AND THE SEPARATE DISSENTING OPINIONS OF BURGER, C.J., BRENNAN, AND WHITE ARE OMITTED].

## Notes

1. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), the Court refused to extend *Gertz* to a nonmedia defendant in a matter not of "public concern." The facts, as explained in the Court's plurality opinion, authored by Justice Powell, and joined by Justices Rehnquist and O'Connor were these:

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about businesses. All the information is confidential; under the terms of the subscription agreement the subscribers may not reveal it to anyone else. On July 26, 1976, petitioner sent a report to five subscribers indicating that respondent, a construction contractor, had filed a voluntary petition for bankruptcy. This report was false and grossly misrepresented respondent's assets and liabilities. That same day, while discussing the possibility of future financing with its bank, respondent's president was told that the bank had received the defamatory report. He immediately called petitioner's regional office, explained the error, and asked for a correction. In addition, he requested the names of the firms that had received the false report in order to assure them that the company was solvent. Petitioner promised to look into the matter but refused to divulge the names of those who had received the report.

After determining that its report was indeed false, petitioner issued a corrective notice on or about August 3, 1976, to the five subscribers who had received the initial report. The notice stated that one of respondent's former employees, not respondent itself, had filed for bankruptcy and that respondent "continued in business as usual." Respondent told petitioner that it was dissatisfied with the notice, and it again asked for a list of subscribers who had seen the initial report. Again petitioner refused to divulge their names.

Respondent then brought this defamation action in Vermont state court. It alleged that the false report had injured its reputation and sought both compensatory and punitive damages. The trial established that the error in petitioner's report had been caused when one of its employees, a 17-year-old

high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed to respondent a bankruptcy petition filed by one of respondent's former employees. Although petitioner's representative testified that it was routine practice to check the accuracy of such reports with the businesses themselves, it did not try to verify the information about respondent before reporting it.

The Court held that “actual malice,” the standard derived from *New York Times v. Sullivan*, was not applicable and concluded that damages - - - even presumed damages or punitive damages - - - were permissible. It declined to “constitutionalize the entire common law of libel.” (*Id.* at 761 n.7). Thus, one might say that *Dun & Bradstreet* marks the limit to the Court’s First Amendment shaping of defamation.

Moreover, *Dun & Bradstreet* might be most important for what it did not decide. Argued twice, it provided an opportunity for the Court to revisit both *New York Times* and *Gertz*, as some Justices reportedly were wont to do. See Lee Levine & Stephen Wermeil, *The Landmark That Wasn't: A First Amendment Play in Five Acts*, 88 WASH. L. REV. 1 (2013). As Levine and Wermeil noted as the fiftieth anniversary of *New York Times v. Sullivan* was approaching, and as remains true, the Court has not decided another defamation case since *Dun & Bradstreet*. However, the Court certainly has considered similar issues, such as false statements in *United States v. Alvarez* (2012), we which we previously covered, and intentional infliction of emotional distress in *Snyder v. Phelps* (2011), which we will consider in a subsequent chapter. Neither of these cases involved the press, but both rely heavily on defamation precedent.

2. What about bloggers who are sued for defamation? In *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284 (9th Cir.) *cert. denied*, 134 S. Ct. 2680 (2014), the Ninth Circuit agreed with other circuits that

The protections of the First Amendment do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others' writings, or tried to get both sides of a story. As the Supreme Court has accurately warned, a First Amendment distinction between the institutional press and other speakers is unworkable: “With the advent of the Internet and the decline of print and broadcast media ... the line between the media and others who wish to comment on political and social issues becomes far more blurred.” *Citizens United* (2010) [Chapter 8]. In defamation cases, the public-figure status of a plaintiff and the public importance of the statement at issue—to the identity of the speaker—provide the First Amendment touchstones.

*Id.* at 1291. Yet the facts of *Obsidian* might be troubling to some:

Kevin Padrick is a principal of Obsidian Finance Group, LLC (Obsidian), a firm that provides advice to financially distressed businesses. In December 2008, Summit Accommodators, Inc. (Summit), retained Obsidian in connection with a contemplated bankruptcy. After Summit filed for reorganization, the bankruptcy court appointed Padrick as the Chapter 11 trustee. Because Summit had

misappropriated funds from clients, Padrick's principal task was to marshal the firm's assets for the benefit of those clients.

After Padrick's appointment, Crystal Cox published blog posts on several websites that she created, accusing Padrick and Obsidian of fraud, corruption, money-laundering, and other illegal activities in connection with the Summit bankruptcy. Cox apparently has a history of making similar allegations and seeking payoffs in exchange for retraction. See David Carr, *When Truth Survives Free Speech*, N.Y. Times, Dec. 11, 2011, at B1. Padrick and Obsidian sent Cox a cease-and-desist letter, but she continued posting allegations. This defamation suit ensued.

*Id.* at 1287. Do you agree that the *Gertz* standard should apply?

## B. Other Torts

### *Time, Inc. v. Hill*

385 U.S. 374 (1967)

BRENNAN DELIVERED THE OPINION OF THE COURT. BLACK, J., FILED A CONCURRING OPINION IN WHICH DOUGLAS, J., JOINED. DOUGLAS, J., FILED A CONCURRING OPINION. HARLAN, J., FILED AN OPINION CONCURRING IN PART AND DISSENTING IN PART. FORTAS, J., FILED A DISSENTING OPINION IN WHICH THE CHIEF JUSTICE [WARREN] AND CLARK JOINED.

JUSTICE BRENNAN DELIVERED THE OPINION OF THE COURT.

The question in this case is whether appellant, publisher of *Life Magazine*, was denied constitutional protections of speech and press by the application by the New York courts of 50-51 of the New York Civil Rights Law [fn1] to award appellee damages on allegations that Life falsely reported that a new play portrayed an experience suffered by appellee and his family.

[fn 1: The complete text of the New York Civil Rights Law 50-51 is as follows:

" 50. Right of privacy

"A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."

" 51. Action for injunction and for damages

"Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment,

unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith." ]

The article appeared in *Life* in February 1955. It was entitled "True Crime Inspires Tense Play," with the subtitle, "The ordeal of a family trapped by convicts gives Broadway a new thriller, 'The Desperate Hours.'" The text of the article reads as follows:

"Three years ago Americans all over the country read about the desperate ordeal of the James Hill family, who were held prisoners in their home outside Philadelphia by three escaped convicts. Later they read about it in Joseph Hayes's novel, *The Desperate Hours*, inspired by the family's experience. Now they can see the story re-enacted in Hayes's Broadway play based on the book, and next year will see it in his movie, which has been filmed but is being held up until the play has a chance to pay off.

"The play, directed by Robert Montgomery and expertly acted, is a heart-stopping account of how a family rose to heroism in a crisis. LIFE photographed the play during its Philadelphia tryout, transported some of the actors to the actual house where the Hills were besieged. On the next page scenes from the play are re-enacted on the site of the crime."

The pictures on the ensuing two pages included an enactment of the son being "roughed up" by one of the convicts, entitled "brutish convict," a picture of the daughter biting the hand of a convict to make him drop a gun, entitled "daring daughter," and one of the father throwing his gun through the door after a "brave try" to save his family is foiled.

The James Hill referred to in the article is the appellee. He and his wife and five children involuntarily became the subjects of a front-page news story after being held hostage by three escaped convicts in their suburban, Whitemarsh, Pennsylvania, home for 19 hours on September 11-12, 1952. The family was released unharmed. In an interview with newsmen after the convicts departed, appellee stressed that the convicts had treated the family courteously, had not molested them, and had not been at all violent. The convicts were thereafter apprehended in a widely publicized encounter with the police which resulted in the killing of two of the convicts. Shortly thereafter the family moved to Connecticut. The appellee discouraged all efforts to keep them in the public spotlight through magazine articles or appearances on television.

In the spring of 1953, Joseph Hayes' novel, *The Desperate Hours*, was published. The story depicted the experience of a family of four held hostage by three escaped convicts in the family's suburban home. But, unlike Hill's experience, the family of the story suffer violence at the hands of the convicts; the father and son are beaten and the daughter subjected to a verbal sexual insult.

The book was made into a play, also entitled *The Desperate Hours*, and it is Life's article about the play which is the subject of appellee's action. The complaint sought damages under [the New York statute] on allegations that the *Life* article was intended to, and did, give the impression that the play mirrored the Hill family's experience, which, to the knowledge of defendant ". . . was false and untrue." Appellant's defense was that the article was "a subject of legitimate news interest," "a subject of general interest and of value and concern to the public" at the time of publication, and that it was "published in good faith without any malice whatsoever . . . ." A motion to dismiss the complaint for substantially these reasons was made at the close of the case and was denied by the trial judge on the ground that the proofs presented a jury question as to the truth of the article.

The jury awarded appellee \$50,000 compensatory and \$25,000 punitive damages. On appeal the Appellate Division of the Supreme Court ordered a new trial as to damages but sustained the jury verdict of liability. \*\*\*

At the new trial on damages, a jury was waived and the court awarded \$30,000 compensatory damages without punitive damages. The New York Court of Appeals affirmed the Appellate Division "on the majority and concurring opinions at the Appellate Division," two judges dissenting. We noted probable jurisdiction of the appeal to consider the important constitutional questions of freedom of speech and press involved. After argument last Term, the case was restored to the docket for reargument. We reverse and remand the case to the Court of Appeals for further proceedings not inconsistent with this opinion.

#### I.

\*\*\* The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." *Bridges v. California* (1941). We have no doubt that the subject of the *Life* article, the opening of a new play linked to an actual incident, is a matter of public interest. \*\*\* Erroneous statement is no less inevitable in such a case than in the case of comment upon public affairs, and in both, if innocent or merely negligent, ". . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'. . . ." *New York Times Co. v. Sullivan* (1964). As James Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." Elliot's *DEBATES ON THE FEDERAL CONSTITUTION* 571 (1876 ed.). We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with

the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to non-defamatory matter. Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.

In this context, sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees. Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society. Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to "steer . . . wider of the unlawful zone," *New York Times Co. v. Sullivan* and thus "create the danger that the legitimate utterance will be penalized."

But the constitutional guarantees can tolerate sanctions against calculated falsehood without significant impairment of their essential function. We held in *New York Times* that calculated falsehood enjoyed no immunity in the case of alleged defamation of a public official concerning his official conduct. Similarly, calculated falsehood should enjoy no immunity in the situation here presented us. \*\*\*

We find applicable here the standard of knowing or reckless falsehood, not through blind application of *New York Times Co. v. Sullivan*, relating solely to libel actions by public officials, but only upon consideration of the factors which arise in the particular context of the application of the New York statute in cases involving private individuals. This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the First Amendment principles pronounced in *New York Times* guide our conclusion, we reach that conclusion only by applying these principles in this discrete context. It therefore serves no purpose to distinguish the facts here from those in *New York Times*. Were this a libel action, the distinction which has been suggested between the relative opportunities of the public official and the private individual to rebut defamatory charges might be germane. And the additional state interest in the protection of the individual against damage to his reputation would be involved. Moreover, a different test might be required in a statutory action by a public official, as opposed to a libel action by a public official or a statutory action by a private individual. Different considerations might arise concerning the degree of "waiver" of the protection the State might afford. But the question whether the same standard should be applicable both to persons voluntarily and involuntarily thrust into the public limelight is not here before us.

## II.

Turning to the facts of the present case, the proofs reasonably would support either a jury finding of innocent or merely negligent misstatement by Life, or a

finding that Life portrayed the play as a re-enactment of the Hill family's experience reckless of the truth or with actual knowledge that the portrayal was false. \*\*\*

The judgment of the Court of Appeals is set aside and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

[CONCURRING AND DISSENTING OPINIONS OMITTED].

## ***Hustler Magazine v. Falwell***

485 U.S. 46 (1988)

REHNQUIST, C.J., DELIVERED THE OPINION OF THE COURT, IN WHICH BRENNAN, MARSHALL, BLACKMUN, STEVENS, O'CONNOR, AND SCALIA, JJ., JOINED. WHITE, J., FILED AN OPINION CONCURRING IN THE JUDGMENT. KENNEDY, J., TOOK NO PART IN THE CONSIDERATION OR DECISION OF THE CASE.

CHIEF JUSTICE REHNQUIST DELIVERED THE OPINION OF THE COURT.

Petitioner Hustler Magazine, Inc., is a magazine of nationwide circulation. Respondent Jerry Falwell, a nationally known minister who has been active as a commentator on politics and public affairs, sued petitioner and its publisher, petitioner Larry Flynt, to recover damages for invasion of privacy, libel, and intentional infliction of emotional distress. The District Court directed a verdict against respondent on the privacy claim, and submitted the other two claims to a jury. The jury found for petitioners on the defamation claim, but found for respondent on the claim for intentional infliction of emotional distress and awarded damages. We now consider whether this award is consistent with the First and Fourteenth Amendments of the United States Constitution.

The inside front cover of the November 1983 issue of Hustler Magazine featured a "parody" of an advertisement for Campari Liqueur that contained the name and picture of respondent and was entitled "Jerry Falwell talks about his first time." This parody was modeled after actual Campari ads that included interviews with various celebrities about their "first times." Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of "first times." Copying the form and layout of these Campari ads, Hustler's editors chose respondent as the featured celebrity and drafted an alleged "interview" with him in which he states that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. The Hustler parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk. In small print at the bottom of the page, the ad contains the disclaimer, "ad parody - not to be taken seriously." The magazine's table of contents also lists the ad as "Fiction; Ad and Personality Parody."

Soon after the November issue of *Hustler* became available to the public, respondent brought this diversity action in the United States District Court for the Western District of Virginia against *Hustler Magazine, Inc.*, Larry C. Flynt, and Flynt Distributing Co., Inc. Respondent stated in his complaint that publication of the ad parody in *Hustler* entitled him to recover damages for libel, invasion of privacy, and intentional infliction of emotional distress. The case proceeded to trial. At the close of the evidence, the District Court granted a directed verdict for petitioners on the invasion of privacy claim. The jury then found against respondent on the libel claim, specifically finding that the ad parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated." The jury ruled for respondent on the intentional infliction of emotional distress claim, however, and stated that he should be awarded \$100,000 in compensatory damages, as well as \$50,000 each in punitive damages from petitioners. Petitioners' motion for judgment notwithstanding the verdict was denied.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the judgment against petitioners. The court rejected petitioners' argument that the "actual malice" standard of *New York Times Co. v. Sullivan* (1964), must be met before respondent can recover for emotional distress. The court agreed that because respondent is concededly a public figure, petitioners are "entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in [respondent's] claim for libel." But this does not mean that a literal application of the actual malice rule is appropriate in the context of an emotional distress claim. \*\*\* The Court of Appeals then went on to reject the contention that because the jury found that the ad parody did not describe actual facts about respondent, the ad was an opinion that is protected by the First Amendment. As the court put it, this was "irrelevant," as the issue is "whether [the ad's] publication was sufficiently outrageous to constitute intentional infliction of emotional distress." Petitioners then filed a petition for rehearing en banc, but this was denied by a divided court. Given the importance of the constitutional issues involved, we granted certiorari.

This case presents us with a novel question involving First Amendment limitations upon a State's authority to protect its citizens from the intentional infliction of emotional distress. We must decide whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most. Respondent would have us find that a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do.

At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. "[T]he freedom to speak one's mind is not only an aspect of individual liberty - and thus a good unto itself - but also is essential to the common quest for truth and the vitality of society as a whole." We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First

Amendment recognizes no such thing as a "false" idea. *Gertz v. Robert Welch, Inc.* (1974). As Justice Holmes wrote, "when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." *Abrams v. United States* (1919) (dissenting opinion).

The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." \*\*\*

Of course, this does not mean that any speech about a public figure is immune from sanction in the form of damages. Since *New York Times Co. v. Sullivan* (1964), we have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective. But even though falsehoods have little value in and of themselves, they are "nevertheless inevitable in free debate," and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted "chilling" effect on speech relating to public figures that does have constitutional value. "Freedoms of expression require "breathing space." This breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove both that the statement was false and that the statement was made with the requisite level of culpability.

Respondent argues, however, that a different standard should apply in this case because here the State seeks to prevent not reputational damage, but the severe emotional distress suffered by the person who is the subject of an offensive publication. In respondent's view, and in the view of the Court of Appeals, so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, it is of no constitutional import whether the statement was a fact or an opinion, or whether it was true or false. It is the intent to cause injury that is the gravamen of the tort, and the State's interest in preventing emotional harm simply outweighs whatever interest a speaker may have in speech of this type.

Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently "outrageous." But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. \*\*\* Thus while such a bad motive may be deemed controlling for purposes of tort liability in

other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.

Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject. Webster's defines a caricature as "the deliberately distorted picturing or imitating of a person, literary style, etc. by exaggerating features or mannerisms for satirical effect." WEBSTER'S NEW UNABRIDGED TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 275 (2d ed. 1979). The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events - an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided. One cartoonist expressed the nature of the art in these words:

"The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to pat some politician on the back. It is usually as welcome as a bee sting and is always controversial in some quarters."

Long, *The Political Cartoon: Journalism's Strongest Weapon*, THE QUILL 56, 57 (Nov. 1962).

Several famous examples of this type of intentionally injurious speech were drawn by Thomas Nast, probably the greatest American cartoonist to date, who was associated for many years during the post-Civil War era with Harper's Weekly. In the pages of that publication Nast conducted a graphic vendetta against William M. "Boss" Tweed and his corrupt associates in New York City's "Tweed Ring." It has been described by one historian of the subject as "a sustained attack which in its passion and effectiveness stands alone in the history of American graphic art." M. KELLER, *THE ART AND POLITICS OF THOMAS NAST* 177 (1968). Another writer explains that the success of the Nast cartoon was achieved "because of the emotional impact of its presentation. It continuously goes beyond the bounds of good taste and conventional manners." C. PRESS, *THE POLITICAL CARTOON* 251 (1981).

Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. Nast's castigation of the Tweed Ring, Walt McDougall's characterization of Presidential candidate James G. Blaine's banquet with the millionaires at Delmonico's as "The Royal Feast of Belshazzar," and numerous other efforts have undoubtedly had an effect on the course and outcome of contemporaneous debate. Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.

Respondent contends, however, that the caricature in question here was so "outrageous" as to distinguish it from more traditional political cartoons. There is no doubt that the caricature of respondent and his mother published in

Hustler is at best a distant cousin of the political cartoons described above, and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description "outrageous" does not supply one. "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience. \*\*\*

Admittedly, these oft-repeated First Amendment principles, like other principles, are subject to limitations. \*\*\* But the sort of expression involved in this case does not seem to us to be governed by any exception to the general First Amendment principles stated above.

We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," i. e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a "blind application" of the New York Times standard, it reflects our considered judgment that such a standard is necessary to give adequate "breathing space" to the freedoms protected by the First Amendment.

Here it is clear that respondent Falwell is a "public figure" for purposes of First Amendment law. The jury found against respondent on his libel claim when it decided that the Hustler ad parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated." The Court of Appeals interpreted the jury's finding to be that the ad parody "was not reasonably believable," and in accordance with our custom we accept this finding. Respondent is thus relegated to his claim for damages awarded by the jury for the intentional infliction of emotional distress by "outrageous" conduct. But for reasons heretofore stated this claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here. The judgment of the Court of Appeals is accordingly

*Reversed.*

JUSTICE KENNEDY TOOK NO PART IN THE CONSIDERATION OR DECISION OF THIS CASE.

JUSTICE WHITE, CONCURRING IN THE JUDGMENT.

As I see it, the decision in *New York Times Co. v. Sullivan* (1964), has little to do with this case, for here the jury found that the ad contained no assertion of fact. But I agree with the Court that the judgment below, which penalized the publication of the parody, cannot be squared with the First Amendment.

## Notes

1. The lines between “truth” and “opinion” and “parody” are often unclear. How important should it be that the target of a publication is a public official or public figure under *Gertz* and *Falwell*?
2. Consider this action for compensatory and punitive damages alleging defamation, false light, interference with business relations, and invasion of privacy based upon the publication of an article by journalist Mark Warren on *Esquire Magazine's* Politics Blog.

The article was posted one day after the release of a book entitled “*Where's the Birth Certificate? The Case that Barack Obama is not Eligible to Be President*,” written by Jerome Corsi and published by Joseph Farah's WND Books. Farah's website, WorldNetDaily, announced the book launch with the headline, “*It's out! The book that proves Obama's ineligible: Today's the day Corsi is unleashed to tell all about that 'birth certificate'*” (emphasis in original). Approximately three weeks earlier, President Obama had released his long-form birth certificate showing that he was born in Hawaii. Warren's article was entitled “*BREAKING: Jerome Corsi's Birther Book Pulled from Shelves!*” (emphasis in original). It stated, in part: “In a stunning development one day after the release of [the Corsi book], [Farah] has announced plans to recall and pulp the entire 200,000 first printing run of the book, as well as announcing an offer to refund the purchase price to anyone who has already bought ... the book.” Approximately ninety minutes later, *Esquire* published an “update” on its blog “for those who didn't figure it out,” that Warren's article was “satire”; the “update” clarified that the article was untrue and referenced other “serious” *Esquire* articles on the birth certificate issue. Farah observed the same day that he thought the blog post was a “poorly executed parody.” Also that day, Warren told *The Daily Caller* that he had no regrets about publishing the fictitious article and expressed his negative view of the book's author; his statements were published on *The Daily Caller* website that day and the following day.

In *Farah v. Esquire Magazine*, 736 F.3d 528 (D.C. Cir. 2013), the Court upheld the dismissal of the complaint for failure to state a cause of action. Interestingly, the court concluded that

[b]ecause Farah's and Corsi's defamation claim fails, so do their other tort claims based upon the same allegedly defamatory speech. “[A] plaintiff may not use related causes of action to avoid the constitutional requisites of a defamation claim.” The First Amendment considerations that apply to defamation therefore apply also to Farah's and Corsi's counts for false light, and tortious interference.

This seems to “constitutionalize” a wide range of tort actions aimed at speech. Is it relevant at all that the original blog post was not understood as parody?

# Chapter Five: GOVERNMENT AS EMPLOYER AND EDUCATOR

This chapter considers applications of the First Amendment’s speech clause when the government is not acting as a general sovereign but is acting as an employer or educator. The basic question in such instances is the extent to which the First Amendment doctrine that generally applies should also apply to the employment and educational contexts.

The doctrine plows a middle ground. The courts have rejected the antiquated notion that public employment or education is a “privilege” that requires the abandonment of constitutional rights. [This concept of “unconstitutional conditions” is discussed in the next chapter]. The courts have also rejected the notion that employees and students retain the same First Amendment rights at work and school as they do outside these contexts.

## Chapter Outline

### **I. The Politics of Public Employment**

Civil Service Commission v. National Association of Letter Carriers

Branti v. Finkel

Notes

### **II. Protecting Public Employee Speech**

#### **A. Foundational Tests**

Pickering v. Board of Education of Township High School District, Will County, Illinois

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Notes

#### **B. Applying and modifying the tests**

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Notes

#### **C. Public Employee Speech in the Roberts Court**

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Notes

### **III. Student Speech**

Tinker v. Des Moines Independent Community School District

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Notes

Note: Curriculum

## I. The Politics of Public Employment

The First Amendment rights of public employees to engage in political speech and campaigning is in tension with the interest in a government that is not exclusively partisan and in which public employment positions are attributable to political patronage.

### *Civil Service Commission v. National Association of Letter Carriers*

413 U.S. 548 (1973)

WHITE, J., DELIVERED THE OPINION OF THE COURT, IN WHICH BURGER, C. J., AND STEWART, BLACKMUN, POWELL, AND REHNQUIST, JJ., JOINED. DOUGLAS, J., FILED A DISSENTING OPINION, IN WHICH BRENNAN AND MARSHALL, JJ., JOINED.

JUSTICE WHITE DELIVERED THE OPINION OF THE COURT.

On December 11, 1972, we noted probable jurisdiction of this appeal based on a jurisdictional statement presenting the single question whether the prohibition in § 9(a) of the Hatch Act, now codified in 5 U.S.C. § 7324 (a)(2), against federal employees taking "an active part in political management or in political campaigns," is unconstitutional on its face.

Section 7324(a) provides:

"An employee in an Executive agency or an individual employed by the government of the District of Columbia may not —

"(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or

"(2) take an active part in political management or in political campaigns.

"For the purpose of this subsection, the phrase 'an active part in political management or in political campaigns' means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President."

A divided three-judge court sitting in the District of Columbia had held the section unconstitutional. We reverse the judgment of the District Court.

#### I

The case began when the National Association of Letter Carriers, six individual federal employees and certain local Democratic and Republican political committees filed a complaint, asserting on behalf of themselves and all federal employees that 5 U.S.C. § 7324 (a)(2) was unconstitutional on its face and seeking an injunction against its enforcement. Each of the plaintiffs alleged that the Civil Service Commission was enforcing, or threatening to enforce, the

Hatch Act's prohibition against active participation in political management or political campaigns with respect to certain defined activity in which that plaintiff desired to engage. The Union, for example, stated among other things that its members desired to campaign for candidates for public office. The Democratic and Republican Committees complained of not being able to get federal employees to run for state and local offices. Plaintiff Hummel stated that he was aware of the provision of the Hatch Act and that the activities he desired to engage in would violate that Act as, for example, his participating as a delegate in a party convention or holding office in a political club.

A three-judge court was convened, and the case was tried on both stipulated evidence and oral testimony. The District Court then ruled that § 7324(a)(2) was unconstitutional on its face and enjoined its enforcement. The court recognized the "well-established governmental interest in restricting political activities by federal employees which [had been] asserted long before enactment of the Hatch Act," as well as the fact that the "appropriateness of this governmental objective was recognized by the Supreme Court of the United States when it endorsed the objectives of the Hatch Act. \*\*\*

## II

\*\*\* Our judgment is that neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees.

## A

Such decision on our part would no more than confirm the judgment of history, a judgment made by this country over the last century that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited. That this judgment eventuated is indisputable, and the major steps in reaching it may be simply and briefly set down.

Early in our history, Thomas Jefferson was disturbed by the political activities of some of those in the Executive Branch of the Government. See 10 J. Richardson, Messages and Papers of the Presidents 98 (1899). The heads of the executive departments, in response to his directive, issued an order stating in part that "[t]he right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it."

There were other voices raised in the 19th century against the mixing of partisan politics and routine federal service. But until after the Civil War, the spoils system under which federal employees came and went, depending upon party service and changing administrations, rather than meritorious performance, was much the vogue and the prevalent basis for governmental employment and advancement. That system did not survive. Congress authorized the President to prescribe regulations for the creation of a civil service of federal employees in 1871, known as the Pendleton Act, that declared

that "no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service" and that "no person in said service has any right to use his official authority or influence to coerce the political action of any person or body." That Act authorized the President to promulgate rules to carry the Act into effect and created the Civil Service Commission as the agency or administrator of the Act under the rules of the President.

The original Civil Service rules were promulgated on May 7, 1883, by President Arthur. Civil Service Rule I repeated the language of the Act that no one in the executive service should use his official authority or influence to coerce any other person or to interfere with an election, but went no further in restricting the political activities of federal employees. Problems with political activity continued to arise \*\*\* [historical discussion omitted].

This account of the efforts by the Federal Government to limit partisan political activities by those covered by the Hatch Act should not obscure the equally relevant fact that all 50 States have restricted the political activities of their own employees.

## B

Until now, the judgment of Congress, the Executive, and the country appears to have been that partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly, elections are to play their proper part in representative government, and employees themselves are to be sufficiently free from improper influences. The restrictions so far imposed on federal employees are not aimed at particular parties, groups, or points of view, but apply equally to all partisan activities of the type described. They discriminate against no racial, ethnic, or religious minorities. Nor do they seek to control political opinions or beliefs, or to interfere with or influence anyone's vote at the polls. \*\*\*

It seems fundamental in the first place that employees in the Executive Branch of the Government, or those working for any of its agencies, should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party. They are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof. A major thesis of the Hatch Act is that to serve this great end of Government - the impartial execution of the laws - it is essential that federal employees, for example, not take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns, and not run for office on partisan political tickets. Forbidding activities like these will reduce the hazards to fair and effective government.

There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.

Another major concern of the restriction against partisan activities by federal employees was perhaps the immediate occasion for enactment of the Hatch Act in 1939. That was the conviction that the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine. The experience of the 1936 and 1938 campaigns convinced Congress that these dangers were sufficiently real that substantial barriers should be raised against the party in power - or the party out of power, for that matter - using the thousands or hundreds of thousands of federal employees, paid for at public expense, to man its political structure and political campaigns.

A related concern, and this remains as important as any other, was to further serve the goal that employment and advancement in the Government service not depend on political performance, and at the same time to make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs. It may be urged that prohibitions against coercion are sufficient protection; but for many years the joint judgment of the Executive and Congress has been that to protect the rights of federal employees with respect to their jobs and their political acts and beliefs it is not enough merely to forbid one employee to attempt to influence or coerce another. For example, at the hearings in 1972 on proposed legislation for liberalizing the prohibition against political activity, the Chairman of the Civil Service Commission stated that "the prohibitions against active participation in partisan political management and partisan political campaigns constitute the most significant safeguards against coercion . . . ." Hearings on S. 3374 and S. 3417, *supra*, at 52. Perhaps Congress at some time will come to a different view of the realities of political life and Government service; but that is its current view of the matter, and we are not now in any position to dispute it. Nor, in our view, does the Constitution forbid it.

Neither the right to associate nor the right to participate in political activities is absolute in any event. \*\*\*

### III

But however constitutional the proscription of identifiable partisan conduct in understandable language may be, the District Court's judgment was that 7324 (a) (2) was both unconstitutionally vague and fatally overbroad. Appellees make the same contentions here, but we cannot agree that the section is unconstitutional on its face for either reason.

\*\*\* Whatever might be the difficulty with a provision against taking "active part in political management or in political campaigns," the Act specifically provides that the employee retains the right to vote as he chooses and to express his opinion on political subjects and candidates. The Act exempts research and educational activities supported by the District of Columbia or by religious, philanthropic, or cultural organizations, 5 U.S.C. 7324 (c); and 7326 exempts nonpartisan political activity: questions, that is, that are not identified with national or state political parties are not covered by the Act, including issues with respect to constitutional amendments, referendums, approval of municipal ordinances, and the like. Moreover, the plain import of the 1940 amendment to

the Hatch Act is that the proscription against taking an active part in the proscribed activities is not open-ended but is limited to those rules and proscriptions that had been developed under Civil Service Rule I up to the date of the passage of the 1940 Act. Those rules, as refined by further adjudications within the outer limits of the 1940 rules, were restated by the Commission in 1970 in the form of regulations specifying the conduct that would be prohibited or permitted by 7324 and its companion sections.

We have set out these regulations in the margin. We see nothing impermissibly vague in 5 CFR 733.122, which specifies in separate paragraphs the various activities deemed to be prohibited by 7324 (a)(2). There might be quibbles about the meaning of taking an "active part in managing" or about "actively participating in . . . fund-raising" or about the meaning of becoming a "partisan" candidate for office; but there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. "[T]he general class of offenses to which . . . [the provisions are] directed is plainly within [their] terms, . . . [and they] will not be struck down as vague, even though marginal cases could be put where doubts might arise." Surely, there seemed to be little question in the minds of the plaintiffs who brought this lawsuit as to the meaning of the law, or as to whether or not the conduct in which they desire to engage was or was not prohibited by the Act.

The Act permits the individual employee to "express his opinion on political subjects and candidates," 5 U.S.C. 7324 (b); and the corresponding regulation, 5 CFR 733.111 (a) (2), privileges the employee to "[e]xpress his opinion as an individual privately and publicly on political subjects and candidates." The section of the regulations which purports to state the partisan acts that are proscribed, *id.*, 733.122, forbids in subparagraph (a) (10) the endorsement of "a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature, or similar material," and in subparagraph (a) (12), prohibits "[a]ddressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office." Arguably, there are problems in meshing 733.111 (a) (2) with 733.122 (a) (10) and (12), but we think the latter prohibitions sufficiently clearly carve out the prohibited political conduct from the expressive activity permitted by the prior section to survive any attack on the ground of vagueness or in the name of any of those policies that doctrine may be deemed to further.

It is also important in this respect that the Commission has established a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the law, at least insofar as the Commission itself is concerned.

\*\*\* For the foregoing reasons, the judgment of the District Court is reversed.

*So ordered.*

JUSTICE DOUGLAS, WITH WHOM JUSTICE BRENNAN AND JUSTICE MARSHALL CONCUR, DISSENTING.

The Hatch Act by 9 (a) prohibits federal employees from taking "an active part in political management or in political campaigns." Some of the employees, whose union is speaking for them, want

"to run in state and local elections for the school board, for city council, for mayor";

"to write letters on political subjects to newspapers";

"to be a delegate in political convention";

"to run for an office and hold office in a political party or political club";

"to campaign for candidates for political office";

"to work at polling places in behalf of a political party."

There is no definition of what "an active part . . . in political campaigns" means. The Act incorporates over 3,000 rulings of the Civil Service Commission between 1886 and 1940 and many hundreds of rulings since 1940. But even with that gloss on the Act, the critical phrases lack precision. In 1971 the Commission published a three-volume work entitled Political Activities Reporter which contains over 800 of its decision since the enactment of the Hatch Act. One can learn from studying those volumes that it is not "political activity" to march in a band during a political parade or to wear political badges or to "participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his agency."

That is to say, some things, like marching in a band, are clear. Others are pregnant with ambiguity as "participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise," etc. Permission to "[t]ake an active part . . . in a nonpartisan election," also raises large questions of uncertainty because one may be partisan for a person, an issue, a candidate without feeling an identification with one political party or the other.

\*\*\* The chilling effect of these vague and generalized prohibitions is so obvious as not to need elaboration. That effect would not be material to the issue of constitutionality if only the normal contours of the police power were involved.

\*\*\* [But] We deal here with a First Amendment right to speak, to propose, to publish, to petition Government, to assemble. Time and place are obvious limitations. Thus no one could object if employees were barred from using office time to engage in outside activities whether political or otherwise. But it is of no concern of Government what an employee does in his spare time, whether religion, recreation, social work, or politics is his hobby - unless what he does impairs efficiency or other facets of the merits of his job. Some things, some activities do affect or may be thought to affect the employee's job performance. But his political creed, like his religion, is irrelevant. In the areas of speech, like religion, it is of no concern what the employee says in private to his wife or to the public in Constitution Hall. If Government employment were only a

"privilege," then all sorts of conditions might be attached. But it is now settled that Government employment may not be denied or penalized "on a basis that infringes [the employee's] constitutionally protected interests - especially, his interest in freedom of speech." \*\*\*

Free discussion of governmental affairs is basic in our constitutional system. Laws that trench on that area must be narrowly and precisely drawn to deal with precise ends. Overbreadth in the area of the First Amendment has a peculiar evil, the evil of creating chilling effects which deter the exercise of those freedoms. \*\*\*

The present Act cannot be appropriately narrowed to meet the need for narrowly drawn language not embracing First Amendment speech or writing without substantial revision. That rewriting cannot be done by the Commission because Congress refused to delegate to it authority to regulate First Amendment rights. The proposal to do so aroused a great debate in Congress and Senator Hatch finally submitted a substitute, saying "[i]t does away with the question of the delegation of power."

The Commission, on a case-by-case approach, has listed 13 categories of prohibited activities, 5 CFR 733.122 (b), starting with the catch-all "include but are not limited to." So the Commission ends up with open-end discretion to penalize X or not to penalize him. For example, a "permissible" activity is the employee's right to "[e]xpress his opinion as an individual privately and publicly on political subjects and candidates." 5 CFR 733.111 (a) (2). Yet "soliciting votes" is prohibited. 5 CFR 733.122 (b) (7). Is an employee safe from punishment if he expresses his opinion that candidate X is the best and candidate Y the worst? Is that crossing the forbidden line of soliciting votes?

A nursing assistant at a veterans' hospital put an ad in a newspaper reading:

"To All My Many Friends of Poplar Bluff and Butler County I want to take this opportunity to ask your vote and support in the election, TUESDAY, AUGUST 7th. A very special person is seeking the Democratic nomination for Sheriff. I do not have to tell you of his qualifications, his past records stand.

"This person is my dad, Lester (Less) Massingham.

"THANK YOU

"WALLACE (WALLY) MASSINGHAM"

He was held to have violated the Act. Massingham, 1 Political Activity Reporter 792, 793 (1959).

Is a letter a permissible "expression" of views or a prohibited "solicitation?" The Solicitor General says it is a "permissible" expression; but the Commission ruled otherwise. For an employee who does not have the Solicitor General as counsel great consequences flow from an innocent decision. He may lose his job. Therefore the most prudent thing is to do nothing. Thus is self-imposed censorship imposed on many nervous people who live on narrow economic margins.

I would strike this provision of the law down as unconstitutional so that a new start may be made on this old problem that confuses and restricts nearly five

million federal, state, and local public employees today that live under the present Act.

## *Branti v. Finkel*

445 U.S. 507 (1980)

STEVENS, J., DELIVERED THE OPINION FOR THE COURT, IN WHICH BURGER, C. J., AND BRENNAN, WHITE, MARSHALL, AND BLACKMUN, JJ., JOINED. STEWART, J., FILED A DISSENTING OPINION; POWELL, J., FILED A DISSENTING OPINION, IN WHICH REHNQUIST, J., JOINED AND IN PART I OF WHICH STEWART, J., JOINED.

JUSTICE STEVENS DELIVERED THE OPINION OF THE COURT.

The question presented is whether the First and Fourteenth Amendments to the Constitution protect an assistant public defender who is satisfactorily performing his job from discharge solely because of his political beliefs.

Respondents, Aaron Finkel and Alan Tabakman, commenced this action in the United States District Court for the Southern District of New York in order to preserve their positions as assistant public defenders in Rockland County, New York. On January 4, 1978, on the basis of a showing that the petitioner public defender was about to discharge them solely because they were Republicans, the District Court entered a temporary restraining order preserving the status quo. After hearing evidence for eight days, the District Court entered detailed findings of fact and permanently enjoined petitioner from terminating or attempting to terminate respondents' employment "upon the sole grounds of their political beliefs." The Court of Appeals affirmed in an unpublished memorandum opinion.

The critical facts can be summarized briefly. The Rockland County Public Defender is appointed by the County Legislature for a term of six years. He in turn appoints nine assistants who serve at his pleasure. The two respondents have served as assistants since their respective appointments in March 1971 and September 1975; they are both Republicans.

Petitioner Branti's predecessor, a Republican, was appointed in 1972 by a Republican-dominated County Legislature. By 1977, control of the legislature had shifted to the Democrats and petitioner, also a Democrat, was appointed to replace the incumbent when his term expired. As soon as petitioner was formally appointed on January 3, 1978, he began executing termination notices for six of the nine assistants then in office. Respondents were among those who were to be terminated. With one possible exception, the nine who were to be appointed or retained were all Democrats and were all selected by Democratic legislators or Democratic town chairmen on a basis that had been determined by the Democratic caucus.

The District Court found that Finkel and Tabakman had been selected for termination solely because they were Republicans and thus did not have the necessary Democratic sponsors\*\*\*

Having concluded that respondents had been discharged solely because of their political beliefs, the District Court held that those discharges would be

permissible under this Court's [plurality] decision in *Elrod v. Burns* (1976) only if assistant public defenders are the type of policymaking, confidential employees who may be discharged solely on the basis of their political affiliations. The court concluded that respondents clearly did not fall within that category. Although recognizing that they had broad responsibilities with respect to particular cases that were assigned to them, the court found that respondents had "very limited, if any, responsibility" with respect to the overall operation of the public defender's office. They did not "act as advisors or formulate plans for the implementation of the broad goals of the office" and, although though they made decisions in the context of specific cases, "they do not make decisions about the orientation and operation of the office in which they work."

The District Court also rejected the argument that the confidential character of respondents' work justified conditioning their employment on political grounds. The court found that they did not occupy any confidential relationship to the policymaking process, and did not have access to confidential documents that influenced policymaking deliberations. Rather, the only confidential information to which they had access was the product of their attorney-client relationship with the office's clients; to the extent that such information was shared with the public defender, it did not relate to the formulation of office policy.

In light of these factual findings, the District Court concluded that petitioner could not terminate respondents' employment as assistant public defenders consistent with the First and Fourteenth Amendments. On appeal, a panel of the Second Circuit affirmed, specifically holding that the District Court's findings of fact were adequately supported by the record. That court also expressed "no doubt" that the District Court "was correct in concluding that an assistant public defender was neither a policymaker nor a confidential employee." We granted certiorari and now affirm.

Petitioner advances two principal arguments for reversal: First, that the holding in *Elrod v. Burns* is limited to situations in which government employees are coerced into pledging allegiance to a political party that they would not voluntarily support and does not apply to a simple requirement that an employee be sponsored by the party in power; and, second, that, even if party sponsorship is an unconstitutional condition of continued public employment for clerks, deputies, and janitors, it is an acceptable requirement for an assistant public defender.

## I

In *Elrod v. Burns* the Court held that the newly elected Democratic Sheriff of Cook County, Ill., had violated the constitutional rights of certain non-civil-service employees by discharging them "because they did not support and were not members of the Democratic Party and had failed to obtain the sponsorship of one of its leaders." That holding was supported by two separate opinions.

Writing for the plurality, Justice Brennan identified two separate but interrelated reasons supporting the conclusion that the discharges were prohibited by the First and Fourteenth Amendments. First, he analyzed the impact of a political patronage system on freedom of belief and association. Noting that in order to retain their jobs, the Sheriff's employees were required to

pledge their allegiance to the Democratic Party, work for or contribute to the party's candidates, or obtain a Democratic sponsor, he concluded that the inevitable tendency of such a system was to coerce employees into compromising their true beliefs. That conclusion, in his opinion, brought the practice within the rule of cases like *West Virginia Board of Education v. Barnette* (1943) [Chapter 6] condemning the use of governmental power to prescribe what the citizenry must accept as orthodox opinion.

Second, apart from the potential impact of patronage dismissals on the formation and expression of opinion, Justice Brennan also stated that the practice had the effect of imposing an unconstitutional condition on the receipt of a public benefit and therefore came within the rule of cases like *Perry v. Sindermann*. In support of the holding in *Perry* that even an employee with no contractual right to retain his job cannot be dismissed for engaging in constitutionally protected speech, the Court had stated:

"For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible. . . . .

"Thus, the respondent's lack of a contractual or tenure 'right' to re-employment for the 1969-1970 academic year is immaterial to his free speech claim. Indeed, twice before, this Court has specifically held that the non-renewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights. \*\*\*

If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes. Under this line of analysis, unless the government can demonstrate "an overriding interest" "of vital importance," requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment.

\*\*\* Petitioner argues that *Elrod v. Burns* should be read to prohibit only dismissals resulting from an employee's failure to capitulate to political coercion. Thus, he argues that, so long as an employee is not asked to change his political affiliation or to contribute to or work for the party's candidates, he may be dismissed with impunity - even though he would not have been dismissed if he had had the proper political sponsorship and even though the sole reason for dismissing him was to replace him with a person who did have such sponsorship. Such an interpretation would surely emasculate the principles set forth in *Elrod*. While it would perhaps eliminate the more blatant forms of coercion described in *Elrod*, it would not eliminate the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job. \*\*\* More importantly, petitioner's interpretation would require the Court to repudiate entirely the conclusion \*\*\*

that the First Amendment prohibits the dismissal of a public employee solely because of his private political beliefs.

In sum, there is no requirement that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance. To prevail in this type of an action, it was sufficient, as Elrod holds, for respondents to prove that they were discharged "solely for the reason that they were not affiliated with or sponsored by the Democratic Party."

## II

Both opinions in *Elrod* recognize that party affiliation may be an acceptable requirement for some types of government employment. Thus, if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency. In *Elrod*, it was clear that the duties of the employees - the chief deputy of the process division of the sheriff's office, a process server and another employee in that office, and a bailiff and security guard at the Juvenile Court of Cook County - were not of that character, for they were "nonpolicymaking, nonconfidential" employees.

As Justice Brennan noted in *Elrod*, it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered. Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character. As one obvious example, if a State's election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately discharged solely for changing his party registration. That conclusion would not depend on any finding that the job involved participation in policy decisions or access to confidential information. Rather, it would simply rest on the fact that party membership was essential to the discharge of the employee's governmental responsibilities.

It is equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position. The coach of a state university's football team formulates policy, but no one could seriously claim that Republicans make better coaches than Democrats, or vice versa, no matter which party is in control of the state government. On the other hand, it is equally clear that the Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments. In sum, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Having thus framed the issue, it is manifest that the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party in control of the county government. The primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State. As we recently observed in commenting

on the duties of counsel appointed to represent indigent defendants in federal criminal proceedings:

"[T]he primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the government and to oppose it in adversary litigation."

Thus, whatever policymaking occurs in the public defender's office must relate to the needs of individual clients and not to any partisan political interests. Similarly, although an assistant is bound to obtain access to confidential information arising out of various attorney-client relationships, that information has no bearing whatsoever on partisan political concerns. Under these circumstances, it would undermine, rather than promote, the effective performance of an assistant public defender's office to make his tenure dependent on his allegiance to the dominant political party.

Accordingly, the entry of an injunction against termination of respondents' employment on purely political grounds was appropriate and the judgment of the Court of Appeals is

*Affirmed.*

JUSTICE POWELL, WITH WHOM JUSTICE REHNQUIST JOINS, AND WITH WHOM JUSTICE STEWART JOINS AS TO PART I, DISSENTING.

The Court today continues the evisceration of patronage practices begun in *Elrod v. Burns* (1976). With scarcely a glance at almost 200 years of American political tradition, the Court further limits the relevance of political affiliation to the selection and retention of public employees. Many public positions previously filled on the basis of membership in national political parties now must be staffed in accordance with a constitutionalized civil service standard that will affect the employment practices of federal, state, and local governments. Governmental hiring practices long thought to be a matter of legislative and executive discretion now will be subjected to judicial oversight. Today's decision is an exercise of judicial lawmaking that, as The Chief Justice wrote in his *Elrod* dissent, "represents a significant intrusion into the area of legislative and policy concerns." I dissent.

## I

The Court contends that its holding is compelled by the First Amendment. In reaching this conclusion, the Court largely ignores the substantial governmental interests served by patronage. Patronage is a long-accepted practice that never has been eliminated totally by civil service laws and regulations. The flaw in the Court's opinion lies not only in its application of First Amendment principles, but also in its promulgation of a new, and substantially expanded, standard for determining which governmental employees may be retained or dismissed on the basis of political affiliation.

\*\*\* The standard articulated by the Court is framed in vague and sweeping language certain to create vast uncertainty. Elected and appointed officials at all levels who now receive guidance from civil service laws, no longer will know when political affiliation is an appropriate consideration in filling a position. Legislative bodies will not be certain whether they have the final authority to make the delicate line-drawing decisions embodied in the civil service laws. Prudent individuals requested to accept a public appointment must consider whether their predecessors will threaten to oust them through legal action.

One example at the national level illustrates the nature and magnitude of the problem created by today's holding. The President customarily has considered political affiliation in removing and appointing United States attorneys. Given the critical role that these key law enforcement officials play in the administration of the Department of Justice, both Democratic and Republican Attorneys General have concluded, not surprisingly, that they must have the confidence and support of the United States attorneys. And political affiliation has been used as one indicator of loyalty.

Yet, it would be difficult to say, under the Court's standard, that "partisan" concerns properly are relevant to the performance of the duties of a United States attorney. This Court has noted that "[t]he office of public prosecutor is one which must be administered with courage and independence." Nevertheless, I believe that the President must have the right to consider political affiliation when he selects top ranking Department of Justice officials. The President and his Attorney General, not this Court, are charged with the responsibility for enforcing the laws and administering the Department of Justice. The Court's vague, overbroad decision may cast serious doubt on the propriety of dismissing United States attorneys, as well as thousands of other policymaking employees at all levels of government, because of their membership in a national political party.

A constitutional standard that is both uncertain in its application and impervious to legislative change will now control selection and removal of key governmental personnel. Federal judges will now be the final arbiters as to who federal, state, and local governments may employ. In my view, the Court is not justified in removing decisions so essential to responsible and efficient governance from the discretion of legislative and executive officials.

## II

The Court errs not only in its selection of a standard, but more fundamentally in its conclusion that the First Amendment prohibits the use of membership in a national political party as a criterion for the dismissal of public employees. In reaching this conclusion, the Court makes new law from inapplicable precedents. The Court suggests that its decision is mandated by the principle that governmental action may not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ." *Board of Education v. Barnette* (1943). The Court also relies upon the decisions in *Perry v. Sindermann* (1972), and *Keyishian v. Board of Regents* (1967). But the propriety of patronage was neither questioned nor addressed in those cases.

Both *Keyishian* and *Perry* involved faculty members who were dismissed from state educational institutions because of their political views. In *Keyishian*, the

Court reviewed a state statute that permitted dismissals of faculty members from state institutions for "treasonable or seditious" utterances or acts. The Court noted that academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." Because of the ambiguity in the statutory language, the Court held that the law was unconstitutionally vague. The Court also held that membership in the Communist Party could not automatically disqualify a person from holding a faculty position in a state university. In *Perry*, the Court held that the Board of Regents of a state university system could not discharge a professor in retaliation for his exercise of free speech. In neither case did the State suggest that the governmental positions traditionally had been regarded as patronage positions. Thus, the Court correctly held that no substantial state interest justified the infringement of free speech. This case presents a question quite different from that in *Keyishian* and *Perry*.

The constitutionality of appointing or dismissing public employees on the basis of political affiliation depends upon the governmental interests served by patronage. No constitutional violation exists if patronage practices further sufficiently important interests to justify tangential burdening of First Amendment rights. See *Buckley v. Valeo* (1976). This inquiry cannot be resolved by reference to First Amendment cases in which patronage was neither involved nor discussed. Nor can the question in this case be answered in a principled manner without identifying and weighing the governmental interest served by patronage.

### III

Patronage appointments help build stable political parties by offering rewards to persons who assume the tasks necessary to the continued functioning of political organizations. "As all parties are concerned with power they naturally operate by placing members and supporters into positions of power. Thus there is nothing derogatory in saying that a primary function of parties is patronage." J. JUPP, *POLITICAL PARTIES* 25-26 (1968). The benefits of patronage to a political organization do not derive merely from filling policymaking positions on the basis of political affiliation. Many, if not most, of the jobs filled by patronage at the local level may not involve policymaking functions. The use of patronage to fill such positions builds party loyalty and avoids "splintered parties and unrestrained factionalism [that might] do significant damage to the fabric of government."

Until today, I would have believed that the importance of political parties was self-evident. Political parties, dependent in many ways upon patronage, serve a variety of substantial governmental interests. A party organization allows political candidates to muster donations of time and money necessary to capture the attention of the electorate. Particularly in a time of growing reliance upon expensive television advertisements, a candidate who is neither independently wealthy nor capable of attracting substantial contributions must rely upon party workers to bring his message to the voters. In contests for less visible offices, a candidate may have no efficient method of appealing to the voters unless he enlists the efforts of persons who seek reward through the patronage system. Insofar as the Court's decision today limits the ability of

candidates to present their views to the electorate, our democratic process surely is weakened.

Strong political parties also aid effective governance after election campaigns end. Elected officials depend upon appointees who hold similar views to carry out their policies and administer their programs. Patronage - the right to select key personnel and to reward the party "faithful" - serves the public interest by facilitating the implementation of policies endorsed by the electorate. The Court's opinion casts a shadow over this time-honored element of our system. It appears to recognize that the implementation of policy is a legitimate goal of the patronage system and that some, but not all, policymaking employees may be replaced on the basis of their political affiliation. But the Court does not recognize that the implementation of policy often depends upon the cooperation of public employees who do not hold policymaking posts. As one commentator has written: "What the Court forgets is that, if government is to work, policy implementation is just as important as policymaking. No matter how wise the chief, he has to have the right Indians to transform his ideas into action, to get the job done." The growth of the civil service system already has limited the ability of elected politicians to effect political change. Public employees immune to public pressure "can resist changes in policy without suffering either the loss of their jobs or a cut in their salary." Such effects are proper when they follow from legislative or executive decisions to withhold some jobs from the patronage system. But the Court tips the balance between patronage and nonpatronage positions, and, in my view, imposes unnecessary constraints upon the ability of responsible officials to govern effectively and to carry out new policies. \*\*\*

In sum, the effect of the Court's decision will be to decrease the accountability and denigrate the role of our national political parties. This decision comes at a time when an increasing number of observers question whether our national political parties can continue to operate effectively. Broad-based political parties supply an essential coherence and flexibility to the American political scene. They serve as coalitions of different interests that combine to seek national goals. The decline of party strength inevitably will enhance the influence of special interest groups whose only concern all too often is how a political candidate votes on a single issue. The quality of political debate, and indeed the capacity of government to function in the national interest, suffer when candidates and officeholders are forced to be more responsive to the narrow concerns of unrepresentative special interest groups than to overarching issues of domestic and foreign policy. The Court ignores the substantial governmental interests served by reasonable patronage. In my view, its decision will seriously hamper the functioning of stable political parties.

#### IV

The facts of this case also demonstrate that the Court's decision well may impair the right of local voters to structure their government. Consideration of the form of local government in Rockland County, N. Y., demonstrates the antidemocratic effect of the Court's decision.

The voters of the county elect a legislative body. Among the responsibilities that the voters give to the legislature is the selection of a county public defender. In 1972, when the county voters elected a Republican majority in the legislature, a

Republican was selected as Public Defender. The Public Defender retained one respondent and appointed the other as Assistant Public Defenders. Not surprisingly, both respondents are Republicans. In 1976, the voters elected a majority of Democrats to the legislature. The Democratic majority, in turn, selected a Democratic Public Defender who replaced both respondents with Assistant Public Defenders approved by the Democratic legislators.

The voters of Rockland County are free to elect their public defender and assistant public defenders instead of delegating their selection to elected and appointed officials. Certainly the Court's holding today would not preclude the voters, the ultimate "hiring authority," from choosing both public defenders and their assistants by party membership. The voters' choice of public officials on the basis of political affiliation is not yet viewed as an inhibition of speech; it is democracy. Nor may any incumbent contend seriously that the voters' decision not to re-elect him because of his political views is an impermissible infringement upon his right of free speech or affiliation. In other words, the operation of democratic government depends upon the selection of elected officials on precisely the basis rejected by the Court today.

Although the voters of Rockland County could have elected both the public defender and his assistants, they have given their legislators a representative proxy to appoint the public defender. And they have delegated to the public defender the power to choose his assistants. Presumably the voters have adopted this course in order to facilitate more effective representative government. Of course, the voters could have instituted a civil service system that would preclude the selection of either the public defender or his assistants on the basis of political affiliation. But the continuation of the present system reflects the electorate's decision to select certain public employees on the basis of political affiliation.

The Court's decision today thus limits the ability of the voters of a county to structure their democratic government in the way that they please. Now those voters must elect both the public defender and his assistants if they are to fill governmental positions on a partisan basis. Because voters certainly may elect governmental officials on the basis of party ties, it is difficult to perceive a constitutional reason for prohibiting them from delegating that same authority to legislators and appointed officials.

## V

The benefits of political patronage and the freedom of voters to structure their representative government are substantial governmental interests that justify the selection of the assistant public defenders of Rockland County on the basis of political affiliation. The decision to place certain governmental positions within a civil service system is a sensitive political judgment that should be left to the voters and to elected representatives of the people. But the Court's constitutional holding today displaces political responsibility with judicial fiat. In my view, the First Amendment does not incorporate a national civil service system. I would reverse the judgment of the Court of Appeals.

## Notes

1. In *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), a closely divided Court extended *Branti* and *Elrod* to a range of public employment decisions. The Governor of Illinois had issued an executive order instituting a “hiring freeze” absent the Governor’s express permission. The Governor then allegedly used that permission to operate a “patronage system” in that Republican party members were routinely hired, allowed to transfer, or promoted, while non-Republican party members were not. Writing for the Court, Justice Brennan began his opinion thusly:

To the victor belong only those spoils that may be constitutionally obtained. *Elrod v. Burns* (1976), and *Branti v. Finkel* (1980) decided that the First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved. Today we are asked to decide the constitutionality of several related political patronage practices — whether promotion, transfer, recall, and hiring decisions involving low-level public employees may be constitutionally based on party affiliation and support. We hold that they may not.

The dissenting opinion, authored by Justice Scalia, and joined by Chief Justice Rehnquist, as well as Justices Kennedy and (in part) O'Connor, began:

Today the Court establishes the constitutional principle that party membership is not a permissible factor in the dispensation of government jobs, except those jobs for the performance of which party affiliation is an "appropriate requirement." It is hard to say precisely (or even generally) what that exception means, but if there is any category of jobs for whose performance party affiliation is not an appropriate requirement, it is the job of being a judge, where partisanship is not only unneeded but positively undesirable. It is, however, rare that a federal administration of one party will appoint a judge from another party. And it has always been rare. See *Marbury v. Madison*, 1 Cranch 137 (1803). Thus, the new principle that the Court today announces will be enforced by a corps of judges (the Members of this Court included) who overwhelmingly owe their office to its violation. Something must be wrong here, and I suggest it is the Court.

2. In *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996), the Court held that the protections of *Elrod* and *Branti* extend to an instance where government retaliates against a contractor, or a regular provider of services, for the exercise of rights of political association or the expression of political allegiance.

3. Do you think there should be a distinction between prosecutors and public defenders regarding the rule of *Elrod* and *Branti*?

4. How do you see the relationship between The Hatch Act and patronage?

## II. Protecting Public Employee Speech

### A. Foundational Tests

#### *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*

91 U.S. 563 (1968)

MARSHALL, J., DELIVERED THE OPINION OF THE COURT, IN WHICH WARREN, C.J., HARLAN, BRENNAN, STEWART, AND FORTAS, JJ., JOINED. DOUGLAS, J., FILED A CONCURRING OPINION IN WHICH BLACK, J., JOINED. WHITE, J., FILED AN OPINION CONCURRING IN PART AND DISSENTING IN PART.

JUSTICE MARSHALL DELIVERED THE OPINION OF THE COURT.

Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. Appellant's dismissal resulted from a determination by the Board, after a full hearing, that the publication of the letter was 'detrimental to the efficient operation and administration of the schools of the district' and hence, under the relevant Illinois statute, Ill.Rev.Stat., c. 122, § 10—22.4(1963), that 'interests of the schools require(d) (his dismissal).'

Appellant's claim that his writing of the letter was protected by the First and Fourteenth Amendments was rejected. Appellant then sought review of the Board's action in the Circuit Court of Will County, which affirmed his dismissal on the ground that the determination that appellant's letter was detrimental to the interests of the school system was supported by substantial evidence and that the interests of the schools overruled appellant's First Amendment rights. On appeal, the Supreme Court of Illinois, two Justices dissenting, affirmed the judgment of the Circuit Court. We noted probable jurisdiction of appellant's claim that the Illinois statute permitting his dismissal on the facts of this case was unconstitutional as applied under the First and Fourteenth Amendments. For the reasons detailed below we agree that appellant's rights to freedom of speech were violated and we reverse.

#### I.

In February of 1961 the appellee Board of Education asked the voters of the school district to approve a bond issue to raise \$4,875,000 to erect two new schools. The proposal was defeated. Then, in December of 1961, the Board submitted another bond proposal to the voters which called for the raising of \$5,500,000 to build two new schools. This second proposal passed and the schools were built with the money raised by the bond sales. In May of 1964 a proposed increase in the tax rate to be used for educational purposes was

submitted to the voters by the Board and was defeated. Finally, on September 19, 1964, a second proposal to increase the tax rate was submitted by the Board and was likewise defeated. It was in connection with this last proposal of the School Board that appellant wrote the letter to the editor (which we reproduce in an Appendix to this opinion) that resulted in his dismissal.

Prior to the vote on the second tax increase proposal a variety of articles attributed to the District 205 Teachers' Organization appeared in the local paper. These articles urged passage of the tax increase and stated that failure to pass the increase would result in a decline in the quality of education afforded children in the district's schools. A letter from the superintendent of schools making the same point was published in the paper two days before the election and submitted to the voters in mimeographed form the following day. It was in response to the foregoing material, together with the failure of the tax increase to pass, that appellant submitted the letter in question to the editor of the local paper.

The letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue.

The Board dismissed Pickering for writing and publishing the letter. Pursuant to Illinois law, the Board was then required to hold a hearing on the dismissal. At the hearing the Board charged that numerous statements in the letter were false and that the publication of the statements unjustifiably impugned the 'motives, honesty, integrity, truthfulness, responsibility and competence' of both the Board and the school administration. The Board also charged that the false statements damaged the professional reputations of its members and of the school administrators, would be disruptive of faculty discipline, and would tend to foment 'controversy, conflict and dissension' among teachers, administrators, the Board of Education, and the residents of the district. Testimony was introduced from a variety of witnesses on the truth or falsity of the particular statements in the letter with which the Board took issue. The Board found the statements to be false as charged. No evidence was introduced at any point in the proceedings as to the effect of the publication of the letter on the community as a whole or on the administration of the school system in particular, and no specific findings along these lines were made.

The Illinois courts reviewed the proceedings solely to determine whether the Board's findings were supported by substantial evidence and whether, on the facts as found, the Board could reasonably conclude that appellant's publication of the letter was 'detrimental to the best interests of the schools.' Pickering's claim that his letter was protected by the First Amendment was rejected on the ground that his acceptance of a teaching position in the public schools obliged him to refrain from making statements about the operation of the schools 'which in the absence of such position he would have an undoubted right to engage in.' It is not altogether clear whether the Illinois Supreme Court held that the First Amendment had no applicability to appellant's dismissal for writing the letter in question or whether it determined that the particular statements made in the letter were not entitled to First Amendment protection.

In any event, it clearly rejected Pickering's claim that, on the facts of this case, he could not constitutionally be dismissed from his teaching position.

## II.

To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. "(T)he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian v. Board of Regents* (1967). At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

## III.

The Board contends that 'the teacher by virtue of his public employment has a duty of loyalty to support his superiors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and accurately, commensurate with his education and experience.' Appellant, on the other hand, argues that the test applicable to defamatory statements directed against public officials by persons having no occupational relationship with them, namely, that statements to be legally actionable must be made 'with knowledge that (they were) \* \* \* false or with reckless disregard of whether (they were) \* \* \* false or not,' *New York Times Co. v. Sullivan* (1964), should also be applied to public statements made by teachers. Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run.

An examination of the statements in appellant's letter objected to by the Board reveals that they, like the letter as a whole, consist essentially of criticism of the Board's allocation of school funds between educational and athletic programs, and of both the Board's and the superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real reasons why additional tax revenues were being sought for the schools. The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among

coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning. Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct, such as statements (1)—(4) of appellant's letter, see Appendix, *infra*, may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.

We next consider the statements in appellant's letter which we agree to be false. The Board's original charges included allegations that the publication of the letter damaged the professional reputations of the Board and the superintendent and would foment controversy and conflict among the Board, teachers, administrators, and the residents of the district. However, no evidence to support these allegations was introduced at the hearing. So far as the record reveals, Pickering's letter was greeted by everyone but its main target, the Board, with massive apathy and total disbelief. The Board must, therefore, have decided, perhaps by analogy with the law of libel, that the statements were *per se* harmful to the operation of the schools.

However, the only way in which the Board could conclude, absent any evidence of the actual effect of the letter, that the statements contained therein were *per se* detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools. Certainly an accusation that too much money is being spent on athletics by the administrators of the school system (which is precisely the import of that portion of appellant's letter containing the statements that we have found to be false, see Appendix, *infra*) cannot reasonably be regarded as *per se* detrimental to the district's schools. Such an accusation reflects rather a difference of opinion between Pickering and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest.

In addition, the fact that particular illustrations of the Board's claimed undesirable emphasis on athletic programs are false would not normally have any necessary impact on the actual operation of the schools, beyond its tendency to anger the Board. For example, Pickering's letter was written after the defeat at the polls of the second proposed tax increase. It could, therefore, have had no effect on the ability of the school district to raise necessary revenue, since there was no showing that there was any proposal to increase taxes pending when the letter was written.

More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

In addition, the amounts expended on athletics which Pickering reported erroneously were matters of public record on which his position as a teacher in the district did not qualify him to speak with any greater authority than any other taxpayer. The Board could easily have rebutted appellant's errors by publishing the accurate figures itself, either via a letter to the same newspaper or otherwise. We are thus not presented with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts. Accordingly, we have no occasion to consider at this time whether under such circumstances a school board could reasonably require that a teacher make substantial efforts to verify the accuracy of his charges before publishing them.

What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

#### IV.

The public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment—is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity. *New York Times Co. v. Sullivan*. The same test has been applied to suits for invasion of privacy based on false statements where a 'matter of public interest' is involved. *Time, Inc. v. Hill* (1967) . It is therefore perfectly clear that, were appellant a member of the general public, the State's power to afford the appellee Board of Education or its members any legal right to sue him for writing the letter at issue here would be limited by the requirement that the letter be judged by the standard laid down in *New York Times*.

This Court has also indicated, in more general terms, that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors. \*\*\*

While criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech. We have already noted our disinclination to make an across-the-board equation of dismissal from public employment for remarks critical of superiors with awarding damages in a libel suit by a public official for similar criticism. However, in a case such as the

present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.

In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. Since no such showing has been made in this case regarding appellant's letter, see Appendix, *infra*, his dismissal for writing it cannot be upheld and the judgment of the Illinois Supreme Court must, accordingly, be reversed and the case remanded for further proceedings not inconsistent with this opinion. It is so ordered.

*Judgment reversed and case remanded with directions.*

JUSTICE DOUGLAS, WITH WHOM BLACK, J., JOINS, CONCURS IN THE JUDGMENT OF THE COURT [OMITTED]

WHITE, J., CONCURRING IN PART AND DISSENTING IN PART [OMITTED].

#### APPENDIX TO OPINION OF THE COURT

##### LETTERS TO THE EDITOR

\* \* \* Graphic Newspapers, Inc. Thursday, September 24, 1964, Page 4

Dear Editor:

I enjoyed reading the back issues of your paper which you loaned to me. Perhaps others would enjoy reading them in order to see just how far the two new high schools have deviated from the original promises by the Board of Education. First, let me state that I am referring to the February thru November, 1961 issues of your paper, so that it can be checked.

One statement in your paper declared that swimming pools, athletic fields, and auditoriums had been left out of the program. They may have been left out but they got put back in very quickly because Lockport West has both an auditorium and athletic field. In fact, Lockport West has a better athletic field than Lockport Central. It has a track that isn't quite regulation distance even though the board spent a few thousand dollars on it. Whose fault is that? Oh, I forgot, it wasn't supposed to be there in the first place. It must have fallen out of the sky. Such responsibility has been touched on in other letters but it seems one just can't help noticing it. I am not saying the school shouldn't have these facilities, because I think they should, but promises are promises, or are they?

Since there seems to be a problem getting all the facts to the voter on the twice defeated bond issue, many letters have been written to this paper and probably more will follow, I feel I must say something about the letters and their writers. Many of these letters did not give the whole story. Letters by your Board and Administration have stated that teachers' salaries total \$1,297,746 for one year. Now that must have been the total payroll, otherwise the teachers would be getting \$10,000 a year. I teach at the high school and I know this just isn't the case. However, this shows their 'stop at nothing' attitude. To illustrate further, do you know that the superintendent told the teachers, and I quote, 'Any teacher that opposes the referendum should be prepared for the consequences.' I think this gets at the reason we have problems passing bond issues. Threats

take something away; these are insults to voters in a free society. We should try to sell a program on its merits, if it has any.

Remember those letters entitled 'District 205 Teachers Speak,' I think the voters should know that those letters have been written and agreed to by only five or six teachers, not 98% of the teachers in the high school. In fact, many teachers didn't even know who was writing them. Did you know that those letters had to have the approval of the superintendent before they could be put in the paper? That's the kind of totalitarianism teachers live in at the high school, and your children go to school in.

In last week's paper, the letter written by a few uninformed teachers threatened to close the school cafeteria and fire its personnel. This is ridiculous and insults the intelligence of the voter because properly managed school cafeterias do not cost the school district any money. If the cafeteria is losing money, then the board should not be packing free lunches for athletes on days of athletic contests. Whatever the case, the taxpayer's child should only have to pay about 30¢ for his lunch instead of 35¢ to pay for free lunches for the athletes.

In a reply to this letter your Board of Administration will probably state that these lunches are paid for from receipts from the games. But \$20,000 in receipts doesn't pay for the \$200,000 a year they have been spending on varsity sports while neglecting the wants of teachers.

You see we don't need an increase in the transportation tax unless the voters want to keep paying \$50,000 or more a year to transport athletes home after practice and to away games, etc. Rest of the \$200,000 is made up in coaches' salaries, athletic directors' salaries, baseball pitching machines, sodded football fields, and thousands of dollars for other sports equipment.

These things are all right, provided we have enough money for them. To sod football fields on borrowed money and then not be able to pay teachers' salaries is getting the cart before the horse.

If these things aren't enough for you, look at East High. No doors on many of the classrooms, a plant room without any sunlight, no water in a first aid treatment room, are just a few of many things. The taxpayers were really taken to the cleaners. A part of the sidewalk in front of the building has already collapsed. Maybe Mr. Hess would be interested to know that we need blinds on the windows in that building also.

Once again, the board must have forgotten they were going to spend \$3,200,000 on the West building and \$2,300,000 on the East building.

As I see it, the bond issue is a fight between the Board of Education that is trying to push tax-supported athletics down our throats with education, and a public that has mixed emotions about both of these items because they feel they are already paying enough taxes, and simply don't know whom to trust with any more tax money.

I must sign this letter as a citizen, taxpayer and voter, not as a teacher, since that freedom has been taken from the teachers by the administration. Do you really know what goes on behind those stone walls at the high school?

Respectfully,

Marvin L. Pickering

## *Mt. Healthy City Board of Ed. v. Doyle*

429 U.S. 274 (1977)

REHNQUIST, J., DELIVERED THE OPINION FOR A UNANIMOUS COURT.

Respondent Doyle sued petitioner Mt. Healthy Board of Education in the United States District Court for the Southern District of Ohio. Doyle claimed that the Board's refusal to renew his contract in 1971 violated his rights under the First and Fourteenth Amendments to the United States Constitution. After a bench trial the District Court held that Doyle was entitled to reinstatement with backpay. The Court of Appeals for the Sixth Circuit affirmed the judgment, and we granted the Board's petition for certiorari to consider an admixture of jurisdictional and constitutional claims.

I -III

[omitted]

IV

Having concluded that respondent's complaint sufficiently pleaded jurisdiction under 28 U.S.C. 1331, that the Board has failed to preserve the issue whether that complaint stated a claim upon which relief could be granted against the Board, and that the Board is not immune from suit under the Eleventh Amendment, we now proceed to consider the merits of respondent's claim under the First and Fourteenth Amendments.

Doyle was first employed by the Board in 1966. He worked under one-year contracts for the first three years, and under a two-year contract from 1969 to 1971. In 1969 he was elected president of the Teachers' Association, in which position he worked to expand the subjects of direct negotiation between the Association and the Board of Education. During Doyle's one-year term as president of the Association, and during the succeeding year when he served on its executive committee, there was apparently some tension in relations between the Board and the Association.

Beginning early in 1970, Doyle was involved in several incidents not directly connected with his role in the Teachers' Association. In one instance, he engaged in an argument with another teacher which culminated in the other teacher's slapping him. Doyle subsequently refused to accept an apology and insisted upon some punishment for the other teacher. His persistence in the matter resulted in the suspension of both teachers for one day, which was followed by a walkout by a number of other teachers, which in turn resulted in the lifting of the suspensions.

On other occasions, Doyle got into an argument with employees of the school cafeteria over the amount of spaghetti which had been served him; referred to students, in connection with a disciplinary complaint, as "sons of bitches"; and made an obscene gesture to two girls in connection with their failure to obey commands made in his capacity as cafeteria supervisor. Chronologically the last in the series of incidents which respondent was involved in during his employment by the Board was a telephone call by him to a local radio station. It

was the Board's consideration of this incident which the court below found to be a violation of the First and Fourteenth Amendments.

In February 1971, the principal circulated to various teachers a memorandum relating to teacher dress and appearance, which was apparently prompted by the view of some in the administration that there was a relationship between teacher appearance and public support for bond issues. Doyle's response to the receipt of the memorandum - on a subject which he apparently understood was to be settled by joint teacher-administration action - was to convey the substance of the memorandum to a disc jockey at WSAI, a Cincinnati radio station, who promptly announced the adoption of the dress code as a news item. Doyle subsequently apologized to the principal, conceding that he should have made some prior communication of his criticism to the school administration.

Approximately one month later the superintendent made his customary annual recommendations to the Board as to the rehiring of nontenured teachers. He recommended that Doyle not be rehired. The same recommendation was made with respect to nine other teachers in the district, and in all instances, including Doyle's, the recommendation was adopted by the Board. Shortly after being notified of this decision, respondent requested a statement of reasons for the Board's actions. He received a statement citing "a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships." That general statement was followed by references to the radio station incident and to the obscene-gesture incident.

The District Court found that all of these incidents had in fact occurred. It concluded that respondent Doyle's telephone call to the radio station was "clearly protected by the First Amendment," and that because it had played a "substantial part" in the decision of the Board not to renew Doyle's employment, he was entitled to reinstatement with backpay. The District Court did not expressly state what test it was applying in determining that the incident in question involved conduct protected by the First Amendment, but simply held that the communication to the radio station was such conduct. The Court of Appeals affirmed in a brief per curiam opinion.

Doyle's claims under the First and Fourteenth Amendments are not defeated by the fact that he did not have tenure. Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, *Board of Regents v. Roth* (1972), he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms. *Perry v. Sindermann* (1972).

That question of whether speech of a government employee is constitutionally protected expression necessarily entails striking "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education* (1968). There is no suggestion by the Board that Doyle violated any established policy, or that its reaction to his communication to the radio station was anything more than an ad hoc response to Doyle's action in making the memorandum public. We therefore accept the District Court's

finding that the communication was protected by the First and Fourteenth Amendments. We are not, however, entirely in agreement with that court's manner of reasoning from this finding to the conclusion that Doyle is entitled to reinstatement with backpay.

The District Court made the following "conclusions" on this aspect of the case:

"1) If a non-permissible reason, e. g., exercise of First Amendment rights, played a substantial part in the decision not to renew - even in the face of other permissible grounds - the decision may not stand (citations omitted).

"2) A non-permissible reason did play a substantial part. That is clear from the letter of the Superintendent immediately following the Board's decision, which stated two reasons - the one, the conversation with the radio station clearly protected by the First Amendment. A court may not engage in any limitation of First Amendment rights based on 'tact' - that is not to say that the 'tactfulness' is irrelevant to other issues in this case."

At the same time, though, it stated that

"[i]n fact, as this Court sees it and finds, both the Board and the Superintendent were faced with a situation in which there did exist in fact reason . . . independent of any First Amendment rights or exercise thereof, to not extend tenure."

Since respondent Doyle had no tenure, and there was therefore not even a state-law requirement of "cause" or "reason" before a decision could be made not to renew his employment, it is not clear what the District Court meant by this latter statement. Clearly the Board legally could have dismissed respondent had the radio station incident never come to its attention. One plausible meaning of the court's statement is that the Board and the Superintendent not only could, but in fact would have reached that decision had not the constitutionally protected incident of the telephone call to the radio station occurred. We are thus brought to the issue whether, even if that were the case, the fact that the protected conduct played a "substantial part" in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not.

A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision - even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

This is especially true where, as the District Court observed was the case here, the current decision to rehire will accord "tenure." The long-term consequences of an award of tenure are of great moment both to the employee and to the employer. They are too significant for us to hold that the Board in this case would be precluded, because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of fact that quite apart from such conduct Doyle's record was such that he would not have been rehired in any event.

In other areas of constitutional law, this Court has found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused. We think those are instructive in formulating the test to be applied here.

In *Lyons v. Oklahoma* (1944), the Court held that even though the first confession given by a defendant had been involuntary, the Fourteenth Amendment did not prevent the State from using a second confession obtained 12 hours later if the coercion surrounding the first confession had been sufficiently dissipated as to make the second confession voluntary. In *Wong Sun v. United States* (1963), the Court was willing to assume that a defendant's arrest had been unlawful, but held that "the connection between the arrest and the statement [given several days later] had `become so attenuated as to dissipate the taint.' \*\*\* While the type of causation on which the taint cases turn may differ somewhat from that which we apply here, those cases do suggest that the proper test to apply in the present context is one which likewise protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights.

Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" - or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct.

We cannot tell from the District Court opinion and conclusions, nor from the opinion of the Court of Appeals affirming the judgment of the District Court, what conclusion those courts would have reached had they applied this test. The judgment of the Court of Appeals is therefore vacated, and the case remanded for further proceedings consistent with this opinion.

*So ordered.*

## Notes

1. Importantly, *Pickering* rejects the notion that public employees abandon their First Amendment rights as a condition of public employment. The Court relies on *Keyishian v. Bd. of Regents of Univ. of State of N. Y.* (1967), decided the previous year, in which the Court held unconstitutional a “loyalty oath” that was a prerequisite of continued state university employment. Each plaintiff had refused to sign a “Feinberg Certificate,” that “he was not a Communist, and that if he had ever been a Communist, he had communicated that fact to the President of the State University of New York.” Writing for the Court in *Keyishian*, Justice Brennan opined:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. ‘The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’ The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’

How is this notion of “academic freedom” in tension with the holding in *Pickering* itself?

2. Justice White, who concurs in part and dissents in part in *Pickering* differed with the Court on whether false statements would be protected:

Deliberate or reckless falsehoods serve no First Amendment ends and deserve no protection under that Amendment. \*\*\* As I see it, a teacher may be fired without violation of the First Amendment for knowingly or recklessly making false statements regardless of their harmful impact on the schools.

Do White’s concerns survive *United States v. Alvarez*?

3. Articulate the “*Pickering* test” which remains valid doctrine. Why is it called a “balancing” test?

4. Articulate the “*Mt. Healthy* test” which also remains valid doctrine. When does it apply?

5. While doctrinal cross-fertilization is not unusual, is the other area of constitutional law that the Court finds “instructive” one that is predictable? Have you encountered a test similar to *Mt. Healthy* in other areas of law?

## B. Applying and modifying the tests

This section considers four cases that reached the Court between 1979 and 2004 applying *Pickering* and *Mt. Healthy*. Consider whether each case is a mere refinement of the doctrine or a substantial change.

### *Givhan v. Western Line Consol. School Dist.*

439 U.S. 410 (1979)

REHNQUIST, J., DELIVERED THE OPINION FOR A UNANIMOUS COURT. STEVENS, J., FILED A CONCURRING OPINION.

JUSTICE REHNQUIST DELIVERED THE OPINION OF THE COURT.

Petitioner Bessie Givhan was dismissed from her employment as a junior high English teacher at the end of the 1970-1971 school year. At the time of petitioner's termination, respondent Western Line Consolidated School District was the subject of a desegregation order entered by the United States District Court for the Northern District of Mississippi. Petitioner filed a complaint in intervention in the desegregation action, seeking reinstatement on the dual grounds that nonrenewal of her contract violated the rule laid down by the Court of Appeals for the Fifth Circuit \*\*\* and infringed her right of free speech secured by the First and Fourteenth Amendments of the United States Constitution. In an effort to show that its decision was justified, respondent School District introduced evidence of, among other things, a series of private encounters between petitioner and the school principal in which petitioner allegedly made "petty and unreasonable demands" in a manner variously described by the principal as "insulting," "hostile," "loud," and "arrogant." After a two-day bench trial, the District Court held that petitioner's termination had violated the First Amendment. Finding that petitioner had made "demands" on but two occasions and that those demands "were neither 'petty' nor 'unreasonable,' insomuch as all the complaints in question involved employment policies and practices at [the] school which [petitioner] conceived to be racially discriminatory in purpose or effect," the District Court concluded that "the primary reason for the school district's failure to renew [petitioner's] contract was her criticism of the policies and practices of the school district, especially the school to which she was assigned to teach." Accordingly, the District Court held that the dismissal violated petitioner's First Amendment rights, as enunciated in *Perry v. Sindermann* (1972), and *Pickering v. Board of Education* (1968), and ordered her reinstatement.

The Court of Appeals for the Fifth Circuit reversed. Although it found the District Court's findings not clearly erroneous, the Court of Appeals concluded that because petitioner had privately expressed her complaints and opinions to the principal, her expression was not protected under the First Amendment. Support for this proposition was thought to be derived from *Pickering*, *Perry*, and *Mt. Healthy City Bd. of Ed. v. Doyle* (1977), which were found to contain

"[t]he strong implication . . . that private expression by a public employee is not constitutionally protected." The Court of Appeals also concluded that there is no constitutional right to "press even `good' ideas on an unwilling recipient," saying that to afford public employees the right to such private expression "would in effect force school principals to be ombudsmen, for damnable as well as laudable expressions." We are unable to agree that private expression of one's views is beyond constitutional protection, and therefore reverse the Court of Appeals' judgment and remand the case so that it may consider the contentions of the parties freed from this erroneous view of the First Amendment.

This Court's decisions in *Pickering*, *Perry*, and *Mt. Healthy* do not support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly. While those cases each arose in the context of a public employee's public expression, the rule to be derived from them is not dependent on that largely coincidental fact. \*\*\*

The First Amendment forbids abridgment of the "freedom of speech." Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.

\*\*\* Since this case was tried before *Mt. Healthy* was decided, it is not surprising that respondents did not attempt to prove in the District Court that the decision not to rehire petitioner would have been made even absent consideration of her "demands." Thus, the case came to the Court of Appeals in very much the same posture as *Mt. Healthy* was presented to this Court. And while the District Court found that petitioner's "criticism" was the "primary" reason for the School District's failure to rehire her, it did not find that she would have been rehired but for her criticism. Respondents' *Mt. Healthy* claim called for a factual determination which could not, on this record, be resolved by the Court of Appeals.

Accordingly, the judgment of the Court of Appeals is vacated insofar as it relates to petitioner, and the case is remanded for further proceedings consistent with this opinion.

*So ordered.*

JUSTICE STEVENS, CONCURRING [OMITTED] [DISCUSSES THE REMAND PROCESS]

## Connick v. Myers

61 U.S. 138 (1983)

WHITE, J., DELIVERED THE OPINION OF THE COURT, IN WHICH BURGER, C.J., POWELL, O'CONNOR AND REHNQUIST, J.J., JOINED. BRENNAN, J., FILED A DISSIDENTING OPINION, JOINED BY MARSHALL, BLACKMUN, AND STEVENS, J.J., JOINED.

JUSTICE WHITE DELIVERED THE OPINION OF THE COURT.

In *Pickering v. Board of Education* (1968), we stated that a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment. We also recognized that the State's interests as an employer in regulating the speech of its employees "differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." The problem, we thought, was arriving "at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." We return to this problem today and consider whether the First and Fourteenth Amendments prevent the discharge of a state employee for circulating a questionnaire concerning internal office affairs.

### I

The respondent, Sheila Myers, was employed as an Assistant District Attorney in New Orleans for five and a half years. She served at the pleasure of petitioner Harry Connick, the District Attorney for Orleans Parish. During this period Myers competently performed her responsibilities of trying criminal cases.

In the early part of October 1980, Myers was informed that she would be transferred to prosecute cases in a different section of the criminal court. Myers was strongly opposed to the proposed transfer and expressed her view to several of her supervisors, including Connick. Despite her objections, on October 6 Myers was notified that she was being transferred. Myers again spoke with Dennis Waldron, one of the First Assistant District Attorneys, expressing her reluctance to accept the transfer. A number of other office matters were discussed and Myers later testified that, in response to Waldron's suggestion that her concerns were not shared by others in the office, she informed him that she would do some research on the matter.

That night Myers prepared a questionnaire soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. Early the following morning, Myers typed and copied the questionnaire. She also met with Connick who urged her to accept the transfer. She said she would "consider" it. Connick then left the office. Myers then distributed the questionnaire to 15 Assistant District Attorneys. Shortly after noon, Dennis Waldron learned that Myers was distributing the survey. He immediately phoned Connick and informed him that Myers was creating a "mini-insurrection" within the office. Connick returned to the office and told Myers that she was being terminated because of her refusal

to accept the transfer. She was also told that her distribution of the questionnaire was considered an act of insubordination. Connick particularly objected to the question which inquired whether employees "had confidence in and would rely on the word" of various superiors in the office, and to a question concerning pressure to work in political campaigns which he felt would be damaging if discovered by the press.

Myers filed suit under 42 U. S. C. § 1983 contending that her employment was wrongfully terminated because she had exercised her constitutionally protected right of free speech. The District Court agreed, ordered Myers reinstated, and awarded backpay, damages, and attorney's fees. The District Court found that although Connick informed Myers that she was being fired because of her refusal to accept a transfer, the facts showed that the questionnaire was the real reason for her termination. The court then proceeded to hold that Myers' questionnaire involved matters of public concern and that the State had not "clearly demonstrated" that the survey "substantially interfered" with the operations of the District Attorney's office.

Connick appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed on the basis of the District Court's opinion. Connick then sought review in this Court by way of certiorari, which we granted.

## II

For at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. *Keyishian v. Board of Regents* (1967); *Pickering v. Board of Education* (1968); *Perry v. Sindermann* (1972); *Branti v. Finkel* (1980). Our task, as we defined it in *Pickering*, is to seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." The District Court, and thus the Court of Appeals as well, misapplied our decision in *Pickering* and consequently, in our view, erred in striking the balance for respondent.

\*\*\* *Pickering*, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.

\*\*\* Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. In this case, with but one exception, the questions posed by Myers to her co-workers do not fall under the rubric of matters of "public concern." We view the questions pertaining to the confidence and trust

that Myers' co-workers possess in various supervisors, the level of office morale, and the need for a grievance committee as mere extensions of Myers' dispute over her transfer to another section of the criminal court. Unlike the dissent, we do not believe these questions are of public import in evaluating the performance of the District Attorney as an elected official. Myers did not seek to inform the public that the District Attorney's Office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others. Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo. While discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of Myers' questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors. These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre.

To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark — and certainly every criticism directed at a public official — would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

One question in Myers' questionnaire, however, does touch upon a matter of public concern. Question 11 inquires if assistant district attorneys "ever feel pressured to work in political campaigns on behalf of office supported candidates." We have recently noted that official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights. *Branti v. Finkel*; *Elrod v. Burns*. In addition, there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service. *CSC v. Letter Carriers*, 413 U. S. 548 (1973). Given this history, we believe it apparent that the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal.

## B

Because one of the questions in Myers' survey touched upon a matter of public concern and contributed to her discharge, we must determine whether Connick was justified in discharging Myers. Here the District Court again erred in imposing an unduly onerous burden on the State to justify Myers' discharge. The District Court viewed the issue of whether Myers' speech was upon a matter of "public concern" as a threshold inquiry, after which it became the government's burden to "clearly demonstrate" that the speech involved "substantially interfered" with official responsibilities. Yet *Pickering* unmistakably states, and respondent agrees, that the State's burden in justifying a particular discharge varies depending upon the nature of the

employee's expression. Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests.

### C

The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public. \*\*\*

We agree with the District Court that there is no demonstration here that the questionnaire impeded Myers' ability to perform her responsibilities. The District Court was also correct to recognize that "it is important to the efficient and successful operation of the District Attorney's office for Assistants to maintain close working relationships with their superiors." Connick's judgment, and apparently also that of his first assistant Dennis Waldron, who characterized Myers' actions as causing a "mini-insurrection," was that Myers' questionnaire was an act of insubordination which interfered with working relationships. When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern.

The District Court rejected Connick's position because "[u]nlike a statement of fact which might be deemed critical of one's superiors, [Myers'] questionnaire was not a statement of fact but the presentation and solicitation of ideas and opinions," which are entitled to greater constitutional protection because "under the First Amendment there is no such thing as a false idea." This approach, while perhaps relevant in weighing the value of Myers' speech, bears no logical relationship to the issue of whether the questionnaire undermined office relationships. Questions, no less than forcefully stated opinions and facts, carry messages and it requires no unusual insight to conclude that the purpose, if not the likely result, of the questionnaire is to seek to precipitate a vote of no confidence in Connick and his supervisors. Thus, Question 10, which asked whether or not the Assistants had confidence in and relied on the word of five named supervisors, is a statement that carries the clear potential for undermining office relations.

Also relevant is the manner, time, and place in which the questionnaire was distributed. As noted in *Givhan*: "Private expression . . . may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered." Here the questionnaire was prepared and distributed at the office; the manner of distribution required not only Myers to leave her work but others to do the same in order that the questionnaire be completed. Although some latitude in when official work is performed is to be allowed when professional employees are involved, and Myers did not violate announced office policy, the

fact that Myers, unlike Pickering, exercised her rights to speech at the office supports Connick's fears that the functioning of his office was endangered.

Finally, the context in which the dispute arose is also significant. This is not a case where an employee, out of purely academic interest, circulated a questionnaire so as to obtain useful research. Myers acknowledges that it is no coincidence that the questionnaire followed upon the heels of the transfer notice. When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office. Although we accept the District Court's factual finding that Myers' reluctance to accede to the transfer order was not a sufficient cause in itself for her dismissal, and thus does not constitute a sufficient defense under *Mt. Healthy*, this does not render irrelevant the fact that the questionnaire emerged after a persistent dispute between Myers and Connick and his deputies over office transfer policy.

### III

Myers' questionnaire touched upon matters of public concern in only a most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment. We reiterate, however, the caveat we expressed in *Pickering*, "Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged."

Our holding today is grounded in our longstanding recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office. Although today the balance is struck for the government, this is no defeat for the First Amendment. For it would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance that we see presented here. The judgment of the Court of Appeals is

*Reversed.*

#### APPENDIX TO OPINION OF THE COURT

Questionnaire distributed by respondent on October 7, 1980.

"PLEASE TAKE THE FEW MINUTES IT WILL REQUIRE TO FILL THIS OUT. YOU CAN FREELY EXPRESS YOUR OPINION WITH ANONYMITY GUARANTEED.

1. How long have you been in the Office? \_\_\_\_\_
2. Were you moved as a result of the recent transfers? \_\_\_\_\_

3. Were the transfers as they effected [sic] you discussed with you by any superior prior to the notice of them being posted? \_\_\_\_\_
4. Do you think as a matter of policy, they should have been? \_\_\_\_\_
5. From your experience, do you feel office procedure regarding transfers has been fair? \_\_\_\_\_
6. Do you believe there is a rumor mill active in the office?
7. If so, how do you think it effects [sic] overall working performance of A.D.A. personnel? \_\_\_\_\_
8. If so, how do you think it effects [sic] office morale? \_\_\_\_
9. Do you generally first learn of office changes and developments through rumor? \_\_\_\_\_
10. Do you have confidence in and would you rely on the word of:  
Bridget Bane \_\_\_\_\_ Fred Harper \_\_\_\_\_ Lindsay Larson \_\_\_\_  
Joe Meyer \_\_\_\_\_ Dennis Waldron \_\_\_\_\_
11. Do you ever feel pressured to work in political campaigns on behalf of office supported candidates? \_\_\_\_\_
12. Do you feel a grievance committee would be a worthwhile addition to the office structure? \_\_\_\_\_
13. How would you rate office morale? \_\_\_\_\_
14. Please feel free to express any comments or feelings you have. \_\_\_\_\_

THANK YOU FOR YOUR COOPERATION IN THIS SURVEY."

JUSTICE BRENNAN, WITH WHOM JUSTICE MARSHALL, JUSTICE BLACKMUN, AND JUSTICE STEVENS JOIN, DISSENTING.

Sheila Myers was discharged for circulating a questionnaire to her fellow Assistant District Attorneys seeking information about the effect of petitioner's personnel policies on employee morale and the overall work performance of the District Attorney's Office. The Court concludes that her dismissal does not violate the First Amendment, primarily because the questionnaire addresses matters that, in the Court's view, are not of public concern. It is hornbook law, however, that speech about "the manner in which government is operated or should be operated" is an essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment. Because the questionnaire addressed such matters and its distribution did not adversely affect the operations of the District Attorney's Office or interfere with Myers' working relationship with her fellow employees, I dissent.

## I

The Court correctly reaffirms the long-established principle that the government may not constitutionally compel persons to relinquish their First Amendment rights as a condition of public employment. \*\*\*

The Court's decision today is flawed in three respects. First, the Court distorts the balancing analysis required under *Pickering* by suggesting that one factor,

the context in which a statement is made, is to be weighed *twice* — first in determining whether an employee's speech addresses a matter of public concern and then in deciding whether the statement adversely affected the government's interest as an employer. Second, in concluding that the effect of respondent's personnel policies on employee morale and the work performance of the District Attorney's Office is not a matter of public concern, the Court impermissibly narrows the class of subjects on which public employees may speak out without fear of retaliatory dismissal. Third, the Court misapplies the *Pickering* balancing test in holding that Myers could constitutionally be dismissed for circulating a questionnaire addressed to at least one subject that *was* "a matter of interest to the community," in the absence of evidence that her conduct disrupted the efficient functioning of the District Attorney's Office.

## II

\*\*\* The standard announced by the Court suggests that the manner and context in which a statement is made must be weighed on *both* sides of the *Pickering* balance. It is beyond dispute that how and where a public employee expresses his views are relevant in the second half of the *Pickering* inquiry — determining whether the employee's speech adversely affects the government's interests as an employer. The Court explicitly acknowledged this in *Givhan v. Western Line Consolidated School District* (1979) \*\*\* But the fact that a public employee has chosen to express his views in private has nothing whatsoever to do with the first half of the *Pickering* calculus — whether those views relate to a matter of public concern. This conclusion is implicit in *Givhan's* holding that the freedom of speech guaranteed by the First Amendment is not "lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."

\*\*\*Unconstrained discussion concerning the manner in which the government performs its duties is an essential element of the public discourse necessary to informed self-government. \*\*\*

Applying these principles, I would hold that Myers' questionnaire addressed matters of public concern because it discussed subjects that could reasonably be expected to be of interest to persons seeking to develop informed opinions about the manner in which the Orleans Parish District Attorney, an elected official charged with managing a vital governmental agency, discharges his responsibilities. The questionnaire sought primarily to obtain information about the impact of the recent transfers on morale in the District Attorney's Office. It is beyond doubt that personnel decisions that adversely affect discipline and morale may ultimately impair an agency's efficient performance of its duties. Because I believe the First Amendment protects the right of public employees to discuss such matters so that the public may be better informed about how their elected officials fulfill their responsibilities, I would affirm the District Court's conclusion that the questionnaire related to matters of public importance and concern.

The Court's adoption of a far narrower conception of what subjects are of public concern seems prompted by its fears that a broader view "would mean that virtually every remark — and certainly every criticism directed at a public official — would plant the seed of a constitutional case." Obviously, not every

remark directed at a public official by a public employee is protected by the First Amendment. But deciding whether a particular matter is of public concern is an inquiry that, by its very nature, is a sensitive one for judges charged with interpreting a constitutional provision intended to put "the decision as to what views shall be voiced largely into the hands of each of us . . . ." *Cohen v. California*, (1971). \*\*\* In making such a delicate inquiry, we must bear in mind that "the citizenry is the final judge of the proper conduct of public business."

The Court's decision ignores these precepts. Based on its own narrow conception of which matters are of public concern, the Court implicitly determines that information concerning employee morale at an important government office will not inform public debate. To the contrary, the First Amendment protects the dissemination of such information so that the people, not the courts, may evaluate its usefulness. The proper means to ensure that the courts are not swamped with routine employee grievances mischaracterized as First Amendment cases is not to restrict artificially the concept of "public concern," but to require that adequate weight be given to the public's important interests in the efficient performance of governmental functions and in preserving employee discipline and harmony sufficient to achieve that end.

### III

Although the Court finds most of Myers' questionnaire unrelated to matters of public interest, it does hold that one question — asking whether Assistants felt pressured to work in political campaigns on behalf of office-supported candidates — addressed a matter of public importance and concern. The Court also recognizes that this determination of public interest must weigh heavily in the balancing of competing interests required by *Pickering*. Having gone that far, however, the Court misapplies the *Pickering* test and holds — against our previous authorities — that a public employer's mere apprehension that speech will be disruptive justifies suppression of that speech when all the objective evidence suggests that those fears are essentially unfounded. \*\*\*

The District Court weighed all of the relevant factors identified by our cases. It found that petitioner failed to establish that Myers violated either a duty of confidentiality or an office policy. Noting that most of the copies of the questionnaire were distributed during lunch, it rejected the contention that the distribution of the questionnaire impeded Myers' performance of her duties, and it concluded that "Connick has not shown *any* evidence to indicate that the plaintiff's work performance was adversely affected by her expression."

The Court accepts all of these findings. It concludes, however, that the District Court failed to give adequate weight to the context in which the questionnaire was distributed and to the need to maintain close working relationships in the District Attorney's Office. In particular, the Court suggests the District Court failed to give sufficient weight to the disruptive potential of Question 10, which asked whether the Assistants had confidence in the word of five named supervisors. The District Court, however, explicitly recognized that this was petitioner's "most forceful argument"; but after hearing the testimony of four of the five supervisors named in the question, it found that the question had no adverse effect on Myers' relationship with her superiors. To this the Court responds that an employer need not wait until the destruction of working

relationships is manifest before taking action. In the face of the District Court's finding that the circulation of the questionnaire had no disruptive effect, the Court holds that respondent may be dismissed because petitioner "reasonably believed [the action] would disrupt the office, undermine his authority, and destroy close working relationships." Even though the District Court found that the distribution of the questionnaire did not impair Myers' working relationship with her supervisors, the Court bows to petitioner's judgment because "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."

Such extreme deference to the employer's judgment is not appropriate when public employees voice critical views concerning the operations of the agency for which they work. \*\*\* If the employer's judgment is to be controlling, public employees will not speak out when what they have to say is critical of their supervisors. In order to protect public employees' First Amendment right to voice critical views on issues of public importance, the courts must make their own appraisal of the effects of the speech in question.

\*\*\* After reviewing the evidence, the District Court found that "it cannot be said that the defendant's interest in promoting the efficiency of the public services performed through his employees was either adversely affected or substantially impeded by plaintiff's distribution of the questionnaire." 507 F. Supp., at 759. Based on these findings the District Court concluded that the circulation of the questionnaire was protected by the First Amendment. The District Court applied the proper legal standard and reached an acceptable accommodation between the competing interests. I would affirm its decision and the judgment of the Court of Appeals.

#### IV

The Court's decision today inevitably will deter public employees from making critical statements about the manner in which government agencies are operated for fear that doing so will provoke their dismissal. As a result, the public will be deprived of valuable information with which to evaluate the performance of elected officials. Because protecting the dissemination of such information is an essential function of the First Amendment, I dissent.

### ***Rankin v. McPherson***

483 U.S. 378 (1987)

MARSHALL, J., DELIVERED THE OPINION OF THE COURT, IN WHICH BRENNAN, BLACKMUN, POWELL, AND STEVENS, JJ., JOINED. POWELL, J., FILED A CONCURRING OPINION. SCALIA, J., FILED A DISSENTING OPINION, IN WHICH REHNQUIST, C. J., AND WHITE AND O'CONNOR, JJ., JOINED.

JUSTICE MARSHALL DELIVERED THE OPINION OF THE COURT.

The issue in this case is whether a clerical employee in a county Constable's office was properly discharged for remarking, after hearing of an attempt on the life of the President, "If they go for him again, I hope they get him."

#### I

On January 12, 1981, respondent Ardith McPherson was appointed a deputy in the office of the Constable of Harris County, Texas. The Constable is an elected official who functions as a law enforcement officer. At the time of her appointment, McPherson, a black woman, was 19 years old and had attended college for a year, studying secretarial science. Her appointment was conditional for a 90-day probationary period.

Although McPherson's title was "deputy constable," this was the case only because all employees of the Constable's office, regardless of job function, were deputy constables. She was not a commissioned peace officer, did not wear a uniform, and was not authorized to make arrests or permitted to carry a gun. McPherson's duties were purely clerical. Her work station was a desk at which there was no telephone, in a room to which the public did not have ready access. Her job was to type data from court papers into a computer that maintained an automated record of the status of civil process in the county. Her training consisted of two days of instruction in the operation of her computer terminal.

On March 30, 1981, McPherson and some fellow employees heard on an office radio that there had been an attempt to assassinate the President of the United States. Upon hearing that report, McPherson engaged a co-worker, Lawrence Jackson, who was apparently her boyfriend, in a brief conversation, which according to McPherson's uncontroverted testimony went as follows:

"Q: What did you say?

"A: I said I felt that that would happen sooner or later.

"Q: Okay. And what did Lawrence say?

"A: Lawrence said, yeah, agreeing with me.

"Q: Okay. Now, when you - after Lawrence spoke, then what was your next comment?

"A: Well, we were talking - it's a wonder why they did that. I felt like it would be a black person that did that, because I feel like most of my kind is on welfare and CETA, and they use medicaid, and at the time, I was thinking that's what it was.

". . . But then after I said that, and then Lawrence said, yeah, he's cutting back medicaid and food stamps. And I said, yeah, welfare and CETA. I said, shoot, if they go for him again, I hope they get him."

McPherson's last remark was overheard by another Deputy Constable, who, unbeknownst to McPherson, was in the room at the time. The remark was reported to Constable Rankin, who summoned McPherson. McPherson readily admitted that she had made the statement, but testified that she told Rankin, upon being asked if she made the statement, "Yes, but I didn't mean anything by it." After their discussion, Rankin fired McPherson.

McPherson brought suit in the United States District Court for the Southern District of Texas under 42 U.S.C. 1983, alleging that petitioner Rankin, in discharging her, had violated her constitutional rights under color of state law. She sought reinstatement, backpay, costs and fees, and other equitable relief. The District Court held a hearing, and then granted summary judgment to Constable Rankin, holding that McPherson's speech had been unprotected and that her discharge had therefore been proper. The Court of Appeals for the Fifth Circuit vacated and remanded for trial on the ground that substantial issues of

material fact regarding the context in which the statement had been made precluded the entry of summary judgment.

On remand, the District Court held another hearing and ruled once again, this time from the bench, that the statements were not protected speech. Again, the Court of Appeals reversed. It held that McPherson's remark had addressed a matter of public concern, requiring that society's interest in McPherson's freedom of speech be weighed against her employer's interest in maintaining efficiency and discipline in the workplace. Performing that balancing, the Court of Appeals concluded that the Government's interest did not outweigh the First Amendment interest in protecting McPherson's speech. Given the nature of McPherson's job and the fact that she was not a law enforcement officer, was not brought by virtue of her job into contact with the public, and did not have access to sensitive information, the Court of Appeals deemed her "duties . . . so utterly ministerial and her potential for undermining the office's mission so trivial" as to forbid her dismissal for expression of her political opinions. "However ill-considered Ardith McPherson's opinion was," the Court of Appeals concluded, "it did not make her unfit" for the job she held in Constable Rankin's office. The Court of Appeals remanded the case for determination of an appropriate remedy.

We granted certiorari and now affirm.

## II

It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech. *Perry v. Sindermann* (1972). Even though McPherson was merely a probationary employee, and even if she could have been discharged for any reason or for no reason at all, she may nonetheless be entitled to reinstatement if she was discharged for exercising her constitutional right to freedom of expression.

The determination whether a public employer has properly discharged an employee for engaging in speech requires "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education* (1968); *Connick v. Myers* (1983). This balancing is necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment. On the one hand, public employers are employers, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions. On the other hand, "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." *Pickering*. Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.

## A

The threshold question in applying this balancing test is whether McPherson's speech may be "fairly characterized as constituting speech on a matter of public concern." *Connick*. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." The District Court apparently found that McPherson's speech did not address a matter of public concern. The Court of Appeals rejected this conclusion, finding that "the life and death of the President are obviously matters of public concern." \*\*\*

Considering the statement in context, as *Connick* requires, discloses that it plainly dealt with a matter of public concern. The statement was made in the course of a conversation addressing the policies of the President's administration. It came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President. While a statement that amounted to a threat to kill the President would not be protected by the First Amendment, the District Court concluded, and we agree, that McPherson's statement did not amount to a threat punishable under 18 U.S.C. 871(a) or 18 U.S.C. 2385, or, indeed, that could properly be criminalized at all. The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern. "[D]ebate on public issues should be uninhibited, robust, and wideopen, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*.

## B

Because McPherson's statement addressed a matter of public concern, Pickering next requires that we balance McPherson's interest in making her statement against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." The State bears a burden of justifying the discharge on legitimate grounds. *Connick*.

In performing the balancing, the statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose. We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.

These considerations, and indeed the very nature of the balancing test, make apparent that the state interest element of the test focuses on the effective functioning of the public employer's enterprise. Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest. From this perspective, however, petitioners fail to demonstrate a state interest that outweighs McPherson's First Amendment rights. While McPherson's statement was made at the workplace, there is no evidence that it interfered with the efficient functioning of the office. The Constable was evidently not afraid that McPherson had disturbed or interrupted other

employees - he did not inquire to whom respondent had made the remark and testified that he "was not concerned who she had made it to," Tr. 42. In fact, Constable Rankin testified that the possibility of interference with the functions of the Constable's office had not been a consideration in his discharge of respondent and that he did not even inquire whether the remark had disrupted the work of the office.

Nor was there any danger that McPherson had discredited the office by making her statement in public. McPherson's speech took place in an area to which there was ordinarily no public access; her remark was evidently made in a private conversation with another employee. There is no suggestion that any member of the general public was present or heard McPherson's statement. Nor is there any evidence that employees other than Jackson who worked in the room even heard the remark. Not only was McPherson's discharge unrelated to the functioning of the office, it was not based on any assessment by the Constable that the remark demonstrated a character trait that made respondent unfit to perform her work.

While the facts underlying Rankin's discharge of McPherson are, despite extensive proceedings in the District Court, still somewhat unclear, it is undisputed that he fired McPherson based on the content of her speech. Evidently because McPherson had made the statement, and because the Constable believed that she "meant it," he decided that she was not a suitable employee to have in a law enforcement agency. But in weighing the State's interest in discharging an employee based on any claim that the content of a statement made by the employee somehow undermines the mission of the public employer, some attention must be paid to the responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails. Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal. We cannot believe that every employee in Constable Rankin's office, whether computer operator, electrician, or file clerk, is equally required, on pain of discharge, to avoid any statement susceptible of being interpreted by the Constable as an indication that the employee may be unworthy of employment in his law enforcement agency. At some point, such concerns are so removed from the effective functioning of the public employer that they cannot prevail over the free speech rights of the public employee.

This is such a case. McPherson's employment-related interaction with the Constable was apparently negligible. Her duties were purely clerical and were limited solely to the civil process function of the Constable's office. There is no indication that she would ever be in a position to further - or indeed to have any involvement with - the minimal law enforcement activity engaged in by the Constable's office. Given the function of the agency, McPherson's position in the office, and the nature of her statement, we are not persuaded that Rankin's interest in discharging her outweighed her rights under the First Amendment.

Because we agree with the Court of Appeals that McPherson's discharge was improper, the judgment of the Court of Appeals is

*Affirmed.*

JUSTICE POWELL, CONCURRING [OMITTED]

JUSTICE SCALIA, WITH WHOM THE CHIEF JUSTICE, JUSTICE WHITE, AND JUSTICE O'CONNOR JOIN, DISSENTING.

I agree with the proposition, felicitously put by Constable Rankin's counsel, that no law enforcement agency is required by the First Amendment to permit one of its employees to "ride with the cops and cheer for the robbers." The issue in this case is whether Constable Rankin, a law enforcement official, is prohibited by the First Amendment from preventing his employees from saying of the attempted assassination of President Reagan - on the job and within hearing of other employees - "If they go for him again, I hope they get him." The Court, applying the two-prong analysis of *Connick v. Myers* (1983), holds that McPherson's statement was protected by the First Amendment because (1) it "addressed a matter of public concern," and (2) McPherson's interest in making the statement outweighs Rankin's interest in suppressing it. In so doing, the Court significantly and irrationally expands the definition of "public concern"; it also carves out a new and very large class of employees - i. e., those in "nonpolicymaking" positions - who, if today's decision is to be believed, can never be disciplined for statements that fall within the Court's expanded definition. Because I believe the Court's conclusions rest upon a distortion of both the record and the Court's prior decisions, I dissent.

I

\*\*\* McPherson's statement is indeed so different from those that [we have held protected] it is only one step removed from statements that we have previously held entitled to no First Amendment protection even in the nonemployment context - including assassination threats against the President (which are illegal under 18 U.S.C. 871), "fighting words," epithets or personal abuse; and advocacy of force or violence. A statement lying so near the category of completely unprotected speech cannot fairly be viewed as lying within the "heart" of the First Amendment's protection; it lies within that category of speech that can neither be characterized as speech on matters of public concern nor properly subject to criminal penalties. Once McPherson stopped explicitly criticizing the President's policies and expressed a desire that he be assassinated, she crossed the line.

The Court reaches the opposite conclusion only by distorting the concept of "public concern." It does not explain how a statement expressing approval of a serious and violent crime - assassination of the President - can possibly fall within that category. It simply rehearses the "context" of McPherson's statement, which as we have already seen is irrelevant here, and then concludes that because of that context, and because the statement "came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President," the statement "plainly dealt

with a matter of public concern." I cannot respond to this progression of reasoning except to say I do not understand it. Surely the Court does not mean to adopt the reasoning of the court below, which was that McPherson's statement was "addressed to a matter of public concern" within the meaning of *Connick* because the public would obviously be "concerned" about the assassination of the President. That is obviously untenable: The public would be "concerned" about a statement threatening to blow up the local federal building or demanding a \$1 million extortion payment, yet that kind of "public concern" does not entitle such a statement to any First Amendment protection at all.

## II

Even if I agreed that McPherson's statement was speech on a matter of "public concern," I would still find it unprotected. It is important to be clear on what the issue is in this part of the case. It is not, as the Court suggests, whether "Rankin's interest in discharging [McPherson] outweighed her rights under the First Amendment." Rather, it is whether his interest in preventing the expression of such statements in his agency outweighed her First Amendment interest in making the statement. We are not deliberating, in other words, (or at least should not be) about whether the sanction of dismissal was, as the concurrence puts it, "an . . . intemperat[e] employment decision." It may well have been - and personally I think it was. But we are not sitting as a panel to develop sound principles of proportionality for adverse actions in the state civil service. We are asked to determine whether, given the interests of this law enforcement office, McPherson had a right to say what she did - so that she could not only not be fired for it, but could not be formally reprimanded for it, or even prevented from repeating it endlessly into the future. It boggles the mind to think that she has such a right.

The Constable testified that he "was very concerned that this remark was made." Rightly so. As a law enforcement officer, the Constable obviously has a strong interest in preventing statements by any of his employees approving, or expressing a desire for, serious, violent crimes - regardless of whether the statements actually interfere with office operations at the time they are made or demonstrate character traits that make the speaker unsuitable for law enforcement work. \*\*\*

Statements by the Constable's employees to the effect that "if they go for the President again, I hope they get him" might also, to put it mildly, undermine public confidence in the Constable's office. \*\*\*

In sum, since Constable Rankin's interest in maintaining both an esprit de corps and a public image consistent with his office's law enforcement duties outweighs any interest his employees may have in expressing on the job a desire that the President be killed, even assuming that such an expression addresses a matter of public concern it is not protected by the First Amendment from suppression. I emphasize once again that that is the issue here - and not, as both the Court's opinion and especially the concurrence seem to assume, whether the means used to effect suppression (*viz.*, firing) were excessive. The First Amendment contains no "narrow tailoring" requirement that speech the government is entitled to suppress must be suppressed by the mildest means

possible. If Constable Rankin was entitled (as I think any reasonable person would say he was) to admonish McPherson for saying what she did on the job, within hearing of her co-workers, and to warn her that if she did it again a formal censure would be placed in her personnel file, then it follows that he is entitled to rule that particular speech out of bounds in that particular work environment - and that is the end of the First Amendment analysis. The "intemperate" manner of the permissible suppression is an issue for another forum, or at least for a more plausibly relevant provision of the Constitution.

Because the statement at issue here did not address a matter of public concern, and because, even if it did, a law enforcement agency has adequate reason not to permit such expression, I would reverse the judgment of the court below.

## *San Diego v. Roe*

543 U.S. 77 (2004)

PER CURIAM.

The city of San Diego (City), a petitioner here, terminated a police officer, respondent, for selling videotapes he made and for related activity. The tapes showed the respondent engaging in sexually explicit acts. Respondent brought suit alleging, among other things, that the termination violated his First and Fourteenth Amendment rights to freedom of speech. The United States District Court for the Southern District of California granted the City's motion to dismiss. The Court of Appeals for the Ninth Circuit reversed.

The petition for a writ of certiorari is granted, and the judgment of the Court of Appeals is reversed.

### I

Respondent John Roe, a San Diego police officer, made a video showing himself stripping off a police uniform and masturbating. He sold the video on the adults-only section of eBay, the popular online auction site. His user name was "Code3stud@aol.com," a word play on a high priority police radio call. The uniform apparently was not the specific uniform worn by the San Diego police, but it was clearly identifiable as a police uniform. Roe also sold custom videos, as well as police equipment, including official uniforms of the San Diego Police Department (SDPD), and various other items such as men's underwear. Roe's eBay user profile identified him as employed in the field of law enforcement.

Roe's supervisor, a police sergeant, discovered Roe's activities when, while on eBay, he came across an official SDPD police uniform for sale offered by an individual with the user-name "Code3stud@aol.com." He searched for other items Code3stud offered and discovered listings for Roe's videos depicting the objectionable material. Recognizing Roe's picture, the sergeant printed images of certain of Roe's offerings and shared them with others in Roe's chain of command, including a police captain. The captain notified the SDPD's internal affairs department, which began an investigation. In response to a request by an undercover officer, Roe produced a custom video. It showed Roe, again in police uniform, issuing a traffic citation but revoking it after undoing the uniform and masturbating.

The investigation revealed that Roe's conduct violated specific SDPD policies, including conduct unbecoming of an officer, outside employment, and immoral conduct. When confronted, Roe admitted to selling the videos and police paraphernalia. The SDPD ordered Roe to "cease displaying, manufacturing, distributing or selling any sexually explicit materials or engaging in any similar behaviors, via the internet, U. S. Mail, commercial vendors or distributors, or any other medium available to the public." Although Roe removed some of the items he had offered for sale, he did not change his seller's profile, which described the first two videos he had produced and listed their prices as well as the prices for custom videos. After discovering Roe's failure to follow its orders, the SDPD—citing Roe for the added violation of disobedience of lawful orders—began termination proceedings. The proceedings resulted in Roe's dismissal from the police force.

Roe brought suit in the District Court \*\*\* alleging that the employment termination violated his First Amendment right to free speech. In granting the City's motion to dismiss, the District Court decided that Roe had not demonstrated that selling official police uniforms and producing, marketing, and selling sexually explicit videos for profit qualified as expression relating to a matter of "public concern" under this Court's decision in *Connick v. Myers*.

In reversing, the Court of Appeals held Roe's conduct fell within the protected category of citizen commentary on matters of public concern. Central to the Court of Appeals' conclusion was that Roe's expression was not an internal workplace grievance, took place while he was off duty and away from his employer's premises, and was unrelated to his employment.

## II

A government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment. On the other hand, a governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public. The Court has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment. Outside of this category, the Court has held that when government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification "far stronger than mere speculation" in regulating it. We have little difficulty in concluding that the City was not barred from terminating Roe under either line of cases.

## A

In concluding that Roe's activities qualified as a matter of public concern, the Court of Appeals relied heavily on the Court's decision in *NTEU*. [ *United States v. National Treasury Employees Union* (1995)]. In *NTEU* it was established that the speech was unrelated to the employment and had no effect on the mission and purpose of the employer. The question was whether the Federal Government could impose certain monetary limitations on outside earnings from speaking or writing on a class of federal employees. The Court held that, within the particular classification of employment, the Government had shown

no justification for the outside salary limitations. The First Amendment right of the employees sufficed to invalidate the restrictions on the outside earnings for such activities. The Court noted that throughout history public employees who undertook to write or to speak in their spare time had made substantial contributions to literature and art, and observed that none of the speech at issue "even arguably [had] any adverse impact" on the employer.

The Court of Appeals' reliance on *NTEU* was seriously misplaced. Although Roe's activities took place outside the workplace and purported to be about subjects not related to his employment, the SDPD demonstrated legitimate and substantial interests of its own that were compromised by his speech. Far from confining his activities to speech unrelated to his employment, Roe took deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer. The use of the uniform, the law enforcement reference in the Web site, the listing of the speaker as "in the field of law enforcement," and the debased parody of an officer performing indecent acts while in the course of official duties brought the mission of the employer and the professionalism of its officers into serious disrepute.

The Court of Appeals noted the City conceded Roe's activities were "unrelated" to his employment. In the context of the pleadings and arguments, the proper interpretation of the City's statement is simply to underscore the obvious proposition that Roe's speech was not a comment on the workings or functioning of the SDPD. It is quite a different question whether the speech was detrimental to the SDPD. On that score the City's consistent position has been that the speech is contrary to its regulations and harmful to the proper functioning of the police force. The present case falls outside the protection afforded in *NTEU*. The authorities that instead control, and which are considered below, are this Court's decisions in *Pickering*, *Connick*, and the decisions which follow them.

## B

To reconcile the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission, the *Pickering* Court adopted a balancing test. It requires a court evaluating restraints on a public employee's speech to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.

*Pickering* did not hold that any and all statements by a public employee are entitled to balancing. To require *Pickering* balancing in every case where speech by a public employee is at issue, no matter the content of the speech, could compromise the proper functioning of government offices. This concern

prompted the Court in *Connick* to explain a threshold inquiry (implicit in *Pickering* itself) that in order to merit *Pickering* balancing, a public employee's speech must touch on a matter of "public concern." \*\*\*

Although the boundaries of the public concern test are not well defined, *Connick* provides some guidance. It directs courts to examine the "content, form, and context of a given statement, as revealed by the whole record" in assessing whether an employee's speech addresses a matter of public concern. In addition, it notes that the standard for determining whether expression is of public concern is the same standard used to determine whether a common-law action for invasion of privacy is present. \*\*\* These cases make clear that public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication. The Court has also recognized that certain private remarks, such as negative comments about the President of the United States, touch on matters of public concern and should thus be subject to *Pickering* balancing.

Applying these principles to the instant case, there is no difficulty in concluding that Roe's expression does not qualify as a matter of public concern under any view of the public concern test. He fails the threshold test and *Pickering* balancing does not come into play.

*Connick* is controlling precedent, but to show why this is not a close case it is instructive to note that even under the view expressed by the dissent in *Connick* from four Members of the Court, the speech here would not come within the definition of a matter of public concern. The dissent in *Connick* would have held that the entirety of the questionnaire circulated by the employee "discussed subjects that could reasonably be expected to be of interest to persons seeking to develop informed opinions about the manner in which . . . an elected official charged with managing a vital governmental agency, discharges his responsibilities." No similar purpose could be attributed to the employee's speech in the present case. Roe's activities did nothing to inform the public about any aspect of the SDPD's functioning or operation. Nor were Roe's activities anything like the private remarks at issue in *Rankin*, where one co-worker commented to another co-worker on an item of political news. Roe's expression was widely broadcast, linked to his official status as a police officer, and designed to exploit his employer's image.

The speech in question was detrimental to the mission and functions of the employer. There is no basis for finding that it was of concern to the community as the Court's cases have understood that term in the context of restrictions by governmental entities on the speech of their employees.

The judgment of the Court of Appeals is

*Reversed.*

## Notes

1. The most closely divided case of the four above cases that reached the Court between 1979 and 2004 is *Connick v. Myers*, a 5-4 decision in favor of the employer. Do you find the majority or dissenting opinions more persuasive? Is the case merely an application of *Pickering* or does it

point to problems within the *Pickering* standard? How important do you think it is that Sheila Myers was an attorney?

2. The Court decided *San Diego v. Roe* without oral argument in a per curiam opinion. Was it really so simple?

## C. Public Employee Speech in the Roberts Court

As in the previous section, the next two cases purport to apply *Pickering*. Again, consider whether these two most recent cases from the Court are modest refinements or substantial changes of *Pickering*.

### *Garcetti v. Ceballos*

547 U.S. 410 (2006)

KENNEDY, J., DELIVERED THE OPINION OF THE COURT, IN WHICH ROBERTS, C. J., AND SCALIA, THOMAS, AND ALITO, JJ., JOINED. STEVENS, J., FILED A DISSENTING OPINION. SOUTER, J., FILED A DISSENTING OPINION, IN WHICH STEVENS AND GINSBURG, JJ., JOINED. BREYER, J., FILED A DISSENTING OPINION.

JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

It is well settled that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." The question presented by the instant case is whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties.

#### I

Respondent Richard Ceballos has been employed since 1989 as a deputy district attorney for the Los Angeles County District Attorney's Office. During the period relevant to this case, Ceballos was a calendar deputy in the office's Pomona branch, and in this capacity he exercised certain supervisory responsibilities over other lawyers. In February 2000, a defense attorney contacted Ceballos about a pending criminal case. The defense attorney said there were inaccuracies in an affidavit used to obtain a critical search warrant. The attorney informed Ceballos that he had filed a motion to traverse, or challenge, the warrant, but he also wanted Ceballos to review the case. According to Ceballos, it was not unusual for defense attorneys to ask calendar deputies to investigate aspects of pending cases.

After examining the affidavit and visiting the location it described, Ceballos determined the affidavit contained serious misrepresentations. The affidavit called a long driveway what Ceballos thought should have been referred to as a separate roadway. Ceballos also questioned the affidavit's statement that tire tracks led from a stripped-down truck to the premises covered by the warrant.

His doubts arose from his conclusion that the roadway's composition in some places made it difficult or impossible to leave visible tire tracks.

Ceballos spoke on the telephone to the warrant affiant, a deputy sheriff from the Los Angeles County Sheriff's Department, but he did not receive a satisfactory explanation for the perceived inaccuracies. He relayed his findings to his supervisors, petitioners Carol Najera and Frank Sundstedt, and followed up by preparing a disposition memorandum. The memo explained Ceballos' concerns and recommended dismissal of the case. On March 2, 2000, Ceballos submitted the memo to Sundstedt for his review. A few days later, Ceballos presented Sundstedt with another memo, this one describing a second telephone conversation between Ceballos and the warrant affiant.

Based on Ceballos' statements, a meeting was held to discuss the affidavit. Attendees included Ceballos, Sundstedt, and Najera, as well as the warrant affiant and other employees from the sheriff's department. The meeting allegedly became heated, with one lieutenant sharply criticizing Ceballos for his handling of the case.

Despite Ceballos' concerns, Sundstedt decided to proceed with the prosecution, pending disposition of the defense motion to traverse. The trial court held a hearing on the motion. Ceballos was called by the defense and recounted his observations about the affidavit, but the trial court rejected the challenge to the warrant.

Ceballos claims that in the aftermath of these events he was subjected to a series of retaliatory employment actions. The actions included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion. Ceballos initiated an employment grievance, but the grievance was denied based on a finding that he had not suffered any retaliation. Unsatisfied, Ceballos sued \*\*\* [and] alleged petitioners violated the First and Fourteenth Amendments by retaliating against him based on his memo of March 2.

Petitioners responded that no retaliatory actions were taken against Ceballos and that all the actions of which he complained were explained by legitimate reasons such as staffing needs. They further contended that, in any event, Ceballos' memo was not protected speech under the First Amendment. Petitioners moved for summary judgment, and the District Court granted their motion. Noting that Ceballos wrote his memo pursuant to his employment duties, the court concluded he was not entitled to First Amendment protection for the memo's contents. It held in the alternative that even if Ceballos' speech was constitutionally protected, petitioners had qualified immunity because the rights Ceballos asserted were not clearly established.

The Court of Appeals for the Ninth Circuit reversed, holding that "Ceballos's allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment." \*\*\* Having concluded that Ceballos' memo satisfied the public-concern requirement, the Court of Appeals proceeded to balance Ceballos' interest in his speech against his supervisors' interest in responding to it. The court struck the balance in Ceballos' favor, noting that petitioners "failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office" as a result of the memo. The court further

concluded that Ceballos' First Amendment rights were clearly established and that petitioners' actions were not objectively reasonable.

Judge O'Scannlain specially concurred. Agreeing that the panel's decision was compelled by Circuit precedent, he nevertheless concluded Circuit law should be revisited and overruled. Judge O'Scannlain emphasized the distinction "between speech offered by a public employee acting *as an employee* carrying out his or her ordinary job duties and that spoken by an employee acting *as a citizen* expressing his or her personal views on disputed matters of public import." In his view, "when public employees speak in the course of carrying out their routine, required employment obligations, they have no *personal* interest in the content of that speech that gives rise to a First Amendment right."

We granted certiorari and we now reverse.

## II

As the Court's decisions have noted, for many years "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." That dogma has been qualified in important respects. The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.

\*\*\* *Pickering* and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

To be sure, conducting these inquiries sometimes has proved difficult. This is the necessary product of "the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal." The Court's overarching objectives, though, are evident.

\*\*\*

## III

With these principles in mind we turn to the instant case. Respondent Ceballos believed the affidavit used to obtain a search warrant contained serious misrepresentations. He conveyed his opinion and recommendation in a memo to his supervisor. That Ceballos expressed his views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive First

Amendment protection for expressions made at work. Many citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like "any member of the general public," to hold that all speech within the office is automatically exposed to restriction.

The memo concerned the subject matter of Ceballos' employment, but this, too, is nondispositive. The First Amendment protects some expressions related to the speaker's job. As the Court noted in *Pickering*: "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." The same is true of many other categories of public employees.

The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do. It is immaterial whether he experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction. The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. Contrast, for example, the expressions made by the speaker in *Pickering*, whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day.

Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.

This result is consistent with our precedents' attention to the potential societal value of employee speech. Refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse. This

prospect of protection, however, does not invest them with a right to perform their jobs however they see fit.

Our holding likewise is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission. Ceballos' memo is illustrative. It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff's department. If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.

Ceballos' proposed contrary rule, adopted by the Court of Appeals, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in our precedents. When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.

\*\*\* Proper application of our precedents thus leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail.

Two final points warrant mentioning. First, as indicated above, the parties in this case do not dispute that Ceballos wrote his disposition memo pursuant to his employment duties. We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate. We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Second, Justice Souter [dissenting] suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence.

We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

#### IV

Exposing governmental inefficiency and misconduct is a matter of considerable significance. \*\*\* These imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions.

We reject, however, the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties. Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE STEVENS, DISSENTING [OMITTED]

JUSTICE SOUTER, WITH WHOM JUSTICE STEVENS AND JUSTICE GINSBURG JOIN, DISSENTING.

The Court holds that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." I respectfully dissent. I agree with the majority that a government employer has substantial interests in effectuating its chosen policy and objectives, and in demanding competence, honesty, and judgment from employees who speak for it in doing their work. But I would hold that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.

#### I

Open speech by a private citizen on a matter of public importance lies at the heart of expression subject to protection by the First Amendment. At the other extreme, a statement by a government employee complaining about nothing beyond treatment under personnel rules raises no greater claim to constitutional protection against retaliatory response than the remarks of a private employee. In between these points lies a public employee's speech unwelcome to the government but on a significant public issue. Such an employee speaking as a citizen, that is, with a citizen's interest, is protected from reprisal unless the statements are too damaging to the government's

capacity to conduct public business to be justified by any individual or public benefit thought to flow from the statements. Entitlement to protection is thus not absolute.

This significant, albeit qualified, protection of public employees who irritate the government is understood to flow from the First Amendment, in part, because a government paycheck does nothing to eliminate the value to an individual of speaking on public matters, and there is no good reason for categorically discounting a speaker's interest in commenting on a matter of public concern just because the government employs him. Still, the First Amendment safeguard rests on something more, being the value to the public of receiving the opinions and information that a public employee may disclose. "Government employees are often in the best position to know what ails the agencies for which they work." \*\*\*

The difference between a case like *Givhan* and this one is that the subject of Ceballos's speech fell within the scope of his job responsibilities, whereas choosing personnel was not what the teacher was hired to do. The effect of the majority's constitutional line between these two cases, then, is that a *Givhan* schoolteacher is protected when complaining to the principal about hiring policy, but a school personnel officer would not be if he protested that the principal disapproved of hiring minority job applicants. This is an odd place to draw a distinction, and while necessary judicial line-drawing sometimes looks arbitrary, any distinction obliges a court to justify its choice. Here, there is no adequate justification for the majority's line categorically denying *Pickering* protection to any speech uttered "pursuant to . . . official duties."

As all agree, the qualified speech protection embodied in *Pickering* balancing resolves the tension between individual and public interests in the speech, on the one hand, and the government's interest in operating efficiently without distraction or embarrassment by talkative or headline-grabbing employees. The need for a balance hardly disappears when an employee speaks on matters his job requires him to address; rather, it seems obvious that the individual and public value of such speech is no less, and may well be greater, when the employee speaks pursuant to his duties in addressing a subject he knows intimately for the very reason that it falls within his duties.

As for the importance of such speech to the individual, it stands to reason that a citizen may well place a very high value on a right to speak on the public issues he decides to make the subject of his work day after day. Would anyone doubt that a school principal evaluating the performance of teachers for promotion or pay adjustment retains a citizen's interest in addressing the quality of teaching in the schools? (Still, the majority indicates he could be fired without First Amendment recourse for fair but unfavorable comment when the teacher under review is the superintendent's daughter.) Would anyone deny that a prosecutor like Richard Ceballos may claim the interest of any citizen in speaking out against a rogue law enforcement officer, simply because his job requires him to express a judgment about the officer's performance? (But the majority says the First Amendment gives Ceballos no protection, even if his judgment in this case was sound and appropriately expressed.)

Indeed, the very idea of categorically separating the citizen's interest from the employee's interest ignores the fact that the ranks of public service include those who share the poet's "object . . . to unite [m]y avocation and my vocation"; these citizen servants are the ones whose civic interest rises highest when they speak pursuant to their duties, and these are exactly the ones government employers most want to attract. There is no question that public employees speaking on matters they are obliged to address would generally place a high value on a right to speak, as any responsible citizen would.

Nor is there any reason to raise the counterintuitive question whether the public interest in hearing informed employees evaporates when they speak as required on some subject at the core of their jobs. \*\*\*

Nothing, then, accountable on the individual and public side of the *Pickering* balance changes when an employee speaks "pursuant" to public duties. On the side of the government employer, however, something is different, and to this extent, I agree with the majority of the Court. The majority is rightly concerned that the employee who speaks out on matters subject to comment in doing his own work has the greater leverage to create office uproars and fracture the government's authority to set policy to be carried out coherently through the ranks. \*\*\* Up to a point, then, the majority makes good points: government needs civility in the workplace, consistency in policy, and honesty and competence in public service.

But why do the majority's concerns, which we all share, require categorical exclusion of First Amendment protection against any official retaliation for things said on the job? Is it not possible to respect the unchallenged individual and public interests in the speech through a *Pickering* balance without drawing the strange line I mentioned before? This is, to be sure, a matter of judgment, but the judgment has to account for the undoubted value of speech to those, and by those, whose specific public job responsibilities bring them face to face with wrongdoing and incompetence in government, who refuse to avert their eyes and shut their mouths. And it has to account for the need actually to disrupt government if its officials are corrupt or dangerously incompetent. It is thus no adequate justification for the suppression of potentially valuable information simply to recognize that the government has a huge interest in managing its employees and preventing the occasionally irresponsible one from turning his job into a bully pulpit. Even there, the lesson of *Pickering* (and the object of most constitutional adjudication) is still to the point: when constitutionally significant interests clash, resist the demand for winner-take-all; try to make adjustments that serve all of the values at stake. \*\*\*

## II

The majority seeks support in two lines of argument extraneous to *Pickering* doctrine. The one turns on a fallacious reading of cases on government speech, the other on a mistaken assessment of protection available under whistleblower statutes.

### A

The majority accepts the fallacy propounded by the county petitioners and the Federal Government as *amicus* that any statement made within the scope of

public employment is (or should be treated as) the government's own speech, and should thus be differentiated as a matter of law from the personal statements the First Amendment protects. The majority invokes \*\*\* *Rust v. Sullivan* (1991) [Chapter 6] which held there was no infringement of the speech rights of Title X funds recipients and their staffs when the Government forbade any on-the-job counseling in favor of abortion as a method of family planning. We have read *Rust* to mean that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."

The key to understanding the difference between this case and *Rust* lies in the terms of the respective employees' jobs and, in particular, the extent to which those terms require espousal of a substantive position prescribed by the government in advance. Some public employees are hired to "promote a particular policy" by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto. See *Legal Services Corporation v. Velazquez* (2001) [Chapter 6]. There is no claim or indication that Ceballos was hired to perform such a speaking assignment. He was paid to enforce the law by constitutional action: to exercise the county government's prosecutorial power by acting honestly, competently, and constitutionally. The only sense in which his position apparently required him to hew to a substantive message was at the relatively abstract point of favoring respect for law and its evenhanded enforcement, subjects that are not at the level of controversy in this case and were not in *Rust*. Unlike the doctors in *Rust*, Ceballos was not paid to advance one specific policy among those legitimately available, defined by a specific message or limited by a particular message forbidden. The county government's interest in his speech cannot therefore be equated with the terms of a specific, prescribed, or forbidden substantive position comparable to the Federal Government's interest in *Rust*, and *Rust* is no authority for the notion that government may exercise plenary control over every comment made by a public employee in doing his job. \*\*\*

## B

The majority's second argument for its disputed limitation of *Pickering* doctrine is that the First Amendment has little or no work to do here owing to an assertedly comprehensive complement of state and national statutes protecting government whistle-blowers from vindictive bosses. But even if I close my eyes to the tenet that "[t]he applicability of a provision of the Constitution has never depended on the vagaries of state or federal law," the majority's counsel to rest easy fails on its own terms.

To begin with, speech addressing official wrongdoing may well fall outside protected whistle-blowing, defined in the classic sense of exposing an official's fault to a third party or to the public; the teacher in *Givhan*, for example, who raised the issue of unconstitutional hiring bias, would not have qualified as that sort of whistle-blower, for she was fired after a private conversation with the school principal. In any event, the combined variants of statutory whistle-blower definitions and protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief. See D. WESTMAN & N. MODESITT, *WHISTLEBLOWING: LAW OF RETALIATORY DISCHARGE* 67-75, 281-307 (2d ed. 2004).

Some state statutes protect all government workers, including the employees of municipalities and other subdivisions; others stop at state employees. Some limit protection to employees who tell their bosses before they speak out; others forbid bosses from imposing any requirement to warn. As for the federal Whistleblower Protection Act of 1989, 5 U. S. C. § 1213 *et seq.* (2000 ed. and Supp. III), current case law requires an employee complaining of retaliation to show that “ ‘a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee [could] reasonably conclude that the actions of the government evidence gross mismanagement.’” And federal employees have been held to have no protection for disclosures made to immediate supervisors, or for statements of facts publicly known already. Most significantly, federal employees have been held to be unprotected for statements made in connection with normal employment duties, the very speech that the majority says will be covered by “the powerful network of legislative enactments . . . available to those who seek to expose wrongdoing.” My point is not to disparage particular statutes or speak here to the merits of interpretations by other federal courts, but merely to show the current understanding of statutory protection: individuals doing the same sorts of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state, or federal jurisdictions that happened to employ them.

### III

The Court remands because the Court of Appeals considered only the disposition memorandum and because Ceballos charges retaliation for some speech apparently outside the ambit of utterances “pursuant to their official duties.” When the Court of Appeals takes up this case once again, it should consider some of the following facts that escape emphasis in the majority opinion owing to its focus. Ceballos says he sought his position out of a personal commitment to perform civic work. After showing his superior, petitioner Frank Sundstedt, the disposition memorandum at issue in this case, Ceballos complied with Sundstedt’s direction to tone down some accusatory rhetoric out of concern that the memorandum would be unnecessarily incendiary when shown to the Sheriff’s Department. After meeting with members of that department, Ceballos told his immediate supervisor, petitioner Carol Najera, that he thought *Brady v. Maryland* (1963), obliged him to give the defense his internal memorandum as exculpatory evidence. He says that Najera responded by ordering him to write a new memorandum containing nothing but the deputy sheriff’s statements, but that he balked at that. Instead, he proposed to turn over the existing memorandum with his own conclusions redacted as work product, and this is what he did. The issue over revealing his conclusions arose again in preparing for the suppression hearing. Ceballos maintains that Sundstedt ordered Najera, representing the prosecution, to give the trial judge a full picture of the circumstances, but that Najera told Ceballos he would suffer retaliation if he testified that the affidavit contained intentional fabrications. In any event, Ceballos’s testimony generally stopped short of his own conclusions. After the hearing, the trial judge denied the motion to suppress, explaining that he found grounds independent of the challenged material sufficient to show probable cause for the warrant.

Ceballos says that over the next six months his supervisors retaliated against him not only for his written reports, but also for his spoken statements to them and his hearing testimony in the pending criminal case. While an internal grievance filed by Ceballos challenging these actions was pending, Ceballos spoke at a meeting of the Mexican-American Bar Association about misconduct of the Sheriff's Department in the criminal case, the lack of any policy at the District Attorney's Office for handling allegations of police misconduct, and the retaliatory acts he ascribed to his supervisors. Two days later, the office dismissed Ceballos's grievance, a result he attributes in part to his bar association speech.

Ceballos's action against petitioners under 42 U. S. C. § 1983 claims that the individuals retaliated against him for exercising his First Amendment rights in submitting the memorandum, discussing the matter with Najera and Sundstedt, testifying truthfully at the hearing, and speaking at the bar meeting. As I mentioned, the Court of Appeals saw no need to address the protection afforded to Ceballos's statements other than the disposition memorandum, which it thought was protected under the *Pickering* test. Upon remand, it will be open to the Court of Appeals to consider the application of *Pickering* to any retaliation shown for other statements; not all of those statements would have been made pursuant to official duties in any obvious sense, and the claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process.

JUSTICE BREYER, DISSENTING.

This case asks whether the First Amendment protects public employees when they engage in speech that both (1) involves matters of public concern and (2) takes place in the ordinary course of performing the duties of a government job. I write separately to explain why I cannot fully accept either the Court's or Justice Souter's answer to the question presented.

\*\*\* Nonetheless, there may well be circumstances with special demand for constitutional protection of the speech at issue, where governmental justifications may be limited, and where administrable standards seem readily available—to the point where the majority's fears of department management by lawsuit are misplaced. In such an instance, I believe that courts should apply the *Pickering* standard, even though the government employee speaks upon matters of public concern in the course of his ordinary duties.

This is such a case. The respondent, a government lawyer, complained of retaliation, in part, on the basis of speech contained in his disposition memorandum that he says fell within the scope of his obligations under *Brady v. Maryland* (1963). The facts present two special circumstances that together justify First Amendment review.

First, the speech at issue is professional speech—the speech of a lawyer. Such speech is subject to independent regulation by canons of the profession. Those canons provide an obligation to speak in certain instances. And where that is so, the government's own interest in forbidding that speech is diminished. The objective specificity and public availability of the profession's canons also help

to diminish the risk that the courts will improperly interfere with the government's necessary authority to manage its work.

Second, the Constitution itself here imposes speech obligations upon the government's professional employee. A prosecutor has a constitutional obligation to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence in the government's possession. So, for example, might a prison doctor have a similar constitutionally related professional obligation to communicate with superiors about seriously unsafe or unsanitary conditions in the cellblock. There may well be other examples.

Where professional and special constitutional obligations are both present, the need to protect the employee's speech is augmented, the need for broad government authority to control that speech is likely diminished, and administrable standards are quite likely available. Hence, I would find that the Constitution mandates special protection of employee speech in such circumstances. Thus I would apply the *Pickering* balancing test here. \*\*\*

## *Lane v. Franks* 573 U.S. \_\_\_ (2014)

SOTOMAYOR, J., DELIVERED THE OPINION FOR A UNANIMOUS COURT. THOMAS, J., FILED A CONCURRING OPINION, IN WHICH SCALIA AND ALITO, JJ., JOINED.

JUSTICE SOTOMAYOR DELIVERED THE OPINION OF THE COURT.

Almost 50 years ago, this Court declared that citizens do not surrender their First Amendment rights by accepting public employment. Rather, the First Amendment protection of a public employee's speech depends on a careful balance "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.* (1968). In *Pickering*, the Court struck the balance in favor of the public employee, extending First Amendment protection to a teacher who was fired after writing a letter to the editor of a local newspaper criticizing the school board that employed him. Today, we consider whether the First Amendment similarly protects a public employee who provided truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities. We hold that it does.

### I

In 2006, Central Alabama Community College (CACC) hired petitioner Edward Lane to be the Director of Community Intensive Training for Youth (CITY), a statewide program for underprivileged youth. CACC hired Lane on a probationary basis. In his capacity as Director, Lane was responsible for overseeing CITY's day-to-day operations, hiring and firing employees, and making decisions with respect to the program's finances.

At the time of Lane's appointment, CITY faced significant financial difficulties. That prompted Lane to conduct a comprehensive audit of the program's

expenses. The audit revealed that Suzanne Schmitz, an Alabama State Representative on CITY's payroll, had not been reporting to her CITY office. After unfruitful discussions with Schmitz, Lane shared his finding with CACC's president and its attorney. They warned him that firing Schmitz could have negative repercussions for him and CACC.

Lane nonetheless contacted Schmitz again and instructed her to show up to the Huntsville office to serve as a counselor. Schmitz refused; she responded that she wished to " 'continue to serve the CITY program in the same manner as [she had] in the past.' " Lane fired her shortly thereafter. Schmitz told another CITY employee, Charles Foley, that she intended to " 'get [Lane] back' " for firing her. She also said that if Lane ever requested money from the state legislature for the program, she would tell him, " '[y]ou're fired.' "

Schmitz' termination drew the attention of many, including agents of the Federal Bureau of Investigation, which initiated an investigation into Schmitz' employment with CITY. In November 2006, Lane testified before a federal grand jury about his reasons for firing Schmitz. In January 2008, the grand jury indicted Schmitz on four counts of mail fraud and four counts of theft concerning a program receiving federal funds. The indictment alleged that Schmitz had collected \$177,251.82 in federal funds even though she performed " 'virtually no services,' " " 'generated virtually no work product,' " and " 'rarely even appeared for work at the CITY Program offices.' " *Id.*, at 1260. It further alleged that Schmitz had submitted false statements concerning the hours she worked and the nature of the services she performed.

Schmitz' trial, which garnered extensive press coverage, commenced in August 2008. Lane testified, under subpoena, regarding the events that led to his terminating Schmitz. The jury failed to reach a verdict. Roughly six months later, federal prosecutors retried Schmitz, and Lane testified once again. This time, the jury convicted Schmitz on three counts of mail fraud and four counts of theft concerning a program receiving federal funds. The District Court sentenced her to 30 months in prison and ordered her to pay \$177,251.82 in restitution and forfeiture.

Meanwhile, CITY continued to experience considerable budget shortfalls. In November 2008, Lane began reporting to respondent Steve Franks, who had become president of CACC in January 2008. Lane recommended that Franks consider layoffs to address the financial difficulties. In January 2009, Franks decided to terminate 29 probationary CITY employees, including Lane. Shortly thereafter, however, Franks rescinded all but 2 of the 29 terminations--those of Lane and one other employee-- because of an "ambiguity in [those other employees'] probationary service." Brief for Respondent Franks 11. Franks claims that he "did not rescind Lane's termination . . . because he believed that Lane was in a fundamentally different category than the other employees: he was the director of the entire CITY program, and not simply an employee." In September 2009, CACC eliminated the CITY program and terminated the program's remaining employees. Franks later retired, and respondent Susan Burrow, the current Acting President of CACC, replaced him while this case was pending before the Eleventh Circuit.

In January 2011, Lane sued Franks in his individual and official capacities alleging that Franks had violated the First Amendment by firing him in retaliation for his testimony against Schmitz. Lane sought damages from Franks in his individual capacity and sought equitable relief, including reinstatement, from Franks in his official capacity.

The District Court granted Franks' motion for summary judgment. Although the court concluded that the record raised "genuine issues of material fact . . . concerning [Franks'] true motivation for terminating [Lane's] employment," it held that Franks was entitled to qualified immunity as to the damages claims because "a reasonable government official in [Franks'] position would not have had reason to believe that the Constitution protected [Lane's] testimony." The District Court relied on *Garcetti v. Ceballos* (2006), which held that " 'when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.' " The court found no violation of clearly established law because Lane had "learned of the information that he testified about while working as Director at [CITY]," such that his "speech [could] still be considered as part of his official job duties and not made as a citizen on a matter of public concern."

The Eleventh Circuit affirmed [in a summary opinion without oral argument].  
\*\*\* We granted certiorari to resolve discord among the Courts of Appeals as to whether public employees may be fired--or suffer other adverse employment consequences--for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities.

## II

Speech by citizens on matters of public concern lies at the heart of the First Amendment, which "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth v. United States* (1957). This remains true when speech concerns information related to or learned through public employment. After all, public employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights. There is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees. For "[g]overnment employees are often in the best position to know what ails the agencies for which they work." "The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it."

Our precedents have also acknowledged the government's countervailing interest in controlling the operation of its workplaces. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."

*Pickering* provides the framework for analyzing whether the employee's interest or the government's interest should prevail in cases where the government seeks to curtail the speech of its employees. It requires "balanc[ing] . . . the interests of the [public employee], as a citizen, in commenting upon matters of

public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."\*\*\*

In *Garcetti*, we described a two-step inquiry into whether a public employee's speech is entitled to protection:

"The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."

In describing the first step in this inquiry, *Garcetti* distinguished between employee speech and citizen speech. Whereas speech as a citizen may trigger protection, the Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Applying that rule to the facts before it, the Court found that an internal memorandum prepared by a prosecutor in the course of his ordinary job responsibilities constituted unprotected employee speech.

### III

Against this backdrop, we turn to the question presented: whether the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities. We hold that it does.

#### A

The first inquiry is whether the speech in question--Lane's testimony at Schmitz' trials--is speech as a citizen on a matter of public concern. It clearly is.

#### 1

Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment.

In rejecting Lane's argument that his testimony was speech as a citizen, the Eleventh Circuit gave short shrift to the nature of sworn judicial statements and ignored the obligation borne by all witnesses testifying under oath. Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth. When the person testifying is a public employee, he may bear separate obligations to his employer--for example, an obligation not to show up to court dressed in an unprofessional manner. But any such obligations as an employee are distinct and independent from the obligation, as a citizen, to speak the truth. That independent obligation renders sworn testimony speech as a citizen and sets it apart from speech made purely in the capacity of an employee.

In holding that Lane did not speak as a citizen when he testified, the Eleventh Circuit read *Garcetti* far too broadly. \*\*\* The sworn testimony in this case is far removed from the speech at issue in *Garcetti*--an internal memorandum prepared by a deputy district attorney for his supervisors recommending dismissal of a particular prosecution. \*\*\*

But *Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment. The *Garcetti* Court made explicit that its holding did not turn on the fact that the memo at issue "concerned the subject matter of [the prosecutor's] employment," because "[t]he First Amendment protects some expressions related to the speaker's job." In other words, the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee--rather than citizen--speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.

It bears emphasis that our precedents dating back to *Pickering* have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment. In *Pickering*, for example, the Court observed that "[t]eachers are . . . the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." Most recently, in *San Diego v. Roe*, the Court again observed that public employees "are uniquely qualified to comment" on "matters concerning government policies that are of interest to the public at large."

The importance of public employee speech is especially evident in the context of this case: a public corruption scandal. The United States, for example, represents that because "[t]he more than 1000 prosecutions for federal corruption offenses that are brought in a typical year . . . often depend on evidence about activities that government officials undertook while in office," those prosecutions often "require testimony from other government employees." Brief for United States as Amicus Curiae. It would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials--speech by public employees regarding information learned through their employment--may never form the basis for a First Amendment retaliation claim. Such a rule would place public employees who witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs.

Applying these principles, it is clear that Lane's sworn testimony is speech as a citizen.

2

Lane's testimony is also speech on a matter of public concern. Speech involves matters of public concern "when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of

value and concern to the public.' " *Snyder v. Phelps* (2011) [Chapter 7]. The inquiry turns on the "content, form, and context" of the speech. *Connick*.

The content of Lane's testimony--corruption in a public program and misuse of state funds--obviously involves a matter of significant public concern. And the form and context of the speech--sworn testimony in a judicial proceeding--fortify that conclusion. "Unlike speech in other contexts, testimony under oath has the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action, action that often affects the rights and liberties of others." *United States v. Alvarez* (2013) [Chapter 3].

We hold, then, that Lane's truthful sworn testimony at Schmitz' criminal trials is speech as a citizen on a matter of public concern.

## B

This does not settle the matter, however. A public employee's sworn testimony is not categorically entitled to First Amendment protection simply because it is speech as a citizen on a matter of public concern. Under *Pickering*, if an employee speaks as a citizen on a matter of public concern, the next question is whether the government had "an adequate justification for treating the employee differently from any other member of the public" based on the government's needs as an employer.

As discussed previously, we have recognized that government employers often have legitimate "interest[s] in the effective and efficient fulfillment of [their] responsibilities to the public," including " 'promot[ing] efficiency and integrity in the discharge of official duties,' " and " 'maintain[ing] proper discipline in public service.' " *Connick*. We have also cautioned, however, that "a stronger showing [of government interests] may be necessary if the employee's speech more substantially involve[s] matters of public concern." *Id.*

Here, the employer's side of the *Pickering* scale is entirely empty: Respondents do not assert, and cannot demonstrate, any government interest that tips the balance in their favor. There is no evidence, for example, that Lane's testimony at Schmitz' trials was false or erroneous or that Lane unnecessarily disclosed any sensitive, confidential, or privileged information while testifying. In these circumstances, we conclude that Lane's speech is entitled to protection under the First Amendment. The Eleventh Circuit erred in holding otherwise and dismissing Lane's claim of retaliation on that basis.

## IV

Respondent Franks argues that even if Lane's testimony is protected under the First Amendment, the claims against him in his individual capacity should be dismissed on the basis of qualified immunity. We agree. \*\*\*

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE THOMAS, WITH WHOM JUSTICE SCALIA AND JUSTICE ALITO JOIN, CONCURRING.

This case presents the discrete question whether a public employee speaks "as a citizen on a matter of public concern," when the employee gives "[t]ruthful testimony under oath . . . outside the scope of his ordinary job duties." Answering that question requires little more than a straightforward application of *Garcetti*. \*\*\*

We accordingly have no occasion to address the quite different question whether a public employee speaks "as a citizen" when he testifies in the course of his ordinary job responsibilities. For some public employees--such as police officers, crime scene technicians, and laboratory analysts--testifying is a routine and critical part of their employment duties. Others may be called to testify in the context of particular litigation as the designated representatives of their employers. See Fed. Rule Civ. Proc. 30(b)(6). The Court properly leaves the constitutional questions raised by these scenarios for another day.

## Notes

1. *Garcetti v. Ceballos* was argued in October 2005 and reargued in March 2006. The intervening event necessitating reargument was the retirement of Justice Sandra Day O'Connor and her replacement by Justice Samuel Alito. This change in Justices may also have changed the outcome in the case.

Based on the timing and practice of opinion assignments, at least one Court-watcher believes that Justice Souter originally had been assigned the majority opinion (in which O'Connor joined). Justice Kennedy, who had been assigned another majority opinion from that October sitting was writing a dissenting opinion, but Alito's preference for Kennedy's position transformed Kennedy's opinion into the Court's opinion. See Karl Blanke, *The Effect of Justice Alito*, ScotusBlog, June 27, 2006, available at: <http://www.scotusblog.com/2006/06/the-effect-of-justice-alito/>

2. However, even in the original oral argument there was some concern about the breadth of "public concern" in a government office. Both Justice Breyer and Chief Justice Roberts proffered brief examples using their own offices and law clerks. Here is a portion of the Roberts colloquy with the attorney for Ceballos:

CHIEF JUSTICE ROBERTS: But Government misconduct -- if I get a memo from a law clerk that says, "Justice So-and-So's jurisprudence is wacky," that goes to --

[Laughter.] -- that goes to Government misconduct, under your theory, right? And I fire them, because I think that's not appropriate to put in a memo.

\*\*\*

CHIEF JUSTICE ROBERTS: And they think it's Government misconduct because of the way cases are decided, and that they have a first amendment

interest. What could be more important than how the Court decides cases? And that violates their first-amendment rights.

How would you respond?

3. After *Garcetti v. Ceballos*, the term “Garcettized” began to be used by some as many courts began to routinely deny First Amendment protection to employees for any statements made related to employment. Indeed, one might view Edward Lane’s claims as having been “Garcettized” when the district judge entered summary judgment in favor of the employer and the Eleventh Circuit affirmed in a per curiam opinion without oral argument.

4. In *Lane v. Franks* the Court found that the Eleventh Circuit read *Garcetti* “far too broadly” and unanimously concluded that resolving the issue in *Lane v. Franks* “requires little more than a straightforward application of *Garcetti*.” Why then does the Court hold that the defendants are entitled to qualified immunity?

### III. Student Speech

This section considers the First Amendment implications when public schools discipline or otherwise regulate speech by students.

#### *Tinker v. Des Moines Independent Community School District*

393 U.S. 503 (1969)

FORTAS, J., DELIVERED THE OPINION OF THE COURT, IN WHICH WARREN, C.J., DOUGLAS, BRENNAN, WHITE, AND MARSHALL, J.J., JOINED. STEWART, J., FILED A CONCURRING OPINION. BLACK, J., AND HARLAN, J., FILED DISSENTING OPINIONS.

JUSTICE FORTAS DELIVERED THE OPINION OF THE COURT.

Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school.

In December, 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program.

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and, if he

refused, he would be suspended until he returned without the armband. Petitioners were aware of the regulation that the school authorities adopted.

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired -- that is, until after New Year's Day.

This complaint was filed in the United States District Court by petitioners, through their fathers, under § 1983 of Title 42 of the United States Code. It prayed for an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners, and it sought nominal damages. After an evidentiary hearing, the District Court dismissed the complaint. It upheld the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline. The court referred to, but expressly declined to follow, the Fifth Circuit's holding in a similar case that the wearing of symbols like the armbands cannot be prohibited unless it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." *Burnside v. Byars*, 363 F.2d 744, 749 (1966).

On appeal, the Court of Appeals for the Eighth Circuit considered the case en banc. The court was equally divided, and the District Court's decision was accordingly affirmed without opinion. We granted certiorari.

## I

The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to "pure speech" which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. In *Meyer v. Nebraska* (1923) and *Bartels v. Iowa* (1923), this Court, in opinions by Mr. Justice McReynolds, held that the Due Process Clause of the Fourteenth Amendment prevents States from forbidding the teaching of a foreign language to young students. Statutes to this effect, the Court held, unconstitutionally interfere with the liberty of teacher, student, and parent. *See also Pierce v. Society of Sisters* (1925). \*\*\*

In *West Virginia v. Barnette* (1943) [Chapter 6] this Court held that, under the First Amendment, the student in public school may not be compelled to salute the flag. \*\*\* \*\*\* On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school

officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

## II

The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech."

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.

In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension

that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption.

On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam. It is revealing, in this respect, that the meeting at which the school principals decided to issue the contested regulation was called in response to a student's statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper. (The student was dissuaded.)

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol -- black armbands worn to exhibit opposition to this Nation's involvement in Vietnam -- was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school, as well as out of school, are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. \*\*\*

The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason -- whether it stems from time, place, or type of behavior -- materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle, but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school. In the circumstances of the present case, the prohibition of the silent, passive "witness of the armbands," as one of the children called it, is no less offensive to the Constitution's guarantees.

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.

We express no opinion as to the form of relief which should be granted, this being a matter for the lower courts to determine. We reverse and remand for further proceedings consistent with this opinion.

*Reversed and remanded.*

MR. JUSTICE STEWART, concurring.

Although I agree with much of what is said in the Court's opinion, and with its judgment in this case, I cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are coextensive with those of adults. Indeed, I had thought the Court decided otherwise just last Term in *Ginsberg v. New York*. I continue to hold the view I expressed in that case:

"[A] State may permissibly determine that, at least in some precisely delineated areas, a child -- like someone in a captive audience -- is not possessed of that

full capacity for individual choice which is the presupposition of First Amendment guarantees."

*Id.*; *Cf. Prince v. Massachusetts.*

MR. JUSTICE WHITE, concurring [omitted].

MR. JUSTICE BLACK, dissenting.

The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected "officials of state supported public schools . . ." in the United States is in ultimate effect transferred to the Supreme Court. The Court brought this particular case here on a petition for certiorari urging that the First and Fourteenth Amendments protect the right of school pupils to express their political views all the way "from kindergarten through high school." Here, the constitutional right to "political expression" asserted was a right to wear black armbands during school hours and at classes in order to demonstrate to the other students that the petitioners were mourning because of the death of United States soldiers in Vietnam and to protest that war which they were against. Ordered to refrain from wearing the armbands in school by the elected school officials and the teachers vested with state authority to do so, apparently only seven out of the school system's 18,000 pupils deliberately refused to obey the order. One defying pupil was Paul Tinker, 8 years old, who was in the second grade; another, Hope Tinker, was 11 years old and in the fifth grade; a third member of the Tinker family was 13, in the eighth grade; and a fourth member of the same family was John Tinker, 15 years old, an 11th grade high school pupil. Their father, a Methodist minister without a church, is paid a salary by the American Friends Service Committee. Another student who defied the school order and insisted on wearing an armband in school was Christopher Eckhardt, an 11th grade pupil and a petitioner in this case. His mother is an official in the Women's International League for Peace and Freedom.

As I read the Court's opinion, it relies upon the following grounds for holding unconstitutional the judgment of the Des Moines school officials and the two courts below. First, the Court concludes that the wearing of armbands is "symbolic speech," which is "akin to pure speech," and therefore protected by the First and Fourteenth Amendments. Secondly, the Court decides that the public schools are an appropriate place to exercise "symbolic speech" as long as normal school functions are not "unreasonably" disrupted. Finally, the Court arrogates to itself, rather than to the State's elected officials charged with running the schools, the decision as to which school disciplinary regulations are "reasonable."

Assuming that the Court is correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment, the crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech -- "symbolic" or "pure" -- and whether the courts will allocate to themselves the function of deciding how the pupils' school day will be spent. While I have always believed that, under the First and Fourteenth Amendments, neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right

to give speeches or engage in demonstrations where he pleases and when he pleases. \*\*\* While the record does not show that any of these armband students shouted, used profane language, or were violent in any manner, detailed testimony by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically "wrecked," chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstration."

Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker "self-conscious" in attending school with his armband. While the absence of obscene remarks or boisterous and loud disorder perhaps justifies the Court's statement that the few armband students did not actually "disrupt" the classwork, I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war. And I repeat that, if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary. The next logical step, it appears to me, would be to hold unconstitutional laws that bar pupils under 21 or 18 from voting, or from being elected members of the boards of education.

\*\*\* I deny, therefore, that it has been the "unmistakable holding of this Court for almost 50 years" that "students" and "teachers" take with them into the "schoolhouse gate" constitutional rights to "freedom of speech or expression."

In my view, teachers in state-controlled public schools are hired to teach there. Although Mr. Justice McReynolds may have intimated to the contrary in *Meyer v. Nebraska*, *supra*, certainly a teacher is not paid to go into school and teach subjects the State does not hire him to teach as a part of its selected curriculum. Nor are public school students sent to the schools at public expense to broadcast political or any other views to educate and inform the public. The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. It may be that the Nation has outworn the old-fashioned slogan that "children are to be seen, not heard," but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that, at their age, they need to learn, not teach.\*\*\*

Change has been said to be truly the law of life, but sometimes the old and the tried and true are worth holding. The schools of this Nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people. Uncontrolled and uncontrollable liberty is an enemy to domestic peace. We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. School discipline, like parental discipline, is an integral and important part of training our

children to be good citizens -- to be better citizens. Here a very small number of students have crisply and summarily refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not need to be a prophet or the son of a prophet to know that, after the Court's holding today, some students in Iowa schools -- and, indeed, in all schools -- will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins. Many of these student groups, as is all too familiar to all who read the newspapers and watch the television news programs, have already engaged in rioting, property seizures, and destruction. They have picketed schools to force students not to cross their picket lines, and have too often violently attacked earnest but frightened students who wanted an education that the pickets did not want them to get. Students engaged in such activities are apparently confident that they know far more about how to operate public school systems than do their parents, teachers, and elected school officials. It is no answer to say that the particular students here have not yet reached such high points in their demands to attend classes in order to exercise their political pressures. Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools, rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons, in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school systems in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

### ***Bethel School District No. 403 v. Fraser***

478 U.S. 675 (1986)

BURGER, C.J., DELIVERED THE OPINION OF THE COURT, IN WHICH WHITE, POWELL, REHNQUIST, AND O'CONNOR, JJ., JOINED. BRENNAN J., FILED AN OPINION CONCURRING IN THE JUDGMENT. BLACKMUN, J. CONCURRED IN THE RESULT. MARSHALL, J., AND STEVENS, J., FILED DISSENTING OPINIONS.

CHIEF JUSTICE BURGER DELIVERED THE OPINION OF THE COURT.

We granted certiorari to decide whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly.

I  
A

On April 26, 1983, respondent Matthew N. Fraser, a student at Bethel High School in Pierce County, Washington, delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students, many of whom were 14-year-olds, attended the assembly. Students were required to attend the assembly or to report to the study hall. The assembly was part of a school-sponsored educational program in self-government. Students who elected not to attend the assembly were required to report to study hall. During the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.

Two of Fraser's teachers, with whom he discussed the contents of his speech in advance, informed him that the speech was "inappropriate and that he probably should not deliver it," and that his delivery of the speech might have "severe consequences."

During Fraser's delivery of the speech, a school counselor observed the reaction of students to the speech. Some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech. Other students appeared to be bewildered and embarrassed by the speech. One teacher reported that, on the day following the speech, she found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class. A Bethel High School disciplinary rule prohibiting the use of obscene language in the school provides:

Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.

The morning after the assembly, the Assistant Principal called Fraser into her office and notified him that the school considered his speech to have been a violation of this rule. Fraser was presented with copies of five letters submitted by teachers, describing his conduct at the assembly; he was given a chance to explain his conduct and he admitted to having given the speech described and that he deliberately used sexual innuendo in the speech. Fraser was then informed that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises.

Fraser sought review of this disciplinary action through the School District's grievance procedures. The hearing officer determined that the speech given by respondent was "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly." The examiner determined that the speech fell within the ordinary meaning of "obscene," as used in the disruptive conduct rule, and affirmed the discipline in its entirety. Fraser served two days of his suspension, and was allowed to return to school on the third day.

## B

Respondent, by his father as guardian *ad litem*, then brought this action in the United States District Court for the Western District of Washington. Respondent alleged a violation of his First Amendment right to freedom of speech, and sought both injunctive relief and monetary damages under 42 U.S.C. § 1983.

The District Court held that the school's sanctions violated respondent's right to freedom of speech under the First Amendment to the United States Constitution, that the school's disruptive conduct rule is unconstitutionally vague and overbroad, and that the removal of respondent's name from the graduation speaker's list violated the Due Process Clause of the Fourteenth Amendment because the disciplinary rule makes no mention of such removal as a possible sanction. The District Court awarded respondent \$278 in damages, \$12,750 in litigation costs and attorney's fees, and enjoined the School District from preventing respondent from speaking at the commencement ceremonies. Respondent, who had been elected graduation speaker by a write-in vote of his classmates, delivered a speech at the commencement ceremonies on June 8, 1983.

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court, holding that respondent's speech was indistinguishable from the protest armband in *Tinker v. Des Moines Independent Community School Dist.* (1969). \*\*\*

We granted certiorari. We reverse.

## II

This Court acknowledged in *Tinker v. Des Moines Independent Community School Dist.* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court of Appeals read that case as precluding any discipline of Fraser for indecent speech and lewd conduct in the school assembly. That court appears to have proceeded on the theory that the use of lewd and obscene speech in order to make what the speaker considered to be a point in a nominating speech for a fellow student was essentially the same as the wearing of an armband in *Tinker* as a form of protest or the expression of a political position.

The marked distinction between the political "message" of the armbands in *Tinker* and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals. In upholding the students' right to engage in a nondisruptive, passive expression of a political viewpoint in *Tinker*, this Court was careful to note that the case did "not concern speech or action that intrudes upon the work of the schools or the rights of other students."

It is against this background that we turn to consider the level of First Amendment protection accorded to Fraser's utterances and actions before an official high school assembly attended by 600 students.

## III

The role and purpose of the American public school system were well described by two historians, who stated:

[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.

C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968). \*\*\*

These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences. \*\*\*

The First Amendment guarantees wide freedom in matters of adult public discourse. A sharply divided Court upheld the right to express an antidraft viewpoint in a public place, albeit in terms highly offensive to most citizens. See *Cohen v. California* (1971) [Chapter 2]. It does not follow, however, that, simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school. \*\*\* The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers -- and indeed the older students -- demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students -- indeed, to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality. Some students were reported as bewildered by the speech and the reaction of mimicry it provoked.

This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children. \*\*\*

We have also recognized an interest in protecting minors from exposure to vulgar and offensive spoken language. \*\*\*

We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials

from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education. \*\*\*

#### IV

Respondent contends that the circumstances of his suspension violated due process because he had no way of knowing that the delivery of the speech in question would subject him to disciplinary sanctions. This argument is wholly without merit. \*\*\*

The judgment of the Court of Appeals for the Ninth Circuit is  
*Reversed.*

JUSTICE BLACKMUN CONCURS IN THE RESULT [WITHOUT OPINION].

JUSTICE BRENNAN, CONCURRING IN THE JUDGMENT.

Respondent gave the following speech at a high school assembly in support of a candidate for student government office:

I know a man who is firm -- he's firm in his pants, he's firm in his shirt, his character is firm -- but most . . . of all, his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts -- he drives hard, pushing and pushing until finally -- he succeeds.

Jeff is a man who will go to the very end -- even the climax, for each and every one of you.

So vote for Jeff for A.S.B. vice-president -- he'll never come between you and the best our high school can be.

The Court, referring to these remarks as "obscene," "vulgar," "lewd," and "offensively lewd," concludes that school officials properly punished respondent for uttering the speech. Having read the full text of respondent's remarks, I find it difficult to believe that it is the same speech the Court describes. To my mind, the most that can be said about respondent's speech -- and all that need be said -- is that, in light of the discretion school officials have to teach high school students how to conduct civil and effective public discourse, and to prevent disruption of school educational activities, it was not unconstitutional for school officials to conclude, under the circumstances of this case, that respondent's remarks exceeded permissible limits. Thus, while I concur in the Court's judgment, I write separately to express my understanding of the breadth of the Court's holding.

The Court today reaffirms the unimpeachable proposition that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate. Moreover, despite the Court's characterizations, the language respondent used is far removed from the very narrow class of "obscene" speech which the Court has held is not protected by the First Amendment. It is true, however, that the State has interests in teaching high school students how to conduct civil and effective public discourse and in avoiding disruption of educational school activities. Thus, the Court holds that, under certain circumstances, high school students may properly be reprimanded for giving a speech at a high school assembly which school officials conclude disrupted the school's educational mission. Respondent's speech may well have been protected had he given it in school but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty.

In the present case, school officials sought only to ensure that a high school assembly proceed in an orderly manner. There is no suggestion that school officials attempted to regulate respondent's speech because they disagreed with the views he sought to express. Nor does this case involve an attempt by school officials to ban written materials they consider "inappropriate" for high school students, cf. *Board of Education v. Pico* (1982), or to limit what students should hear, read, or learn about. Thus, the Court's holding concerns only the authority that school officials have to restrict a high school student's use of disruptive language in a speech given to a high school assembly.

The authority school officials have to regulate such speech by high school students is not limitless. Under the circumstances of this case, however, I believe that school officials did not violate the First Amendment in determining that respondent should be disciplined for the disruptive language he used while addressing a high school assembly. Thus, I concur in the judgment reversing the decision of the Court of Appeals.

JUSTICE MARSHALL, DISSENTING.

I agree with the principles that Justice Brennan sets out in his opinion concurring in the judgment. I dissent from the Court's decision, however, because, in my view, the School District failed to demonstrate that respondent's remarks were indeed disruptive. The District Court and Court of Appeals conscientiously applied *Tinker v. Des Moines Independent Community School Dist.* (1969), and concluded that the School District had not demonstrated any disruption of the educational process. I recognize that the school administration must be given wide latitude to determine what forms of conduct are inconsistent with the school's educational mission; nevertheless, where speech is involved, we may not unquestioningly accept a teacher's or administrator's assertion that certain pure speech interfered with education. Here the School District, despite a clear opportunity to do so, failed to bring in evidence sufficient to convince either of the two lower courts that education at Bethel

School was disrupted by respondent's speech. I therefore see no reason to disturb the Court of Appeals' judgment.

JUSTICE STEVENS, DISSENTING.

"Frankly, my dear, I don't give a damn."

When I was a high school student, the use of those words in a public forum shocked the Nation. Today Clark Gable's four-letter expletive is less offensive than it was then. Nevertheless, I assume that high school administrators may prohibit the use of that word in classroom discussion and even in extracurricular activities that are sponsored by the school and held on school premises. For I believe a school faculty must regulate the content as well as the style of student speech in carrying out its educational mission. It does seem to me, however, that, if a student is to be punished for using offensive speech, he is entitled to fair notice of the scope of the prohibition and the consequences of its violation. The interest in free speech protected by the First Amendment and the interest in fair procedure protected by the Due Process Clause of the Fourteenth Amendment combine to require this conclusion.

\*\*\* I would affirm the judgment of the Court of Appeals.

## *Hazelwood School District v. Kuhlmeier*

484 U.S. 260 (1988)

WHITE, J., DELIVERED THE OPINION OF THE COURT, IN WHICH REHNQUIST, C. J., AND STEVENS, O'CONNOR, AND SCALIA, JJ., JOINED. BRENNAN, J., FILED A DISSENTING OPINION, IN WHICH MARSHALL AND BLACKMUN, JJ., JOINED.

JUSTICE WHITE DELIVERED THE OPINION OF THE COURT.

This case concerns the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum.

### I

Petitioners are the Hazelwood School District in St. Louis County, Missouri; various school officials; Robert Eugene Reynolds, the principal of Hazelwood East High School; and Howard Emerson, a teacher in the school district. Respondents are three former Hazelwood East students who were staff members of Spectrum, the school newspaper. They contend that school officials violated their First Amendment rights by deleting two pages of articles from the May 13, 1983, issue of Spectrum.

Spectrum was written and edited by the Journalism II class at Hazelwood East. The newspaper was published every three weeks or so during the 1982-1983 school year. More than 4,500 copies of the newspaper were distributed during that year to students, school personnel, and members of the community.

The Board of Education allocated funds from its annual budget for the printing of Spectrum. These funds were supplemented by proceeds from sales of the

newspaper. The printing expenses during the 1982-1983 school year totaled \$4,668.50; revenue from sales was \$1,166.84. The other costs associated with the newspaper - such as supplies, textbooks, and a portion of the journalism teacher's salary - were borne entirely by the Board.

The Journalism II course was taught by Robert Stergos for most of the 1982-1983 academic year. Stergos left Hazelwood East to take a job in private industry on April 29, 1983, when the May 13 edition of Spectrum was nearing completion, and petitioner Emerson took his place as newspaper adviser for the remaining weeks of the term.

The practice at Hazelwood East during the spring 1983 semester was for the journalism teacher to submit page proofs of each Spectrum issue to Principal Reynolds for his review prior to publication. On May 10, Emerson delivered the proofs of the May 13 edition to Reynolds, who objected to two of the articles scheduled to appear in that edition. One of the stories described three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students at the school.

Reynolds was concerned that, although the pregnancy story used false names "to keep the identity of these girls a secret," the pregnant students still might be identifiable from the text. He also believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school. In addition, Reynolds was concerned that a student identified by name in the divorce story had complained that her father "wasn't spending enough time with my mom, my sister and I" prior to the divorce, "was always out of town on business or out late playing cards with the guys," and "always argued about everything" with her mother. Reynolds believed that the student's parents should have been given an opportunity to respond to these remarks or to consent to their publication. He was unaware that Emerson had deleted the student's name from the final version of the article.

Reynolds believed that there was no time to make the necessary changes in the stories before the scheduled press run and that the newspaper would not appear before the end of the school year if printing were delayed to any significant extent. He concluded that his only options under the circumstances were to publish a four-page newspaper instead of the planned six-page newspaper, eliminating the two pages on which the offending stories appeared, or to publish no newspaper at all. Accordingly, he directed Emerson to withhold from publication the two pages containing the stories on pregnancy and divorce. He informed his superiors of the decision, and they concurred.

Respondents subsequently commenced this action in the United States District Court for the Eastern District of Missouri seeking a declaration that their First Amendment rights had been violated, injunctive relief, and monetary damages. After a bench trial, the District Court denied an injunction, holding that no First Amendment violation had occurred. \*\*\* The Court of Appeals for the Eighth Circuit reversed. \*\*\*

We granted certiorari and we now reverse.

## II

Students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*. They cannot be punished merely for expressing their personal views on the school premises - whether "in the cafeteria, or on the playing field, or on the campus during the authorized hours," - unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students."

We have nonetheless recognized that the First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings," *Bethel School District No. 403 v. Fraser*, and must be "applied in light of the special characteristics of the school environment." *Tinker*. A school need not tolerate student speech that is inconsistent with its "basic educational mission," *Fraser*, even though the government could not censor similar speech outside the school. \*\*\* It is in this context that respondents' First Amendment claims must be considered.

#### A

We deal first with the question whether Spectrum may appropriately be characterized as a forum for public expression. The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO* (1939). Hence, school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," *Perry Education Assn. v. Perry Local Educators' Assn.* (1983), or by some segment of the public, such as student organizations. *Id.* \*\*\* School officials did not evince either "by policy or by practice" any intent to open the pages of Spectrum to "indiscriminate use," by its student reporters and editors, or by the student body generally. Instead, they "reserve[d] the forum for its intended purpos[e]," as a supervised learning experience for journalism students. Accordingly, school officials were entitled to regulate the contents of Spectrum in any reasonable manner. It is this standard, rather than our decision in *Tinker*, that governs this case.

#### B

The question whether the First Amendment requires a school to tolerate particular student speech - the question that we addressed in *Tinker* - is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. \*\*\* A school must be able to set high standards for the student speech that is disseminated under its auspices - standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the "real" world - and may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order," *Fraser*, or to associate the school with any position other than neutrality on matters of political controversy. Otherwise, the schools would be unduly constrained from fulfilling their role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown v. Board of Education* (1954).

Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges. It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so "directly and sharply implicate as to require judicial intervention to protect students' constitutional rights.

### III

We also conclude that Principal Reynolds acted reasonably in requiring the deletion from the May 13 issue of *Spectrum* of the pregnancy article, the divorce article, and the remaining articles that were to appear on the same pages of the newspaper.

The initial paragraph of the pregnancy article declared that "[a]ll names have been changed to keep the identity of these girls a secret." The principal concluded that the students' anonymity was not adequately protected, however, given the other identifying information in the article and the small number of

pregnant students at the school. Indeed, a teacher at the school credibly testified that she could positively identify at least one of the girls and possibly all three. It is likely that many students at Hazelwood East would have been at least as successful in identifying the girls. Reynolds therefore could reasonably have feared that the article violated whatever pledge of anonymity had been given to the pregnant students. In addition, he could reasonably have been concerned that the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents, who were discussed in the article but who were given no opportunity to consent to its publication or to offer a response. The article did not contain graphic accounts of sexual activity. The girls did comment in the article, however, concerning their sexual histories and their use or nonuse of birth control. It was not unreasonable for the principal to have concluded that such frank talk was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters.

The student who was quoted by name in the version of the divorce article seen by Principal Reynolds made comments sharply critical of her father. The principal could reasonably have concluded that an individual publicly identified as an inattentive parent - indeed, as one who chose "playing cards with the guys" over home and family - was entitled to an opportunity to defend himself as a matter of journalistic fairness. These concerns were shared by both of Spectrum's faculty advisers for the 1982-1983 school year, who testified that they would not have allowed the article to be printed without deletion of the student's name.

Principal Reynolds testified credibly at trial that, at the time that he reviewed the proofs of the May 13 issue during an extended telephone conversation with Emerson, he believed that there was no time to make any changes in the articles, and that the newspaper had to be printed immediately or not at all. It is true that Reynolds did not verify whether the necessary modifications could still have been made in the articles, and that Emerson did not volunteer the information that printing could be delayed until the changes were made. We nonetheless agree with the District Court that the decision to excise the two pages containing the problematic articles was reasonable given the particular circumstances of this case. These circumstances included the very recent replacement of Stergos by Emerson, who may not have been entirely familiar with Spectrum editorial and production procedures, and the pressure felt by Reynolds to make an immediate decision so that students would not be deprived of the newspaper altogether.

In sum, we cannot reject as unreasonable Principal Reynolds' conclusion that neither the pregnancy article nor the divorce article was suitable for publication in Spectrum. Reynolds could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and "the legal, moral, and ethical restrictions imposed upon journalists within [a] school community" that includes adolescent subjects and readers. Finally, we conclude that the principal's decision to delete two pages of Spectrum,

rather than to delete only the offending articles or to require that they be modified, was reasonable under the circumstances as he understood them. Accordingly, no violation of First Amendment rights occurred.

The judgment of the Court of Appeals for the Eighth Circuit is therefore

*Reversed.*

JUSTICE BRENNAN, WITH WHOM JUSTICE MARSHALL AND JUSTICE BLACKMUN JOIN, DISSENTING.

When the young men and women of Hazelwood East High School registered for Journalism II, they expected a civics lesson. Spectrum, the newspaper they were to publish, "was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a . . . forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution . . . ." "[A]t the beginning of each school year," the student journalists published a Statement of Policy - tacitly approved each year by school authorities - announcing their expectation that "Spectrum, as a student-press publication, accepts all rights implied by the First Amendment . . . . Only speech that 'materially and substantially interferes with the requirements of appropriate discipline' can be found unacceptable and therefore prohibited." The school board itself affirmatively guaranteed the students of Journalism II an atmosphere conducive to fostering such an appreciation and exercising the full panoply of rights associated with a free student press. "School sponsored student publications," it vowed, "will not restrict free expression or diverse viewpoints within the rules of responsible journalism."

This case arose when the Hazelwood East administration breached its own promise, dashing its students' expectations. The school principal, without prior consultation or explanation, excised six articles - comprising two full pages - of the May 13, 1983, issue of Spectrum. He did so not because any of the articles would "materially and substantially interfere with the requirements of appropriate discipline," but simply because he considered two of the six "inappropriate, personal, sensitive, and unsuitable" for student consumption.

In my view the principal broke more than just a promise. He violated the First Amendment's prohibitions against censorship of any student expression that neither disrupts classwork nor invades the rights of others, and against any censorship that is not narrowly tailored to serve its purpose.

## I

\*\*\* [The Court has never suggested] the distinction, which the Court today finds dispositive, between school-sponsored and incidental student expression.

## II

Even if we were writing on a clean slate, I would reject the Court's rationale for abandoning *Tinker* in this case. The Court offers no more than an obscure tangle of three excuses to afford educators "greater control" over school-sponsored speech than the *Tinker* test would permit: the public educator's prerogative to control curriculum; the pedagogical interest in shielding the high school audience from objectionable viewpoints and sensitive topics; and the

school's need to dissociate itself from student expression. None of the excuses, once disentangled, supports the distinction that the Court draws. *Tinker* fully addresses the first concern; the second is illegitimate; and the third is readily achievable through less oppressive means.\*\*\*

### III

Since the censorship served no legitimate pedagogical purpose, it cannot by any stretch of the imagination have been designed to prevent "materia[l] disrupt[ion of] classwork," *Tinker*. Nor did the censorship fall within the category that *Tinker* described as necessary to prevent student expression from "inva[ding] the rights of others," *ibid*. If that term is to have any content, it must be limited to rights that are protected by law. "Any yardstick less exacting than [that] could result in school officials curtailing speech at the slightest fear of disturbance," a prospect that would be completely at odds with this Court's pronouncement that the "undifferentiated fear or apprehension of disturbance is not enough [even in the public school context] to overcome the right to freedom of expression." *Tinker*. And, as the Court of Appeals correctly reasoned, whatever journalistic impropriety these articles may have contained, they could not conceivably be tortious, much less criminal.

Finally, even if the majority were correct that the principal could constitutionally have censored the objectionable material, I would emphatically object to the brutal manner in which he did so. Where "[t]he separation of legitimate from illegitimate speech calls for more sensitive tools," the principal used a paper shredder. He objected to some material in two articles, but excised six entire articles. He did not so much as inquire into obvious alternatives, such as precise deletions or additions (one of which had already been made), rearranging the layout, or delaying publication. Such unthinking contempt for individual rights is intolerable from any state official. It is particularly insidious from one to whom the public entrusts the task of inculcating in its youth an appreciation for the cherished democratic liberties that our Constitution guarantees.

### IV

The Court opens its analysis in this case by purporting to reaffirm *Tinker's* time-tested proposition that public school students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." That is an ironic introduction to an opinion that denudes high school students of much of the First Amendment protection that *Tinker* itself prescribed. Instead of "teach[ing] children to respect the diversity of ideas that is fundamental to the American system," and "that our Constitution is a living reality, not parchment preserved under glass," the Court today "teach[es] youth to discount important principles of our government as mere platitudes." *West Virginia Board of Education v. Barnette*. The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.

I dissent.

## *Morse v. Frederick*

551 U.S. 393 (2007)

ROBERTS, C. J., DELIVERED THE OPINION OF THE COURT, IN WHICH SCALIA, KENNEDY, THOMAS, AND ALITO, JJ., JOINED. THOMAS, J., FILED A CONCURRING OPINION. ALITO, J., FILED A CONCURRING OPINION, IN WHICH KENNEDY, J., JOINED. BREYER, J., FILED AN OPINION CONCURRING IN THE JUDGMENT IN PART AND DISSENTING IN PART. STEVENS, J., FILED A DISSENTING OPINION, IN WHICH SOUTER AND GINSBURG, JJ., JOINED.

CHIEF JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

At a school-sanctioned and school-supervised event, a high school principal saw some of her students unfurl a large banner conveying a message she reasonably regarded as promoting illegal drug use. Consistent with established school policy prohibiting such messages at school events, the principal directed the students to take down the banner. One student--among those who had brought the banner to the event--refused to do so. The principal confiscated the banner and later suspended the student. The Ninth Circuit held that the principal's actions violated the First Amendment, and that the student could sue the principal for damages.

Our cases make clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*. At the same time, we have held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Fraser*, and that the rights of students "must be 'applied in light of the special characteristics of the school environment.'" *Hazelwood School Dist.* Consistent with these principles, we hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use. We conclude that the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it.

### I

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah. The torchbearers were to proceed along a street in front of Juneau-Douglas High School (JDHS) while school was in session. Petitioner Deborah Morse, the school principal, decided to permit staff and students to participate in the Torch Relay as an approved social event or class trip. Students were allowed to leave class to observe the relay from either side of the street. Teachers and administrative officials monitored the students' actions.

Respondent Joseph Frederick, a JDHS senior, was late to school that day. When he arrived, he joined his friends (all but one of whom were JDHS students) across the street from the school to watch the event. Not all the students waited patiently. Some became rambunctious, throwing plastic cola bottles and snowballs and scuffling with their classmates. As the torchbearers and camera crews passed by, Frederick and his friends unfurled a 14-foot banner bearing the phrase: "BONG HiTS 4 JESUS." The large banner was easily readable by the students on the other side of the street.

Principal Morse immediately crossed the street and demanded that the banner be taken down. Everyone but Frederick complied. Morse confiscated the banner and told Frederick to report to her office, where she suspended him for 10 days. Morse later explained that she told Frederick to take the banner down because she thought it encouraged illegal drug use, in violation of established school policy. Juneau School Board Policy No. 5520 states: "The Board specifically prohibits any assembly or public expression that ... advocates the use of substances that are illegal to minors ... ." In addition, Juneau School Board Policy No. 5850 subjects "[p]upils who participate in approved social events and class trips" to the same student conduct rules that apply during the regular school program.

Frederick administratively appealed his suspension, but the Juneau School District Superintendent upheld it, limiting it to time served (8 days). In a memorandum setting forth his reasons, the superintendent determined that Frederick had displayed his banner "in the midst of his fellow students, during school hours, at a school-sanctioned activity." He further explained that Frederick "was not disciplined because the principal of the school 'disagreed' with his message, but because his speech appeared to advocate the use of illegal drugs." The superintendent continued:

"The common-sense understanding of the phrase 'bong hits' is that it is a reference to a means of smoking marijuana. Given [Frederick's] inability or unwillingness to express any other credible meaning for the phrase, I can only agree with the principal and countless others who saw the banner as advocating the use of illegal drugs. [Frederick's] speech was not political. He was not advocating the legalization of marijuana or promoting a religious belief. He was displaying a fairly silly message promoting illegal drug usage in the midst of a school activity, for the benefit of television cameras covering the Torch Relay. [Frederick's] speech was potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage their use."

Relying on our decision in *Fraser*, the superintendent concluded that the principal's actions were permissible because Frederick's banner was "speech or action that intrudes upon the work of the schools." The Juneau School District Board of Education upheld the suspension.

Frederick then filed suit under 42 U. S. C. §1983, alleging that the school board and Morse had violated his First Amendment rights. He sought declaratory and injunctive relief, unspecified compensatory damages, punitive damages, and attorney's fees. The District Court granted summary judgment for the school board and Morse, ruling that they were entitled to qualified immunity and that they had not infringed Frederick's First Amendment rights. \*\*\*

The Ninth Circuit reversed. Deciding that Frederick acted during a "school-authorized activit[y]," and "proceed[ing] on the basis that the banner expressed a positive sentiment about marijuana use," the court nonetheless found a violation of Frederick's First Amendment rights because the school punished Frederick without demonstrating that his speech gave rise to a "risk of substantial disruption." The court further concluded that Frederick's right to

display his banner was so "clearly established" that a reasonable principal in Morse's position would have understood that her actions were unconstitutional, and that Morse was therefore not entitled to qualified immunity.

We granted certiorari on two questions: whether Frederick had a First Amendment right to wield his banner, and, if so, whether that right was so clearly established that the principal may be held liable for damages. We resolve the first question against Frederick, and therefore have no occasion to reach the second.

## II

At the outset, we reject Frederick's argument that this is not a school speech case--as has every other authority to address the question. The event occurred during normal school hours. It was sanctioned by Principal Morse "as an approved social event or class trip," and the school district's rules expressly provide that pupils in "approved social events and class trips are subject to district rules for student conduct." Teachers and administrators were interspersed among the students and charged with supervising them. The high school band and cheerleaders performed. Frederick, standing among other JDHS students across the street from the school, directed his banner toward the school, making it plainly visible to most students. Under these circumstances, we agree with the superintendent that Frederick cannot "stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school." There is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents, but not on these facts.

## III

The message on Frederick's banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all. Frederick himself claimed "that the words were just nonsense meant to attract television cameras." But Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one.

As Morse later explained in a declaration, when she saw the sign, she thought that "the reference to a 'bong hit' would be widely understood by high school students and others as referring to smoking marijuana." She further believed that "display of the banner would be construed by students, District personnel, parents and others witnessing the display of the banner, as advocating or promoting illegal drug use"--in violation of school policy.

We agree with Morse. At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs. First, the phrase could be interpreted as an imperative: "[Take] bong hits ..."--a message equivalent, as Morse explained in her declaration, to "smoke marijuana" or "use an illegal drug." Alternatively, the phrase could be viewed as celebrating drug use--"bong hits [are a good thing]," or "[we take] bong hits"--and we discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion.

The pro-drug interpretation of the banner gains further plausibility given the paucity of alternative meanings the banner might bear. The best Frederick can come up with is that the banner is "meaningless and funny." The dissent similarly refers to the sign's message as "curious," "ambiguous," "nonsense," "ridiculous," "obscure," "silly," "quixotic," and "stupid." Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs.

The dissent mentions Frederick's "credible and uncontradicted explanation for the message--he just wanted to get on television." But that is a description of Frederick's *motive* for displaying the banner; it is not an interpretation of what the banner says. The *way* Frederick was going to fulfill his ambition of appearing on television was by unfurling a pro-drug banner at a school event, in the presence of teachers and fellow students.

Elsewhere in its opinion, the dissent emphasizes the importance of political speech and the need to foster "national debate about a serious issue," as if to suggest that the banner is political speech. But not even Frederick argues that the banner conveys any sort of political or religious message. Contrary to the dissent's suggestion, this is plainly not a case about political debate over the criminalization of drug use or possession.

#### IV

The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may.

In *Tinker*, this Court made clear that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." \*\*\* The essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment. The students sought to engage in political speech, using the armbands to express their "disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them." Political speech, of course, is "at the core of what the First Amendment is designed to protect." *Virginia v. Black* (2003). The only interest the Court discerned underlying the school's actions was the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," or "an urgent wish to avoid the controversy which might result from the expression." *Tinker*. That interest was not enough to justify banning "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance." *Id.*

This Court's next student speech case was *Fraser*.\*\*\* The mode of analysis employed in *Fraser* is not entirely clear. The Court was plainly attuned to the content of Fraser's speech, citing the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [Fraser's] speech." But the Court also reasoned that school boards have the authority to determine "what manner of speech in the classroom or in school assembly is inappropriate."

We need not resolve this debate to decide this case. For present purposes, it is enough to distill from *Fraser* two basic principles. First, *Fraser's* holding demonstrates that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. \*\*\* Second, *Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the "substantial disruption" analysis prescribed by *Tinker*.

Our most recent student speech case, *Kuhlmeier*, concerned "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." \*\*\*

*Kuhlmeier* does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur. The case is nevertheless instructive because it confirms both principles cited above. *Kuhlmeier* acknowledged that schools may regulate some speech "even though the government could not censor similar speech outside the school." And, like *Fraser*, it confirms that the rule of *Tinker* is not the only basis for restricting student speech.

\*\*\* Congress has declared that part of a school's job is educating students about the dangers of illegal drug use. It has provided billions of dollars to support state and local drug-prevention programs, and required that schools receiving federal funds under the Safe and Drug-Free Schools and Communities Act of 1994 certify that their drug prevention programs "convey a clear and consistent message that ... the illegal use of drugs [is] wrong and harmful." 20 U. S. C. §7114(d)(6) (2000 ed., Supp. IV).

Thousands of school boards throughout the country--including JDHS--have adopted policies aimed at effectuating this message. Those school boards know that peer pressure is perhaps "the single most important factor leading schoolchildren to take drugs," and that students are more likely to use drugs when the norms in school appear to tolerate such behavior. Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.

The "special characteristics of the school environment," *Tinker*, and the governmental interest in stopping student drug abuse--reflected in the policies of Congress and myriad school boards, including JDHS--allow schools to restrict student expression that they reasonably regard as promoting illegal drug use. *Tinker* warned that schools may not prohibit student speech because of "undifferentiated fear or apprehension of disturbance" or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* The danger here is far more serious and palpable. The particular concern to prevent student drug abuse at issue here, embodied in established school policy, extends well beyond an abstract desire to avoid controversy.

Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive" as that term is used in *Fraser*. We

think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of "offensive." After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use.

Although accusing this decision of doing "serious violence to the First Amendment" by authorizing "viewpoint discrimination," the dissent concludes that "it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting," . Nor do we understand the dissent to take the position that schools are required to tolerate student advocacy of illegal drug use at school events, even if that advocacy falls short of inviting "imminent" lawless action. And even the dissent recognizes that the issues here are close enough that the principal should not be held liable in damages, but should instead enjoy qualified immunity for her actions. Stripped of rhetorical flourishes, then, the debate between the dissent and this opinion is less about constitutional first principles than about whether Frederick's banner constitutes promotion of illegal drug use. We have explained our view that it does. The dissent's contrary view on that relatively narrow question hardly justifies sounding the First Amendment bugle.

School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled his banner, Morse had to decide to act--or not act--on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use--in violation of established school policy--and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.

The judgment of the United States Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE THOMAS, CONCURRING.

The Court today decides that a public school may prohibit speech advocating illegal drug use. I agree and therefore join its opinion in full. I write separately to state my view that the standard set forth in *Tinker v. Des Moines Independent Community School Dist.* (1969), is without basis in the Constitution.

\*\*\* Today, the Court creates another exception. In doing so, we continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates and when it does not. I am afraid that our jurisprudence now says that students have a right to speak in schools except when they don't--a standard continuously developed through litigation against local schools and their administrators. In my view, petitioners could prevail for a much simpler reason: As originally understood, the Constitution does not afford students a right to free speech in public schools. \*\*\*

I join the Court's opinion because it erodes *Tinker's* hold in the realm of student speech, even though it does so by adding to the patchwork of exceptions to the

*Tinker* standard. I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so.

JUSTICE ALITO, WITH WHOM JUSTICE KENNEDY JOINS, CONCURRING.

I join the opinion of the Court on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as "the wisdom of the war on drugs or of legalizing marijuana for medicinal use." \*\*\*

JUSTICE STEVENS, WITH WHOM JUSTICE SOUTER AND JUSTICE GINSBURG JOIN, DISSENTING.

A significant fact barely mentioned by the Court sheds a revelatory light on the motives of both the students and the principal of Juneau-Douglas High School (JDHS). On January 24, 2002, the Olympic Torch Relay gave those Alaska residents a rare chance to appear on national television. As Joseph Frederick repeatedly explained, he did not address the curious message--"BONG HiTS 4 JESUS"--to his fellow students. He just wanted to get the camera crews' attention. Moreover, concern about a nationwide evaluation of the conduct of the JDHS student body would have justified the principal's decision to remove an attention-grabbing 14-foot banner, even if it had merely proclaimed "Glaciers Melt!"

I agree with the Court that the principal should not be held liable for pulling down Frederick's banner. I would hold, however, that the school's interest in protecting its students from exposure to speech "reasonably regarded as promoting illegal drug use," cannot justify disciplining Frederick for his attempt to make an ambiguous statement to a television audience simply because it contained an oblique reference to drugs. The First Amendment demands more, indeed, much more.

The Court holds otherwise only after laboring to establish two uncontroversial propositions: first, that the constitutional rights of students in school settings are not coextensive with the rights of adults, and second, that deterring drug use by schoolchildren is a valid and terribly important interest. As to the first, I take the Court's point that the message on Frederick's banner is not *necessarily* protected speech, even though it unquestionably would have been had the banner been unfurled elsewhere. As to the second, I am willing to assume that the Court is correct that the pressing need to deter drug use supports JDHS's rule prohibiting willful conduct that expressly "advocates the use of substances that are illegal to minors." But it is a gross non sequitur to draw from these two unremarkable propositions the remarkable conclusion that the school may suppress student speech that was never meant to persuade anyone to do anything.

In my judgment, the First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students. This nonsense banner does neither, and the Court does serious violence to the First Amendment in upholding--indeed,

lauding--a school's decision to punish Frederick for expressing a view with which it disagreed.

\*\*\* Even if advocacy could somehow be wedged into Frederick's obtuse reference to marijuana, that advocacy was at best subtle and ambiguous. There is abundant precedent, including another opinion *The Chief Justice* announces today, for the proposition that when the "First Amendment is implicated, the tie goes to the speaker," *Federal Election Comm'n v. Wisconsin Right to Life, Inc.* (2007) and that "when it comes to defining what speech qualifies as the functional equivalent of express advocacy ... we give the benefit of the doubt to speech, not censorship." If this were a close case, the tie would have to go to Frederick's speech, not to the principal's strained reading of his quixotic message.

Among other things, the Court's ham-handed, categorical approach is deaf to the constitutional imperative to permit unfettered debate, even among high-school students, about the wisdom of the war on drugs or of legalizing marijuana for medicinal use. See *Tinker*. If Frederick's stupid reference to marijuana can in the Court's view justify censorship, then high school students everywhere could be forgiven for zipping their mouths about drugs at school lest some "reasonable" observer censor and then punish them for promoting drugs.

Consider, too, that the school district's rule draws no distinction between alcohol and marijuana, but applies evenhandedly to all "substances that are illegal to minors." Given the tragic consequences of teenage alcohol consumption--drinking causes far more fatal accidents than the misuse of marijuana--the school district's interest in deterring teenage alcohol use is at least comparable to its interest in preventing marijuana use. Under the Court's reasoning, must the First Amendment give way whenever a school seeks to punish a student for any speech mentioning beer, or indeed anything else that might be deemed risky to teenagers? While I find it hard to believe the Court would support punishing Frederick for flying a "WINE SiPS 4 JESUS" banner--which could quite reasonably be construed either as a protected religious message or as a pro-alcohol message--the breathtaking sweep of its opinion suggests it would.

Although this case began with a silly, nonsensical banner, it ends with the Court inventing out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions drugs, at least so long as someone could perceive that speech to contain a latent pro-drug message. Our First Amendment jurisprudence has identified some categories of expression that are less deserving of protection than others--fighting words, obscenity, and commercial speech, to name a few. Rather than reviewing our opinions discussing such categories, I mention two personal recollections that have no doubt influenced my conclusion that it would be profoundly unwise to create special rules for speech about drug and alcohol use.

The Vietnam War is remembered today as an unpopular war. During its early stages, however, "the dominant opinion" that Justice Harlan mentioned in his *Tinker* dissent regarded opposition to the war as unpatriotic, if not treason. That dominant opinion strongly supported the prosecution of several of those

who demonstrated in Grant Park during the 1968 Democratic Convention in Chicago and the vilification of vocal opponents of the war like Julian Bond. In 1965, when the Des Moines students wore their armbands, the school district's fear that they might "start an argument or cause a disturbance" was well founded. *Tinker*. Given that context, there is special force to the Court's insistence that "our Constitution says we must take that risk; and our history says that it is this sort of hazardous freedom--this kind of openness--that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." As we now know, the then-dominant opinion about the Vietnam War was not etched in stone.

Reaching back still further, the current dominant opinion supporting the war on drugs in general, and our antimarijuana laws in particular, is reminiscent of the opinion that supported the nationwide ban on alcohol consumption when I was a student. While alcoholic beverages are now regarded as ordinary articles of commerce, their use was then condemned with the same moral fervor that now supports the war on drugs. The ensuing change in public opinion occurred much more slowly than the relatively rapid shift in Americans' views on the Vietnam War, and progressed on a state-by-state basis over a period of many years. But just as prohibition in the 1920's and early 1930's was secretly questioned by thousands of otherwise law-abiding patrons of bootleggers and speakeasies, today the actions of literally millions of otherwise law-abiding users of marijuana, and of the majority of voters in each of the several States that tolerate medicinal uses of the product, lead me to wonder whether the fear of disapproval by those in the majority is silencing opponents of the war on drugs. Surely our national experience with alcohol should make us wary of dampening speech suggesting--however inarticulately--that it would be better to tax and regulate marijuana than to persevere in a futile effort to ban its use entirely.

Even in high school, a rule that permits only one point of view to be expressed is less likely to produce correct answers than the open discussion of countervailing views. *Whitney* (Brandeis, J., concurring); *Abrams* (Holmes, J., dissenting); *Tinker*. In the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment. Whatever the better policy may be, a full and frank discussion of the costs and benefits of the attempt to prohibit the use of marijuana is far wiser than suppression of speech because it is unpopular.

I respectfully dissent.

JUSTICE BREYER, CONCURRING IN THE JUDGMENT IN PART AND DISSENTING IN PART.

This Court need not and should not decide this difficult First Amendment issue on the merits. Rather, I believe that it should simply hold that qualified immunity bars the student's claim for monetary damages and say no more. \*\*\*

## Notes

1. The *Tinker* standard is often called the *Tinker* “disruption standard,” yet in *Tinker* the Court includes in its pronouncement a concern for the rights of other students. For example:

A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason -- whether it stems from time, place, or type of behavior -- materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

How does attention to the “rights of others” change the constitutional reasoning? Is it important in *Fraser*, *Hazlewood*, or *Morse*?

2. How far should *Tinker* as well as *Morse* reach “outside” of the school house gates? In *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. en banc 2011) and *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. en banc 2011), the Third Circuit en banc considered two panel opinion cases decided the same day on similar facts reaching opposite results. Both controversies involved students who, while off school premises, used a social networking site - - - myspace.com - - - to malign their principals by creating false profiles. The en banc opinions found that the speech in both of these cases was protected by the First Amendment, but there remained room for finding that off-campus speech could nevertheless be disciplined under the *Tinker* standard.

These Third Circuit cases involved student speech directed at school officials, but what about student-on-student speech that raises the specter of “cyber-bullying”?

### Note: Curriculum

How do the employee and student cases operate in cases of curriculum? Should the rules be different for public school districts and for colleges/universities?

# Chapter Six: UNCONSTITUTIONAL CONDITIONS AND COMPELLED SPEECH

This chapter considers two separate doctrines - - - unconstitutional conditions and compelled (or coerced) speech - - - concluding with a case decided by the United States Supreme Court in 2013 that explicitly combines the two doctrines.

## Outline of Chapter

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Notes

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#### **C. Compelled Speech and Association**

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Notes

## I. Unconstitutional Conditions and Speech

The doctrine of unconstitutional conditions is not limited to the First Amendment. It can arise whenever the government attaches conditions to funding if those conditions effect the exercise of a constitutional right. For example, if the government requires a person to be sterilized before she could collect unemployment benefits, this would be an example of unconstitutional conditions. When the federal government is involved, doctrine under the Spending Clause, Article I §8 cl. 1, is implicated. When state or local governments are involved, there may be state constitutional issues.

There are two opposing views of the doctrine of unconstitutional conditions:

The most expansive view is that the government cannot impose a condition on funding unless it could impose that condition directly. In other words, the government could mandate sterilization as a condition for unemployment benefits unless it could mandate sterilization generally.

The most restrictive view is that the government can impose any condition on funding. In other words, the “doctrine” of “unconstitutional conditions” does not exist. The government can subsidize whatever it chooses and people are “free” to take the money or to refuse it.

When freedom of speech is the constitutional right at stake in an unconstitutional conditions case, the issue is further complicated by questions of whether the government itself is attempting to speak and whether there are other constitutional considerations.

The major cases on unconstitutional conditions in the First Amendment speech context are *Rust v. Sullivan* (1991) and *Legal Services Corp. v. Velazquez* (2001).

### *Rust v. Sullivan*

500 U.S. 173 (1991)

REHNQUIST, C. J., DELIVERED THE OPINION OF THE COURT, IN WHICH WHITE, KENNEDY, SCALIA, AND SOUTER, JJ., JOINED. BLACKMUN, J., FILED A DISSENTING OPINION, IN WHICH MARSHALL, J., JOINED; IN PART I OF WHICH O'CONNOR, J., JOINED; AND IN PARTS II AND III OF WHICH STEVENS, J., JOINED. STEVENS, J., AND O'CONNOR, J., FILED DISSENTING OPINIONS.

CHIEF JUSTICE REHNQUIST DELIVERED THE OPINION OF THE COURT.

These cases concern a facial challenge to Department of Health and Human Services (HHS) regulations which limit the ability of Title X fund recipients to engage in abortion-related activities. \*\*\*

I.

A.

In 1970, Congress enacted Title X of the Public Health Service Act (Act), which provides federal funding for family-planning services. The Act authorizes the Secretary to “make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services.” Grants and contracts under Title X must “be made in accordance with such regulations as the Secretary may promulgate.” Section 1008 of the Act, however, provides that “[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.” That restriction was intended to ensure that Title X funds would “be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities.”

In 1988, the Secretary promulgated new regulations designed to provide “‘clear and operational guidance’ to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning.” The regulations clarify, through the definition of the term “family planning,” that Congress intended Title X funds “to be used only to support *preventive* family planning services.” (emphasis added). Accordingly, Title X services are limited to “preconceptional counseling, education, and general reproductive health care,” and expressly exclude “pregnancy care (including obstetric or prenatal care).” The regulations “focus the emphasis of the Title X program on its traditional mission: The provision of preventive family planning services specifically designed to enable individuals to determine the number and spacing of their children, while clarifying that pregnant women must be referred to appropriate prenatal care services.”

The regulations attach three principal conditions on the grant of federal funds for Title X projects. First, the regulations specify that a “Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.” Because Title X is limited to preconceptional services, the program does not furnish services related to childbirth. Only in the context of a referral out of the Title X program is a pregnant woman given transitional information. Title X projects must refer every pregnant client “for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child.” The list may not be used indirectly to encourage or promote abortion, “such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by ‘steering’ clients to providers who offer abortion as a method of family planning.” The Title X project is expressly prohibited from referring a pregnant woman to an abortion provider, even upon specific request. One permissible response to such an inquiry is that “the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion.”

Second, the regulations broadly prohibit a Title X project from engaging in activities that “encourage, promote or advocate abortion as a method of family planning.” Forbidden activities include lobbying for legislation that would increase the availability of abortion as a method of family planning, developing or disseminating materials advocating abortion as a method of family planning, providing speakers to promote abortion as a method of family planning, using legal action to make abortion available in any way as a method of family planning, and paying dues to any group that advocates abortion as a method of family planning as a substantial part of its activities.

Third, the regulations require that Title X projects be organized so that they are “physically and financially separate” from prohibited abortion activities. To be deemed physically and financially separate, “a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient.” The regulations provide a list of nonexclusive factors for the Secretary to consider in conducting a case-by-case determination of objective integrity and independence, such as the existence of separate accounting records and separate personnel, and the degree of physical separation of the project from facilities for prohibited activities.

### III

Petitioners contend that the regulations violate the First Amendment by impermissibly discriminating based on viewpoint because they prohibit “all discussion about abortion as a lawful option—including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy—while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term.” They assert that the regulations violate the “free speech rights of private health care organizations that receive Title X funds, of their staff, and of their patients” by impermissibly imposing “viewpoint-discriminatory conditions on government subsidies” and thus “penaliz [e] speech funded with non-Title X monies.” Because “Title X continues to fund speech ancillary to pregnancy testing in a manner that is not evenhanded with respect to views and information about abortion, it invidiously discriminates on the basis of viewpoint.” Relying on *Regan v. Taxation with Representation of Wash.* (1983), and *Arkansas Writers' Project, Inc. v. Ragland*, (1987), petitioners also assert that while the Government may place certain conditions on the receipt of federal subsidies, it may not “discriminate invidiously in its subsidies in such a way as to ‘ai[m] at the suppression of dangerous ideas.’”

There is no question but that the statutory prohibition contained in § 1008 is constitutional. In *Maher v. Roe* (1977), we upheld a state welfare regulation under which Medicaid recipients received payments for services related to childbirth, but not for nontherapeutic abortions. The Court rejected the claim that this unequal subsidization worked a violation of the Constitution. We held that the government may “make a value judgment favoring childbirth over abortion, and ... implement that judgment by the allocation of public funds.” Here the Government is exercising the authority it possesses under *Maher* and *Harris v. McRae* (1980), to subsidize family planning services which will lead to conception and childbirth, and declining to “promote or encourage abortion.”

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. “[A] legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right.” “A refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity.” *McRae*, “There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.” *Maher*.

The challenged regulations implement the statutory prohibition by prohibiting counseling, referral, and the provision of information regarding abortion as a method of family planning. They are designed to ensure that the limits of the federal program are observed. The Title X program is designed not for prenatal care, but to encourage family planning. A doctor who wished to offer prenatal care to a project patient who became pregnant could properly be prohibited from doing so because such service is outside the scope of the federally funded program. The regulations prohibiting abortion counseling and referral are of the same ilk; “no funds appropriated for the project may be used in programs where abortion is a method of family planning,” and a doctor employed by the project may be prohibited in the course of his project duties from counseling abortion or referring for abortion. This is not a case of the Government “suppressing a dangerous idea,” but of a prohibition on a project grantee or its employees from engaging in activities outside of the project’s scope.

To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism. Petitioners’ assertions ultimately boil down to the position that if the government chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition. Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.

We believe that petitioners’ reliance upon our decision in *Arkansas Writers’ Project* is misplaced. That case involved a state sales tax which discriminated between magazines on the basis of their content. Relying on this fact, and on the fact that the tax “targets a small group within the press,” \*\*\* the Court held the tax invalid. But we have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded.

Petitioners rely heavily on their claim that the regulations would not, in the circumstance of a medical emergency, permit a Title X project to refer a woman

whose pregnancy places her life in imminent peril to a provider of abortions or abortion-related services. \*\*\* On their face, we do not read the regulations to bar abortion referral or counseling in such circumstances. Abortion counseling as a “method of family planning” is prohibited, and it does not seem that a medically necessitated abortion in such circumstances would be the equivalent of its use as a “method of family planning.” \*\*\*

Petitioners also contend that the restrictions on the subsidization of abortion-related speech contained in the regulations are impermissible because they condition the receipt of a benefit, in these cases Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling. \*\*\*

[H]ere the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. Title X expressly distinguishes between a Title X *grantee* and a Title X *project*. The grantee, which normally is a health-care organization, may receive funds from a variety of sources for a variety of purposes. The grantee receives Title X funds, however, for the specific and limited purpose of establishing and operating a Title X project. The regulations govern the scope of the Title X *project's* activities, and leave the grantee unfettered in its other activities. The Title X *grantee* can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.

In contrast, our “unconstitutional conditions” cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program. In *FCC v. League of Women Voters of Cal.*, we invalidated a federal law providing that noncommercial television and radio stations that receive federal grants may not “engage in editorializing.” Under that law, a recipient of federal funds was “barred absolutely from all editorializing” because it “is not able to segregate its activities according to the source of its funding” and thus “has no way of limiting the use of its federal funds to all noneditorializing activities.” The effect of the law was that “a noncommercial educational station that receives only 1% of its overall income from [federal] grants is barred absolutely from all editorializing” and “barred from using even wholly private funds to finance its editorial activity.” We expressly recognized, however, that were Congress to permit the recipient stations to “establish ‘affiliate’ organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid.” Such a scheme would permit the station “to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities.”

By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in *League of Women Voters* and *Regan*, not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.

The same principles apply to petitioners' claim that the regulations abridge the free speech rights of the grantee's staff. Individuals who are voluntarily employed for a Title X project must perform their duties in accordance with the regulation's restrictions on abortion counseling and referral. The employees remain free, however, to pursue abortion-related activities when they are not acting under the auspices of the Title X project. The regulations, which govern solely the scope of the Title X project's activities, do not in any way restrict the activities of those persons acting as private individuals. The employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority.<sup>5</sup>

This is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression. For example, this Court has recognized that the existence of a Government "subsidy," in the form of Government-owned property, does not justify the restriction of speech in areas that have "been traditionally open to the public for expressive activity." Similarly, we have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment. It could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government. We need not resolve that question here, however, because the Title X program regulations do not significantly impinge upon the doctor-patient relationship. Nothing in them requires a doctor to represent as his own any opinion that he does not in fact hold. Nor is the doctor-patient relationship established by the Title X program sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice. The program does not provide post conception medical care, and therefore a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her. The doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program. In these circumstances, the general rule that the Government may choose not to subsidize speech applies with full force.

JUSTICE BLACKMUN, WITH WHOM JUSTICE MARSHALL JOINS, WITH WHOM JUSTICE STEVENS JOINS AS TO PARTS II AND III AND WITH WHOM JUSTICE O'CONNOR JOINS AS TO PART I, DISSENTING.

I. [OMITTED]

II.

A.

Until today, the Court never has upheld viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds. Whatever may be the Government's power to condition the receipt of its largess upon the relinquishment of constitutional rights, it surely does not extend to a condition that suppresses the recipient's cherished freedom of speech based solely upon the content or viewpoint of that speech. This rule is a sound one, for, as the Court often has noted: “ ‘A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a “law ... abridging the freedom of speech, or of the press.” ’ ” *League of Women Voters*. “[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”

It cannot seriously be disputed that the counseling and referral provisions at issue in the present cases constitute content-based regulation of speech. Title X grantees may provide counseling and referral regarding any of a wide range of family planning and other topics, save abortion.

The regulations are also clearly viewpoint based. While suppressing speech favorable to abortion with one hand, the Secretary compels antiabortion speech with the other. For example, the Department of Health and Human Services' own description of the regulations makes plain that “Title X projects are *required* to facilitate access to prenatal care and social services, including adoption services, that might be needed by the pregnant client to promote her well-being and that of her child, while making it abundantly clear that the project is not permitted to promote abortion by facilitating access to abortion through the referral process.” (emphasis added).

Moreover, the regulations command that a project refer for prenatal care each woman diagnosed as pregnant, irrespective of the woman's expressed desire to continue or terminate her pregnancy. If a client asks directly about abortion, a Title X physician or counselor is required to say, in essence, that the project does not consider abortion to be an appropriate method of family planning. Both requirements are antithetical to the First Amendment. See *Wooley v. Maynard* (1977).

The regulations pertaining to “advocacy” are even more explicitly viewpoint based. These provide: “A Title X project may not *encourage, promote or advocate* abortion as a method of family planning.” (emphasis added). They explain: “This requirement prohibits actions to *assist* women to obtain abortions or *increase* the availability or accessibility of abortion for family planning purposes.” § (emphasis added). The regulations do not, however, proscribe or even regulate

anti-abortion advocacy. These are clearly restrictions aimed at the suppression of “dangerous ideas.”

Remarkably, the majority concludes that “the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.” But the majority's claim that the regulations merely limit a Title X project's speech to preventive or preconceptional services, rings hollow in light of the broad range of nonpreventive services that the regulations authorize Title X projects to provide. By refusing to fund those family-planning projects that advocate abortion *because* they advocate abortion, the Government plainly has targeted a particular viewpoint. The majority's reliance on the fact that the regulations pertain solely to funding decisions simply begs the question. Clearly, there are some bases upon which government may not rest its decision to fund or not to fund. For example, the Members of the majority surely would agree that government may not base its decision to support an activity upon considerations of race. As demonstrated above, our cases make clear that ideological viewpoint is a similarly repugnant ground upon which to base funding decisions.

The advocacy regulations at issue here, however, are not limited to lobbying but extend to all speech having the effect of encouraging, promoting, or advocating abortion as a method of family planning. Thus, in addition to their impermissible focus upon the viewpoint of regulated speech, the provisions intrude upon a wide range of communicative conduct, including the very words spoken to a woman by her physician. By manipulating the content of the doctor-patient dialogue, the regulations upheld today force each of the petitioners “to be an instrument for fostering public adherence to an ideological point of view [he or she] finds unacceptable.” *Wooley v. Maynard*. This type of intrusive, ideologically based regulation of speech goes far beyond the narrow lobbying limitations approved in *Regan* and cannot be justified simply because it is a condition upon the receipt of a governmental benefit.

## B

The Court concludes that the challenged regulations do not violate the First Amendment rights of Title X staff members because any limitation of the employees' freedom of expression is simply a consequence of their decision to accept employment at a federally funded project. But it has never been sufficient to justify an otherwise unconstitutional condition upon public employment that the employee may escape the condition by relinquishing his or her job. It is beyond question “that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment.”

The majority attempts to circumvent this principle by emphasizing that Title X physicians and counselors “remain free ... to pursue abortion-related activities when they are not acting under the auspices of the Title X project.” “The regulations,” the majority explains, “do not in any way restrict the activities of those persons acting as private individuals.” Under the majority's reasoning, the First Amendment could be read to tolerate *any* governmental restriction upon an employee's speech so long as that restriction is limited to the funded

workplace. This is a dangerous proposition, and one the Court has rightly rejected in the past.

In the cases at bar, the speaker's interest in the communication is both clear and vital. In addressing the family-planning needs of their clients, the physicians and counselors who staff Title X projects seek to provide them with the full range of information and options regarding their health and reproductive freedom. Indeed, the legitimate expectations of the patient and the ethical responsibilities of the medical profession demand no less. "The patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice.... The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice." \*\*\* When a client becomes pregnant, the full range of therapeutic alternatives includes the abortion option, and Title X counselors' interest in providing this information is compelling.

The Government's articulated interest in distorting the doctor-patient dialogue—ensuring that federal funds are not spent for a purpose outside the scope of the program—falls far short of that necessary to justify the suppression of truthful information and professional medical opinion regarding constitutionally protected conduct. Moreover, the offending regulation is not narrowly tailored to serve this interest. For example, the governmental interest at stake could be served by imposing rigorous bookkeeping standards to ensure financial separation or adopting content-neutral rules for the balanced dissemination of family-planning and health information. By failing to balance or even to consider the free speech interests claimed by Title X physicians against the Government's asserted interest in suppressing the speech, the Court falters in its duty to implement the protection that the First Amendment clearly provides for this important message.

### C

Finally, it is of no small significance that the speech the Secretary would suppress is truthful information regarding constitutionally protected conduct of vital importance to the listener. One can imagine no legitimate governmental interest that might be served by suppressing such information. Concededly, the abortion debate is among the most divisive and contentious issues that our Nation has faced in recent years. "But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *West Virginia Bd. of Ed. v. Barnette* (1943).

## *Legal Services Corporation v. Velazquez*

531 U.S. 533 (2001)

KENNEDY, J., DELIVERED THE OPINION OF THE COURT, IN WHICH STEVENS, SOUTER, GINSBURG, AND BREYER, JJ., JOINED. SCALIA, J., FILED A DISSENTING OPINION IN WHICH REHNQUIST, C. J., AND O'CONNOR AND THOMAS, JJ., JOINED.

JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

In 1974, Congress enacted the Legal Services Corporation Act. The Act establishes the Legal Services Corporation (LSC) as a District of Columbia nonprofit corporation. LSC's mission is to distribute funds appropriated by Congress to eligible local grantee organizations "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance."

LSC grantees consist of hundreds of local organizations governed, in the typical case, by local boards of directors. In many instances the grantees are funded by a combination of LSC funds and other public or private sources. The grantee organizations hire and supervise lawyers to provide free legal assistance to indigent clients. Each year LSC appropriates funds to grantees or recipients that hire and supervise lawyers for various professional activities, including representation of indigent clients seeking welfare benefits.

This suit requires us to decide whether one of the conditions imposed by Congress on the use of LSC funds violates the First Amendment rights of LSC grantees and their clients. For purposes of our decision, the restriction, to be quoted in further detail, prohibits legal representation funded by recipients of LSC moneys if the representation involves an effort to amend or otherwise challenge existing welfare law. As interpreted by the LSC and by the Government, the restriction prevents an attorney from arguing to a court that a state statute conflicts with a federal statute or that either a state or federal statute by its terms or in its application is violative of the United States Constitution.

### I.

From the inception of the LSC, Congress has placed restrictions on its use of funds. For instance, the LSC Act prohibits recipients from making available LSC funds, program personnel, or equipment to any political party, to any political campaign, or for use in "advocating or opposing any ballot measures." The Act further proscribes use of funds in most criminal proceedings and in litigation involving non-therapeutic abortions, secondary school desegregation, military desertion, or violations of the Selective Service statute. Fund recipients are barred from bringing class-action suits unless express approval is obtained from LSC.

The restrictions at issue were part of a compromise set of restrictions enacted in the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (1996 Act), and continued in each subsequent annual appropriations Act. The relevant portion of §504(a)(16) prohibits funding of any organization

“that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.”

The prohibitions apply to all of the activities of an LSC grantee, including those paid for by non-LSC funds. We are concerned with the statutory provision which excludes LSC representation in cases which “involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.”

In 1997, LSC adopted final regulations clarifying §504(a)(16). LSC interpreted the statutory provision to allow indigent clients to challenge welfare agency determinations of benefit ineligibility under interpretations of existing law. For example, an LSC grantee could represent a welfare claimant who argued that an agency made an erroneous factual determination or that an agency misread or misapplied a term contained in an existing welfare statute. According to LSC, a grantee in that position could argue as well that an agency policy violated existing law. Under LSC’s interpretation, however, grantees could not accept representations designed to change welfare laws, much less argue against the constitutionality or statutory validity of those laws. Even in cases where constitutional or statutory challenges became apparent after representation was well under way, LSC advised that its attorneys must withdraw.

## II

The United States and LSC rely on *Rust v. Sullivan* (1991), as support for the LSC program restrictions. In *Rust*, Congress established program clinics to provide subsidies for doctors to advise patients on a variety of family planning topics. Congress did not consider abortion to be within its family planning objectives, however, and it forbade doctors employed by the program from discussing abortion with their patients. \*\*\*

We upheld the law, reasoning that Congress had not discriminated against viewpoints on abortion, but had “merely chosen to fund one activity to the exclusion of the other.” The restrictions were considered necessary “to ensure that the limits of the federal program [were] observed.” Title X did not single out a particular idea for suppression because it was dangerous or disfavored; rather, Congress prohibited Title X doctors from counseling that was outside the scope of the project.

The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding. We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, see *Board of Regents of Univ. of Wis. System v. Southworth*, (2000), or instances, like *Rust*, in which the government “used private speakers to transmit specific information pertaining to its own program.” *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995). As we said in *Rosenberger*, “[w]hen the government disburses public funds to private entities to convey a govern-

mental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.” The latitude which may exist for restrictions on speech where the government’s own message is being delivered flows in part from our observation that, “[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.” *Board of Regents of Univ. of Wis. System v. Southworth*.

Neither the latitude for government speech nor its rationale applies to subsidies for private speech in every instance, however. As we have pointed out, “[i]t does not follow . . . that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.”

Although the LSC program differs from the program at issue in *Rosenberger* in that its purpose is not to “encourage a diversity of views,” the salient point is that, like the program in *Rosenberger*, the LSC program was designed to facilitate private speech, not to promote a governmental message. Congress funded LSC grantees to provide attorneys to represent the interests of indigent clients. In the specific context of §504(a)(16) suits for benefits, an LSC-funded attorney speaks on the behalf of the client in a claim against the government for welfare benefits. The lawyer is not the government’s speaker. The attorney defending the decision to deny benefits will deliver the government’s message in the litigation. The LSC lawyer, however, speaks on the behalf of his or her private, indigent client.

The Government has designed this program to use the legal profession and the established Judiciary of the States and the Federal Government to accomplish its end of assisting welfare claimants in determination or receipt of their benefits. The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept. In this vital respect this suit is distinguishable from *Rust*.

The private nature of the speech involved here, and the extent of LSC’s regulation of private expression, are indicated further by the circumstance that the Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning. Where the government uses or attempts to regulate a particular medium, we have been informed by its accepted usage in determining whether a particular restriction on speech is necessary for the program’s purposes and limitations. \*\*\*

When the government creates a limited forum for speech, certain restrictions may be necessary to define the limits and purposes of the program. The same is true when the government establishes a subsidy for specified ends. *Rust v. Sullivan* (1991). As this suit involves a subsidy, limited forum cases \*\*\* may not be controlling in a strict sense, yet they do provide some instruction. Here the program presumes that private, non-governmental speech is necessary, and a substantial restriction is placed upon that speech. At oral argument and in its

briefs the LSC advised us that lawyers funded in the Government program may not undertake representation in suits for benefits if they must advise clients respecting the questionable validity of a statute which defines benefit eligibility and the payment structure. The limitation forecloses advice or legal assistance to question the validity of statutes under the Constitution of the United States. It extends further, it must be noted, so that state statutes inconsistent with federal law under the Supremacy Clause may be neither challenged nor questioned.

By providing subsidies to LSC, the Government seeks to facilitate suits for benefits by using the state and federal courts and the independent bar on which those courts depend for the proper performance of their duties and responsibilities. Restricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys in much the same way broadcast systems or student publication networks were changed in the limited forum cases we have cited. Just as government in those cases could not elect to use a broadcasting network or a college publication structure in a regime which prohibits speech necessary to the proper functioning of those systems, it may not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary.

LSC has advised us, furthermore, that upon determining a question of statutory validity is present in any anticipated or pending case or controversy, the LSC-funded attorney must cease the representation at once. This is true whether the validity issue becomes apparent during initial attorney-client consultations or in the midst of litigation proceedings. A disturbing example of the restriction was discussed during oral argument before the Court. It is well understood that when there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue. [*Ashwander*]. Yet, as the LSC advised the Court, if, during litigation, a judge were to ask an LSC attorney whether there was a constitutional concern, the LSC attorney simply could not answer.

Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy. *Marbury v. Madison*, 1 Cranch 137, 177 (1803) (“It is emphatically the province and the duty of the judicial department to say what the law is”). An informed, independent judiciary presumes an informed, independent bar. Under § 504(a)(16), however, cases would be presented by LSC attorneys who could not advise the courts of serious questions of statutory validity. The disability is inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case. By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. Congress cannot wrest the law from the Constitution which is its source. “Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.”

The restriction imposed by the statute here threatens severe impairment of the judicial function. Section 504(a)(16) sifts out cases presenting constitutional challenges in order to insulate the Government's laws from judicial inquiry. If the restriction on speech and legal advice were to stand, the result would be two tiers of cases. In cases where LSC counsel were attorneys of record, there would be lingering doubt whether the truncated representation had resulted in complete analysis of the case, full advice to the client, and proper presentation to the court. The courts and the public would come to question the adequacy and fairness of professional representations when the attorney, either consciously to comply with this statute or unconsciously to continue the representation despite the statute, avoided all reference to questions of statutory validity and constitutional authority. A scheme so inconsistent with accepted separation-of-powers principles is an insufficient basis to sustain or uphold the restriction on speech.

It is no answer to say the restriction on speech is harmless because, under LSC's interpretation of the Act, its attorneys can withdraw. This misses the point. The statute is an attempt to draw lines around the LSC program to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider.

The restriction on speech is even more problematic because in cases where the attorney withdraws from a representation, the client is unlikely to find other counsel. The explicit premise for providing LSC attorneys is the necessity to make available representation "to persons financially unable to afford legal assistance." There often will be no alternative source for the client to receive vital information respecting constitutional and statutory rights bearing upon claimed benefits. Thus, with respect to the litigation services Congress has funded, there is no alternative channel for expression of the advocacy Congress seeks to restrict. This is in stark contrast to *Rust*. There, a patient could receive the approved Title X family planning counseling funded by the Government and later could consult an affiliate or independent organization to receive abortion counseling. Unlike indigent clients who seek LSC representation, the patient in *Rust* was not required to forfeit the Government-funded advice when she also received abortion counseling through alternative channels. Because LSC attorneys must withdraw whenever a question of a welfare statute's validity arises, an individual could not obtain joint representation so that the constitutional challenge would be presented by a non-LSC attorney, and other, permitted, arguments advanced by LSC counsel.

Finally, LSC and the Government maintain that §504(a)(16) is necessary to define the scope and contours of the federal program, a condition that ensures funds can be spent for those cases most immediate to congressional concern. In support of this contention, they suggest the challenged limitation takes into account the nature of the grantees' activities and provides limited congressional funds for the provision of simple suits for benefits. In petitioners' view, the restriction operates neither to maintain the current welfare system nor insulate it from attack; rather, it helps the current welfare system function in a more efficient and fair manner by removing from the program complex challenges to existing welfare laws.

The effect of the restriction, however, is to prohibit advice or argumentation that existing welfare laws are unconstitutional or unlawful. Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise. Here, notwithstanding Congress' purpose to confine and limit its program, the restriction operates to insulate current welfare laws from constitutional scrutiny and certain other legal challenges, a condition implicating central First Amendment concerns. In no lawsuit funded by the Government can the LSC attorney, speaking on behalf of a private client, challenge existing welfare laws. As a result, arguments by indigent clients that a welfare statute is unlawful or unconstitutional cannot be expressed in this Government-funded program for petitioning the courts, even though the program was created for litigation involving welfare benefits, and even though the ordinary course of litigation involves the expression of theories and postulates on both, or multiple, sides of an issue.

It is fundamental that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *New York Times Co. v. Sullivan* (1964) (quoting *Roth v. United States* (1957)). There can be little doubt that the LSC Act funds constitutionally protected expression; and in the context of this statute there is no programmatic message of the kind recognized in *Rust* and which sufficed there to allow the Government to specify the advice deemed necessary for its legitimate objectives. This serves to distinguish §504(a)(16) from any of the Title X program restrictions upheld in *Rust*, and to place it beyond any congressional funding condition approved in the past by this Court.

Congress was not required to fund an LSC attorney to represent indigent clients; and when it did so, it was not required to fund the whole range of legal representations or relationships. The LSC and the United States, however, in effect ask us to permit Congress to define the scope of the litigation it funds to exclude certain vital theories and ideas. The attempted restriction is designed to insulate the Government's interpretation of the Constitution from judicial challenge. The Constitution does not permit the Government to confine litigants and their attorneys in this manner. We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge. Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest.

For the reasons we have set forth, the funding condition is invalid. \*\*\* The judgment of the Court of Appeals is affirmed.

JUSTICE SCALIA, WITH WHOM THE CHIEF JUSTICE, JUSTICE O'CONNOR, AND JUSTICE THOMAS JOIN, DISSENTING.

Section 504(a)(16) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (Appropriations Act) defines the scope of a federal spending program. It does not directly regulate speech, and it neither establishes a public forum nor discriminates on the basis of viewpoint. The Court agrees with all this, yet applies a novel and unsupportable interpretation of our public-forum

precedents to declare §504(a)(16) facially unconstitutional. This holding not only has no foundation in our jurisprudence; it is flatly contradicted by a recent decision that is on all fours with the present cases. Having found the limitation upon the spending program unconstitutional, the Court then declines to consider the question of severability, allowing a judgment to stand that lets the program go forward under a version of the statute Congress never enacted. I respectfully dissent from both aspects of the judgment.

I [omitted] [description of LSC Act]

## II

The LSC Act is a federal subsidy program, not a federal regulatory program, and “[t]here is a basic difference between [the two].” *Maher v. Roe* (1977). Regulations directly restrict speech; subsidies do not. Subsidies, it is true, may *indirectly* abridge speech, but only if the funding scheme is “ ‘manipulated’ to have a ‘coercive effect’ ” on those who do not hold the subsidized position. Proving unconstitutional coercion is difficult enough when the spending program has universal coverage and excludes only certain speech—such as a tax exemption scheme excluding lobbying expenses. The Court has found such programs unconstitutional only when the exclusion was “aimed at the suppression of dangerous ideas.” Proving the requisite coercion is harder still when a spending program is not universal but limited, providing benefits to a restricted number of recipients, see *Rust v. Sullivan*. The Court has found such selective spending unconstitutionally coercive only once, when the government created a public forum with the spending program but then discriminated in distributing funding within the forum on the basis of view-point. When the limited spending program does not create a public forum, proving coercion is virtually impossible, because simply denying a subsidy “does not ‘coerce’ belief,” and because the criterion of unconstitutionality is whether denial of the subsidy threatens “to drive certain ideas or viewpoints from the marketplace.” Absent such a threat, “the Government may allocate . . . funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.”

In *Rust v. Sullivan*, the Court applied these principles to a statutory scheme that is in all relevant respects indistinguishable from §504(a)(16). The statute in *Rust* authorized grants for the provision of family planning services, but provided that “[n]one of the funds . . . shall be used in programs where abortion is a method of family planning.” Valid regulations implementing the statute required funding recipients to refer pregnant clients “for appropriate prenatal . . . services by furnishing a list of available providers that promote the welfare of mother and unborn child,” but forbade them to refer a pregnant woman specifically to an abortion provider, even upon request. We rejected a First Amendment free-speech challenge to the funding scheme, explaining that “[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem another way.” This was not, we said, the type of “discriminat[ion] on the basis of viewpoint” that triggers strict scrutiny, because the “ ‘decision not to subsidize the exercise of a fundamental right does not infringe the right,’”

The same is true here. The LSC Act, like the scheme in *Rust*, does not create a public forum. Far from encouraging a diversity of views, it has always, as the Court accurately states, “placed restrictions on its use of funds.” Nor does §504(a)(16) discriminate on the basis of viewpoint, since it funds neither challenges to nor defenses of existing welfare law. The provision simply declines to subsidize a certain class of litigation, and under *Rust* that decision “does not infringe the right” to bring such litigation. The Court’s repeated claims that § 504(a)(16) “restricts” and “prohibits” speech, and “insulates” laws from judicial review, are simply baseless. No litigant who, in the absence of LSC funding, would bring a suit challenging existing welfare law is deterred from doing so by §504(a)(16). *Rust* thus controls these cases and compels the conclusion that §504(a)(16) is constitutional.

The Court contends that *Rust* is different because the program at issue subsidized government speech, while the LSC funds private speech. This is so unpersuasive it hardly needs response. If the private doctors’ confidential advice to their patients at issue in *Rust* constituted “government speech,” it is hard to imagine what subsidized speech would *not* be government speech. Moreover, the majority’s contention that the subsidized speech in these cases is not government speech because the lawyers have a professional obligation to represent the interests of their clients founders on the reality that the doctors in *Rust* had a professional obligation to serve the interests of their patients — which at the time of *Rust* we had held to be highly relevant to the permissible scope of federal regulation. Even respondents agree that “the true speaker in *Rust* was not the government, but a doctor.”

The Court further asserts that these cases are different from *Rust* because the welfare funding restriction “seeks to use an existing medium of expression and to control it . . . in ways which distort its usual functioning.” This is wrong on both the facts and the law. It is wrong on the law because there is utterly no precedent for the novel and facially implausible proposition that the First Amendment has anything to do with government funding that—though it does not actually abridge anyone’s speech—“distorts an existing medium of expression.” None of the three cases cited by the Court mentions such an odd principle. \*\*\*

The Court’s “nondistortion” principle is also wrong on the facts, since there is no basis for believing that §504(a)(16), by causing “cases [to] be presented by LSC attorneys who [can]not advise the courts of serious questions of statutory validity,” will distort the operation of the courts. It may well be that the bar of §504(a)(16) will cause LSC-funded attorneys to decline or to withdraw from cases that involve statutory validity. But that means at most that fewer statutory challenges to welfare laws will be presented to the courts because of the unavailability of free legal services for that purpose. So what? The same result would ensue from excluding LSC-funded lawyers from welfare litigation entirely. It is not the mandated, nondistortable function of the courts to inquire into all “serious questions of statutory validity” in all cases. Courts must consider only those questions of statutory validity *that are presented by litigants*, and if the Government chooses not to subsidize the presentation of some such questions, that in no way “distorts” the courts’ role.

The only conceivable argument that can be made for distinguishing *Rust* is that

there even patients who wished to receive abortion counseling could receive the nonabortion services that the Government-funded clinic offered, whereas here some potential LSC clients who wish to receive representation on a benefits claim that does not challenge the statutes will be unable to do so because their cases raise a reform claim that an LSC lawyer may not present. This difference, of course, is required by the same ethical canons that the Court elsewhere does not wish to distort. Rather than sponsor “truncated representation,” Congress chose to subsidize only those cases in which the attorneys it subsidized could work freely. And it is impossible to see how this difference from *Rust* has any bearing upon the First Amendment question, which, to repeat, is whether the funding scheme is “‘manipulated’ to have a ‘coercive effect’ ” on those who do not hold the subsidized position. It could be claimed to have such an effect if the client in a case ineligible for LSC representation could eliminate the ineligibility by waiving the claim that the statute is invalid; but he cannot. No *conceivable* coercive effect exists.

This has been a very long discussion to make a point that is embarrassingly simple: The LSC subsidy neither prevents anyone from speaking nor coerces anyone to change speech, and is indistinguishable in all relevant respects from the subsidy upheld in *Rust v. Sullivan*. There is no legitimate basis for declaring § 504(a)(16) facially unconstitutional.

## Notes

1. *Rust* and *Velazquez* reach opposite conclusions regarding the constitutionality of conditions placed on speech of medical and legal actors. Is the difference simply between that of doctors and lawyers? Is the distinguishing of *Rust* in the majority opinion of *Velazquez* convincing?
2. The majority in *Velazquez* cites *Marbury v. Madison*. How does this support the Court’s conclusion?
3. In *National Endowment for Arts v. Finley*, 524 U. S. 569 (1998), cited in *Velazquez*, the Court upheld the constitutionality of a condition requiring “taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public” in the award of prestigious National Endowment for the Arts (NEA) grants to artists. Only Justice Souter dissented, concluding that such a requirement, even in the context of funding, was “viewpoint discrimination.” The Court’s opinion, authored by Justice O’Connor, stated:

as we held in *Rust*, Congress may “selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.” In doing so, “the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.”

524 U.S. at 588.

Are there distinctions among the purposes of the funding - - - abortion services in *Rust*; legal services in *Velazquez*; and individual artist grants in *Finley* - - - that you would draw? How about grants for computers in public libraries? See *United States v. American Library Ass'n, Inc.*, 539 U.S. 194 (2003) (upholding provision of Children's Internet Protection Act (CIPA), which required public libraries to use Internet filters as condition for receipt of federal funds). Further discussion of *Finley* and *American Library Ass'n* is in Chapter 10.

## II. Compelled Speech

This section considers First Amendment challenges to coerced or compelled speech. It begins with the foundational cases of *West Virginia Board of Education v. Barnette* and *Wooley v. Maynard*.

The second subsection discusses the problems of compelled speech when mandatory dues and fees are used for organizational speech that individuals within the organization do not support.

The third and final subsection involves anti-discrimination laws that would require an organization to accept persons (and their speech) which it believes undermines its own speech.

### A. Foundational Cases of Compelled Speech

#### *West Virginia Board of Education v. Barnette*

319 U.S. 624 (1943)

JACKSON, J., FOR THE COURT. BLACK, J. AND DOUGLAS, J., CONCURRING. MURPHY, J., CONCURRING. ROBERTS, J. AND REED, J., DISSENTING. FRANKFURTER, J., DISSENTING WITH OPINION.

MR. JUSTICE JACKSON DELIVERED THE OPINION OF THE COURT.

Following the decision by this Court on June 3, 1940, in *Minersville School District v. Gobitis*, the West Virginia legislature amended its statutes to require all schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government." Appellant Board of Education was directed, with advice of the State Superintendent of Schools, to "prescribe the courses of study covering these subjects" for public schools. \*\*\*

The Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court's *Gobitis* opinion and ordering that the salute to the flag become "a regular part of the program of activities in the public schools," that all teachers and pupils "shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly."

The resolution originally required the "commonly accepted salute to the Flag" which it defined. Objections to the salute as "being too much like Hitler's" were raised. \*\*\* Some modification appears to have been made in deference to these objections, but no concession was made to Jehovah's Witnesses. What is now required is the "stiff-arm" salute, the saluter to keep the right hand raised with palm turned up while the following is repeated: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all."

Failure to conform is "insubordination" dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is "unlawfully absent" and may be proceeded against as a delinquent. His parents or guardians are liable to prosecution, and if convicted are subject to fine not exceeding \$50 and jail term not exceeding thirty days.

Appellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others similarly situated asking its injunction to restrain enforcement of these laws and regulations against Jehovah's Witnesses. The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them." They consider that the flag is an "image" within this command. For this reason they refuse to salute it.

This case calls upon us to reconsider a precedent decision, as the Court throughout its history often has been required to do. Before turning to the *Gobitis* case, however, it is desirable to notice certain characteristics by which this controversy is distinguished.

The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent

and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

As the present CHIEF JUSTICE said in dissent in the *Gobitis* case, the State may "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country." Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan. \*\*\*

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

Over a decade ago Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guaranties of the Constitution. Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights. [fn: "Early Christians were frequently persecuted for their refusal to participate in ceremonies before the statue of the emperor or other symbol of imperial authority. The story of William Tell's sentence to shoot an apple off his son's head for refusal to salute a bailiff's hat is an ancient one. 21 ENCYCLOPEDIA BRITANNICA (14th ed.) 911-912. The Quakers, William Penn included, suffered punishment, rather than uncover their heads in deference to any civil authority. BRAITHWAITE, THE BEGINNINGS OF QUAKERISM (1912) 200, 229-230, 232-233, 447, 451; FOX, QUAKERS COURAGEOUS (1941) 113."]

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be

acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations. If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

The *Gobitis* decision, however, *assumed*, as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule. The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power and, against this broader definition of issues in this case, reexamine specific grounds assigned for the *Gobitis* decision.

It was said that the flag-salute controversy confronted the Court with "the problem which Lincoln cast in memorable dilemma: `Must a government of

necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?" and that the answer must be in favor of strength.

We think these issues may be examined free of pressure or restraint growing out of such considerations.

It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the State to expel a handful of children from school. Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning. If validly applied to this problem, the utterance cited would resolve every issue of power in favor of those in authority and would require us to override every liberty thought to weaken or delay execution of their policies.

Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

The subject now before us exemplifies this principle. Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system. Observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise.

The *Gobitis* opinion reasoned that this is a field "where courts possess no marked and certainly no controlling competence," that it is committed to the legislatures as well as the courts to guard cherished liberties and that it is constitutionally appropriate to "fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena," since all the "effective means of inducing political changes are left free."

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.

Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

Lastly, and this is the very heart of the *Gobitis* opinion, it reasons that "National unity is the basis of national security," that the authorities have "the right to select appropriate means for its attainment," and hence reaches the conclusion that such compulsory measures toward "national unity" are constitutional. Upon the verity of this assumption depends our answer in this case.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that

patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The decision of this Court in *Minersville School District v. Gobitis* and the holdings of those few *per curiam* decisions which preceded and foreshadowed it are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is *Affirmed*.

MR. JUSTICE FRANKFURTER, DISSENTING.

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review.

Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.

Law is concerned with external behavior and not with the inner life of man. It rests in large measure upon compulsion. Socrates lives in history partly because he gave his life for the conviction that duty of obedience to secular law does not presuppose consent to its enactment or belief in its virtue. The consent upon which free government rests is the consent that comes from sharing in the process of making and unmaking laws. The state is not shut out from a domain because the individual conscience may deny the state's claim. The individual conscience may profess what faith it chooses. It may affirm and promote that faith — in the language of the Constitution, it may "exercise" it freely — but it cannot thereby restrict community action through political organs in matters of community concern, so long as the action is not asserted in a discriminatory way either openly or by stealth. One may have the right to practice one's religion and at the same time owe the duty of formal obedience to laws that run counter to one's beliefs. Compelling belief implies denial of opportunity to combat it and to assert dissident views. Such compulsion is one thing. Quite another matter is submission to conformity of action while denying its wisdom or virtue and with ample opportunity for seeking its change or abrogation.

The flag salute exercise has no kinship whatever to the oath tests so odious in history. For the oath test was one of the instruments for suppressing heretical beliefs. Saluting the flag suppresses no belief nor curbs it. Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to dis-avow as publicly as they choose to do so the meaning that others attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents. Had we before us any act of the state putting the slightest curbs upon such free expression, I should not lag behind any member of this Court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the Constitution.

Of course patriotism can not be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focusing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of

law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.

## *Wooley v. Maynard*

430 U.S. 705 (1977)

BURGER, C.J., DELIVERED THE OPINION OF THE COURT, IN WHICH BRENNAN, STEWART, MARSHALL, POWELL, AND STEVENS, JJ., JOINED, AND IN WHICH WHITE, J., JOINED, EXCEPT INSOFAR AS IT AFFIRMS THE DISTRICT COURT'S ISSUANCE OF AN INJUNCTION. WHITE, J., FILED A OPINION DISSENTING IN PART, IN WHICH BLACKMUN AND REHNQUIST, JJ., JOINED. REHNQUIST, J., FILED A DISSENTING OPINION, IN WHICH BLACKMUN, J., JOINED.

MR. CHIEF JUSTICE BURGER DELIVERED THE OPINION OF THE COURT.

The issue on appeal is whether the State of New Hampshire may constitutionally enforce criminal sanctions against persons who cover the motto "Live Free or Die" on passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs.

Since 1969, New Hampshire has required that noncommercial vehicles bear license plates embossed with the state motto, "Live Free or Die." Another New Hampshire statute makes it a misdemeanor "knowingly [to obscure] . . . the figures or letters on any number plate." The term "letters" in this section has been interpreted by the State's highest court to include the state motto.

Appellees George Maynard and his wife Maxine are followers of the Jehovah's Witnesses faith. The Maynards consider the New Hampshire State motto to be repugnant to their moral, religious, and political beliefs, and therefore assert it objectionable to disseminate this message by displaying it on their automobiles. Pursuant to these beliefs, the Maynards began early in 1974 to cover up the motto on their license plates. [On three different occasions, George Maynard was charged with violating the New Hampshire statutory scheme. He was found guilty, fined, and then sentenced to 15 days jail for failure to pay the fines.]

The District Court held that, by covering up the state motto "Live Free or Die" on his automobile license plate, Mr. Maynard was engaging in symbolic speech, and that New Hampshire's interest in the enforcement of its defacement statute is not sufficient to justify the restriction on [appellee's] constitutionally protected expression. We find it unnecessary to pass on the "symbolic speech" issue, since we find more appropriate First Amendment grounds to affirm the judgment of the District Court. We turn instead to what, in our view, is the essence of appellees' objection to the requirement that they display the motto "Live Free or Die" on their automobile license plates. This is succinctly summarized in the statement made by Mr. Maynard in his affidavit filed with the District Court:

I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously and politically abhorrent.

We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so.

We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."

The Court in *Barnette*, was faced with a state statute which required public school students to participate in daily public ceremonies by honoring the flag both with words and traditional salute gestures. \*\*\* Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree.

\*\*\*New Hampshire's statute in effect requires that appellees use their private property as a "mobile billboard" for the State's ideological message -- or suffer a penalty, as Maynard already has. As a condition to driving an automobile -- a virtual necessity for most Americans -- the Maynards must display "Live Free or Die" to hundreds of people each day. The fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority, and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.

Identifying the Maynards' interests as implicating First Amendment protections does not end our inquiry however. We must also determine whether the State's countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates. *See, e.g., United States v. O'Brien*, (1968). The two interests advanced by the State are that display of the motto (1) facilitates the identification of passenger vehicles, and (2) promotes appreciation of history, individualism, and state pride.

The State first points out that passenger vehicles, but not commercial, trailer, or other vehicles are required to display the state motto. Thus, the argument proceeds, officers of the law are more easily able to determine whether passenger vehicles are carrying the proper plates. However, the record here reveals that New Hampshire passenger license plates normally consist of a specific configuration of letters and numbers, which makes them readily

distinguishable from other types of plates, even without reference to the state motto. Even were we to credit the State's reasons, and "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

The State's second claimed interest is not ideologically neutral. The State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism. Of course, the State may legitimately pursue such interests in any number of ways. However, where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.

We conclude that the State of New Hampshire may not require appellees to display the state motto upon their vehicle license plates; and, accordingly, we affirm the judgment of the District Court.

MR. JUSTICE REHNQUIST, WITH WHOM MR. JUSTICE BLACKMUN JOINS, DISSENTING.

The Court holds that a State is barred by the Federal Constitution from requiring that the state motto be displayed on a state license plate. The path that the Court travels to reach this result demonstrates the difficulty in supporting it. The Court holds that the required display of the motto is an unconstitutional "required affirmation of belief." The District Court, however, expressly refused to consider this contention, \*\*\* found for appellees on the ground that the obscuring of the motto was protected "symbolic speech." This Court, in relying upon a ground expressly avoided by the District Court, appears to disagree with the ground adopted by the District Court. \*\*\*

I not only agree with the Court's implicit recognition that there is no protected "symbolic speech" in this case, but I think that that conclusion goes far to undermine the Court's ultimate holding that there is an element of protected expression here. The State has not forced appellees to "say" anything, and it has not forced them to communicate ideas with nonverbal actions reasonably likened to "speech," such as wearing a lapel button promoting a political candidate or waving a flag as a symbolic gesture. The State has simply required that all noncommercial automobiles bear license tags with the state motto, "Live Free or Die." Appellees have not been forced to affirm or reject that motto; they are simply required by the State, under its police power, to carry a state auto license tag for identification and registration purposes.

\*\*\*[T]he Court relies almost solely on *Board of Education v. Barnette* (1943). The Court cites *Barnette* for the proposition that there is a constitutional right, in some cases, to "refrain from speaking." What the Court does not demonstrate is that there is any "speech" or "speaking" in the context of this case. The Court also relies upon the "right to decline to foster [religious, political, and

ideological] concepts," and treats the state law in this case as if it were forcing appellees to proselytize, or to advocate an ideological point of view. But this begs the question. The issue, unfronted by the Court, is whether appellees, in displaying, as they are required to do, state license tags, the format of which is known to all as having been prescribed by the State, would be considered to be advocating political or ideological views.

The Court recognizes, as it must, that this case substantially differs from *Barnette*, in which school children were forced to recite the pledge of allegiance while giving the flag salute. However, the Court states "the difference is essentially one of degree." But having recognized the rather obvious differences between these two cases, the Court does not explain why the same result should obtain. The Court suggests that the test is whether the individual is forced "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." But, once again, these are merely conclusory words, barren of analysis. For example, were New Hampshire to erect a multitude of billboards, each proclaiming "Live Free or Die," and tax all citizens for the cost of erection and maintenance, clearly the message would be "fostered" by the individual citizen-taxpayers, and, just as clearly, those individuals would be "instruments" in that communication. Certainly, however, that case would not fall within the ambit of *Barnette*. In that case, as in this case, there is no affirmation of belief. For First Amendment principles to be implicated, the State must place the citizen in the position of either apparently or actually "asserting as true" the message. This was the focus of *Barnette*, and clearly distinguishes this case from that one.

In holding that the New Hampshire statute does not run afoul of our holding in *Barnette*, the New Hampshire Supreme Court aptly articulated why there is no required affirmation of belief in this case:

The defendants' membership in a class of persons required to display plates bearing the State motto carries no implication, and is subject to no requirement, that they endorse that motto or profess to adopt it as matter of belief.

As found by the New Hampshire Supreme Court in *Hoskin*, there is nothing in state law which precludes appellees from displaying their disagreement with the state motto as long as the methods used do not obscure the license plates. Thus appellees could place on their bumper a conspicuous bumper sticker explaining in no uncertain terms that they do not profess the motto "Live Free or Die," and that they violently disagree with the connotations of that motto. Since any implication that they affirm the motto can be so easily displaced, I cannot agree that the state statutory system for motor vehicle identification and tourist promotion may be invalidated under the fiction that appellees are unconstitutionally forced to affirm, or profess belief in, the state motto.

The logic of the Court's opinion leads to startling, and, I believe, totally unacceptable, results. For example, the mottoes "In God We Trust" and "E Pluribus Unum" appear on the coin and currency of the United States. I cannot imagine that the statutes, proscribing defacement of United States currency impinge upon the First Amendment rights of an atheist. The fact that an atheist

carries and uses United States currency does not, in any meaningful sense, convey any affirmation of belief on his part in the motto "In God We Trust." Similarly, there is no affirmation of belief involved in the display of state license tags upon the private automobiles involved here.

## Notes

1. The Court in *Barnette* explicitly overruled *Minersville School District v. Gobitis*, decided only three years earlier. Note that Justice Frankfurter wrote the opinion for the Court in *Gobitis*; the only dissenting opinion was by Justice Harlan Stone, who would be elevated to Chief Justice by FDR in 1941. What traces of the historical events in 1940 – 1943 are evident in the *Barnette* opinions?

2. George Maynard eventually left New Hampshire, moving to Connecticut, and covering up the license plate motto "The Constitution State." He later left the Jehovah's Witnesses as well, although he continued to resist secular government. As for his representation by the ACLU, he reportedly stated that "they did right by me in my case and I still appreciate that." He objected, however, to ACLU involvement in "bad things, such as protecting pornography and homosexuality — things that conflict with the teachings of the Bible." See David Hudson, *George Maynard recalls license-plate ordeal, free-speech victory*, freedomforum.org (November 30, 2001), available at: <http://www.freedomforum.org/templates/document.asp?documentID=15440>.

3. Are all license plates subject to a First Amendment compelled speech claim? In 2014, on remand from the Tenth Circuit, a court considered a challenge to the image on the Oklahoma license plate of a person, presumably a Native American male, with an arrow pointed at the sky. The plate also contained the words "Native America" to which there was no objection. What result? See *Cressman v. Thompson*, 2014 WL 131715 (January 14, 2014), available at: <http://lawprofessors.typepad.com/conlaw/2014/01/oklahomas-license-plate-survives-constitutional-challenge.html>

For the Court's view on "specialty license plates" see *Walker v. Texas Division, Sons of Confederate Veterans* (2015) in the next chapter.

## B. Fees and Dues

### *Keller v. State Bar of California*

496 U.S. 1 (1990)

REHNQUIST, C.J., DELIVERED THE OPINION FOR A UNANIMOUS COURT.

Petitioners, members of respondent State Bar of California, sued that body, claiming its use of their membership dues to finance certain ideological or political activities to which they were opposed violated their rights under the First Amendment of the United States Constitution. The Supreme Court of California rejected this challenge on the grounds that the State Bar is a state agency and, as such, may use the dues for any purpose within its broad statutory authority. We agree that lawyers admitted to practice in the State may be required to join and pay dues to the State Bar, but disagree as to the scope of permissible dues-financed activities in which the State Bar may engage.

The State Bar is an organization created under California law to regulate the State's legal profession. It is an entity commonly referred to as an "integrated bar" - an association of attorneys in which membership and dues are required as a condition of practicing law in a State. Respondent's broad statutory mission is to "promote the improvement of the administration of justice." The association performs a variety of functions such as "examining applicants for admission, formulating rules of professional conduct, disciplining members for misconduct, preventing unlawful practice of the law, and engaging in study and recommendation of changes in procedural law and improvement of the administration of justice." Respondent also engages in a number of other activities which are the subject of the dispute in this case. "[T]he State Bar for many years has lobbied the Legislature and other governmental agencies, filed amicus curiae briefs in pending cases, held an annual conference of delegates at which issues of current interest are debated and resolutions approved, and engaged in a variety of education programs." These activities are financed principally through the use of membership dues.

Petitioners, 21 members of the State Bar, sued in state court claiming that through these activities respondent expends mandatory dues payments to advance political and ideological causes to which they do not subscribe. Asserting that their compelled financial support of such activities violates their First and Fourteenth Amendment rights to freedom of speech and association, petitioners requested, inter alia, an injunction restraining respondent from using mandatory bar dues or the name of the State Bar to advance political and ideological causes or beliefs. \*\*\*

In *Abood v. Detroit Board of Education* (1977), the Court confronted the issue whether, consistent with the First Amendment, agency-shop dues of nonunion public employees could be used to support political and ideological causes of the union which were unrelated to collective-bargaining activities. We held that while the Constitution did not prohibit a union from spending "funds for the expression of political views . . . or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative," the Constitution did require that such expenditures be "financed from charges, dues, or assessments paid by employees who [did] not object to advancing those ideas and who [were] not coerced into doing so against their will by the threat of loss of governmental employment." The Court noted that just as prohibitions on making contributions to organizations for political purposes implicate fundamental First Amendment concerns, see *Buckley v. Valeo* (1976),

"compelled . . . contributions for political purposes works no less an infringement of . . . constitutional rights." The Court acknowledged Thomas Jefferson's view that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." \*\*\*

There is, by contrast [to the California Supreme Court's holding], a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other. The reason behind the legislative enactment of "agency-shop" laws is to prevent "free riders" - those who receive the benefit of union negotiation with their employers, but who do not choose to join the union and pay dues - from avoiding their fair share of the cost of a process from which they benefit. The members of the State Bar concededly do not benefit as directly from its activities as do employees from union negotiations with management, but the position of the organized bars has generally been that they prefer a large measure of self-regulation to regulation conducted by a government body which has little or no connection with the profession. The plan established by California for the regulation of the profession is for recommendations as to admission to practice, the disciplining of lawyers, codes of conduct, and the like to be made to the courts or the legislature by the organized bar. It is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort.

But the very specialized characteristics of the State Bar of California discussed above served to distinguish it from the role of the typical government official or agency. Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers. We think that these differences between the State Bar, on the one hand, and traditional government agencies and officials, on the other hand, render unavailing respondent's argument that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees.

Respondent would further distinguish the two situations on the grounds that the compelled association in the context of labor unions serves only a private economic interest in collective bargaining, while the State Bar serves more

substantial public interests. But legislative recognition that the agency-shop arrangements serve vital national interests in preserving industrial peace, indicates that such arrangements serve substantial public interests as well. We are not possessed of any scales which would enable us to determine that the one outweighs the other sufficiently to produce a different result here.

*Aboud* held that a union could not expend a dissenting individual's dues for ideological activities not "germane" to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity. The difficult question, of course, is to define the latter class of activities.

Petitioners assert that the State Bar has engaged in, inter alia, lobbying for or against state legislation (1) prohibiting state and local agency employers from requiring employees to take polygraph tests; (2) prohibiting possession of armorpiercing handgun ammunition; (3) creating an unlimited right of action to sue anybody causing air pollution; and (4) requesting Congress to refrain from enacting a guest-worker program or from permitting the importation of workers from other countries. Petitioners' complaint also alleges that the conference of delegates funded and sponsored by the State Bar endorsed a gun control initiative, disapproved statements of a United States senatorial candidate regarding court review of a victim's bill of rights, endorsed a nuclear weapons freeze initiative, and opposed federal legislation limiting federal-court jurisdiction over abortions, public school prayer, and busing.

Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisers to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.

The judgment of the Supreme Court of California is reversed. \*\*\*

# *Board of Regents of the University of Wisconsin System v. Southworth*

529 U.S. 217 (2000)

KENNEDY, J., DELIVERED THE OPINION OF THE COURT, IN WHICH REHNQUIST, C. J., AND O'CONNOR, SCALIA, THOMAS, AND GINSBURG, JJ., JOINED. SOUTER, J., FILED AN OPINION CONCURRING IN THE JUDGMENT, IN WHICH STEVENS AND BREYER, JJ., JOINED.

JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

For the second time in recent years we consider constitutional questions arising from a program designed to facilitate extracurricular student speech at a public university. Respondents are a group of students at the University of Wisconsin. They brought a First Amendment challenge to a mandatory student activity fee imposed by petitioner Board of Regents of the University of Wisconsin and used in part by the University to support student organizations engaging in political or ideological speech. Respondents object to the speech and expression of some of the student organizations. Relying upon our precedents which protect members of unions and bar associations from being required to pay fees used for speech the members find objectionable, both the District Court and the Court of Appeals invalidated the University's student fee program. The University contends that its mandatory student activity fee and the speech which it supports are appropriate to further its educational mission.

We reverse. The First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral. We do not sustain, however, the student referendum mechanism of the University's program, which appears to permit the exaction of fees in violation of the viewpoint neutrality principle. As to that aspect of the program, we remand for further proceedings.

It seems that since its founding the University has required full-time students enrolled at its Madison campus to pay a nonrefundable activity fee. For the 1995-1996 academic year, when this suit was commenced, the activity fee amounted to \$331.50 per year. The fee is segregated from the University's tuition charge. Once collected, the activity fees are deposited by the University into the accounts of the State of Wisconsin. The fees are drawn upon by the University to support various campus services and extracurricular student activities. In the University's view, the activity fees "enhance the educational experience" of its students by "promot[ing] extracurricular activities," "stimulating advocacy and debate on diverse points of view," enabling "participa[tion] in political activity," "promot[ing] student participa[tion] in campus administrative activity," and providing "opportunities to develop social skills," all consistent with the University's mission.

The board of regents classifies the segregated fee into allocable and nonallocable portions. The nonallocable portion approximates 80% of the total fee and covers expenses such as student health services, intramural sports, debt service, and the upkeep and operations of the student union facilities.

Respondents did not challenge the purposes to which the University commits the nonallocable portion of the segregated fee.

The allocable portion of the fee supports extracurricular endeavors pursued by the University's registered student organizations or RSO's. To qualify for RSO status students must organize as a not-for-profit group, limit membership primarily to students, and agree to undertake activities related to student life on campus. During the 1995-1996 school year, 623 groups had RSO status on the Madison campus. To name but a few, RSO's included the Future Financial Gurus of America; the International Socialist Organization; the College Democrats; the College Republicans; and the American Civil Liberties Union Campus Chapter. As one would expect, the expressive activities undertaken by RSO's are diverse in range and content, from displaying posters and circulating newsletters throughout the campus, to hosting campus debates and guest speakers, and to what can best be described as political lobbying.

RSO's may obtain a portion of the allocable fees in one of three ways. Most do so by seeking funding from the Student Government Activity Fund (SGAF), administered by the ASM. SGAF moneys may be issued to support an RSO's operations and events, as well as travel expenses "central to the purpose of the organization." As an alternative, an RSO can apply for funding from the General Student Services Fund (GSSF), administered through the ASM's finance committee. During the 1995-1996 academic year, 15 RSO's received GSSF funding. These RSO's included a campus tutoring center, the student radio station, a student environmental group, a gay and bisexual student center, a community legal office, an AIDS support network, a campus women's center, and the Wisconsin Student Public Interest Research Group (WISPIRG). The University acknowledges that, in addition to providing campus services ( *e.g.*, tutoring and counseling), the GSSF-funded RSO's engage in political and ideological expression.

The GSSF, as well as the SGAF, consists of moneys originating in the allocable portion of the mandatory fee. The parties have stipulated that, with respect to SGAF and GSSF funding, "[t]he process for reviewing and approving allocations for funding is administered in a viewpoint-neutral fashion," and that the University does not use the fee program for "advocating a particular point of view."

A student referendum provides a third means for an RSO to obtain funding. While the record is sparse on this feature of the University's program, the parties inform us that the student body can vote either to approve or to disapprove an assessment for a particular RSO. One referendum resulted in an allocation of \$45,000 to WISPIRG during the 1995-1996 academic year. At oral argument, counsel for the University acknowledged that a referendum could also operate to defund an RSO or to veto a funding decision of the ASM. In October 1996, for example, the student body voted to terminate funding to a national student organization to which the University belonged. Both parties confirmed at oral argument that their stipulation regarding the program's viewpoint neutrality does not extend to the referendum process. \*\*\*

## II.

It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies. The case we decide here, however, does not raise the issue of the government's right, or, to be more specific, the state-controlled University's right, to use its own funds to advance a particular message. The University's whole justification for fostering the challenged expression is that it springs from the initiative of the students, who alone give it purpose and content in the course of their extracurricular endeavors.

The University of Wisconsin exacts the fee at issue for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students. We conclude the objecting students may insist upon certain safeguards with respect to the expressive activities which they are required to support. Our public forum cases are instructive here by close analogy. This is true even though the student activities fund is not a public forum in the traditional sense of the term and despite the circumstance that those cases most often involve a demand for access, not a claim to be exempt from supporting speech. The standard of viewpoint neutrality found in the public forum cases provides the standard we find controlling. We decide that the viewpoint neutrality requirement of the University program is in general sufficient to protect the rights of the objecting students. The student referendum aspect of the program for funding speech and expressive activities, however, appears to be inconsistent with the viewpoint neutrality requirement.

We must begin by recognizing that the complaining students are being required to pay fees which are subsidies for speech they find objectionable, even offensive. The *Abood* and *Keller* cases, then, provide the beginning point for our analysis. While those precedents identify the interests of the protesting students, the means of implementing First Amendment protections adopted in those decisions are neither applicable nor workable in the context of extracurricular student speech at a university.

\*\*\* If the University conditions the opportunity to receive a college education, an opportunity comparable in importance to joining a labor union or bar association, on an agreement to support objectionable, extracurricular expression by other students, the rights acknowledged in *Abood* and *Keller* become implicated. It infringes on the speech and beliefs of the individual to be required, by this mandatory student activity fee program, to pay subsidies for the objectionable speech of others without any recognition of the State's corresponding duty to him or her. Yet recognition must be given as well to the important and substantial purposes of the University, which seeks to facilitate a wide range of speech.

In *Abood* and *Keller* the constitutional rule took the form of limiting the required subsidy to speech germane to the purposes of the union or bar association. The standard of germane speech as applied to student speech at a university is unworkable, however, and gives insufficient protection both to the objecting students and to the University program itself. \*\*\* To insist upon asking what speech is germane would be contrary to the very goal the University seeks to pursue. It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning.

Just as the vast extent of permitted expression makes the test of germane speech inappropriate for intervention, so too does it underscore the high potential for intrusion on the First Amendment rights of the objecting students. It is all but inevitable that the fees will result in subsidies to speech which some students find objectionable and offensive to their personal beliefs. If the standard of germane speech is inapplicable, then, it might be argued the remedy is to allow each student to list those causes which he or she will or will not support. If a university decided that its students' First Amendment interests were better protected by some type of optional or refund system it would be free to do so. We decline to impose a system of that sort as a constitutional requirement, however. The restriction could be so disruptive and expensive that the program to support extracurricular speech would be ineffective. The First Amendment does not require the University to put the program at risk.

The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.

The University must provide some protection to its students' First Amendment interests, however. The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support. \*\*\* When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others. There is symmetry then in our holding here and in *Rosenberger*: Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected. We conclude that the University of Wisconsin may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle.

The parties have stipulated that the program the University has developed to stimulate extracurricular student expression respects the principle of viewpoint neutrality. If the stipulation is to continue to control the case, the University's program in its basic structure must be found consistent with the First Amendment.

Our decision ought not to be taken to imply that in other instances the University, its agents or employees, or--of particular importance--its faculty, are subject to the First Amendment analysis which controls in this case. Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different. The Court has not held, or suggested, that when the government speaks the rules we have discussed come into play.

### III

It remains to discuss the referendum aspect of the University's program. While the record is not well developed on the point, it appears that by majority vote of the student body a given RSO may be funded or defunded. It is unclear to us what protection, if any, there is for viewpoint neutrality in this part of the process. To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent. That principle is controlling here. A remand is necessary and appropriate to resolve this point; and the case in all events must be reexamined in light of the principles we have discussed.

The judgment of the Court of Appeals is reversed.\*\*\*

## *Johanns v. Livestock Marketing Ass'n* 544 U.S. 550 (2005)

SCALIA, J., DELIVERED THE OPINION OF THE COURT, IN WHICH REHNQUIST, C. J., AND O'CONNOR, THOMAS, AND BREYER, JJ., JOINED. THOMAS, J., AND BREYER, J., FILED CONCURRING OPINIONS. GINSBURG, J., FILED AN OPINION CONCURRING IN THE JUDGMENT. KENNEDY, J., FILED A DISSENTING OPINION. SOUTER, J., FILED A DISSENTING OPINION, IN WHICH STEVENS AND KENNEDY, JJ., JOINED.

JUSTICE SCALIA DELIVERED THE OPINION OF THE COURT.

For the third time in eight years, we consider whether a federal program that finances generic advertising to promote an agricultural product violates the First Amendment. In these cases, unlike the previous two, the dispositive question is whether the generic advertising at issue is the Government's own speech and therefore is exempt from First Amendment scrutiny.

### I

#### A

The Beef Promotion and Research Act of 1985 (Beef Act or Act), announces a federal policy of promoting the marketing and consumption of "beef and beef

products,” using funds raised by an assessment on cattle sales and importation. The statute directs the Secretary of Agriculture to implement this policy by issuing a Beef Promotion and Research Order (Beef Order or Order), and specifies four key terms it must contain: The Secretary is to appoint a Cattlemen’s Beef Promotion and Research Board (Beef Board or Board), whose members are to be a geographically representative group of beef producers and importers, nominated by trade associations. The Beef Board is to convene an Operating Committee, composed of 10 Beef Board members and 10 representatives named by a federation of state beef councils. The Secretary is to impose a \$1-per-head assessment (or “checkoff”) on all sales or importation of cattle and a comparable assessment on imported beef products. And the assessment is to be used to fund beef-related projects, including promotional campaigns, designed by the Operating Committee and approved by the Secretary.

The Secretary promulgated the Beef Order with the specified terms. The assessment is collected primarily by state beef councils, which then forward the proceeds to the Beef Board. The Operating Committee proposes projects to be funded by the checkoff, including promotion and research. The Secretary or his designee approves each project and, in the case of promotional materials, the content of each communication. \*\*\* Many promotional messages funded by the checkoff (though not all) bear the attribution “Funded by America’s Beef Producers.” Most print and television messages also bear a Beef Board logo, usually a check-mark with the word “BEEF.”

## II

We have sustained First Amendment challenges to allegedly compelled expression in two categories of cases: true “compelled speech” cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government; and “compelled subsidy” cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity. We have not heretofore considered the First Amendment consequences of government-compelled subsidy of the government’s own speech.

We first invalidated an outright compulsion of speech in *West Virginia Bd. of Ed. v. Barnette* (1943). The State required every schoolchild to recite the Pledge of Allegiance while saluting the American flag, on pain of expulsion from the public schools. We held that the First Amendment does not “le[ave] it open to public authorities to compel [a person] to utter” a message with which he does not agree. Likewise, in *Wooley v. Maynard* (1977), we held that requiring a New Hampshire couple to bear the State’s motto, “Live Free or Die,” on their cars’ license plates was an impermissible compulsion of expression. Obliging people to “use their private property as a ‘mobile billboard’ for the State’s ideological message” amounted to impermissible compelled expression.

The reasoning of these compelled-speech cases has been carried over to certain instances in which individuals are compelled not to speak, but to subsidize a private message with which they disagree. Thus, although we have upheld state-imposed requirements that lawyers be members of the state bar and pay its annual dues, and that public- school teachers either join the labor union

representing their “shop” or pay “service fees” equal to the union dues, we have invalidated the use of the compulsory fees to fund speech on political matters. See *Keller v. State Bar of Cal.* (1990); *Abood v. Detroit Bd. of Ed.* (1977). Bar or union speech with such content, we held, was not germane to the regulatory interests that justified compelled membership, and accordingly, making those who disagreed with it pay for it violated the First Amendment.

These latter cases led us to sustain a compelled-subsidy challenge to an assessment very similar to the beef check-off, imposed to fund mushroom advertising. Deciding the case on the assumption that the advertising was private speech, not government speech, we concluded that *Abood* and *Keller* were controlling. As in those cases, mushroom producers were obliged by “law or necessity” to pay the checkoff; although *Abood* and *Keller* would permit the mandatory fee if it were “germane” to a “broader regulatory scheme,” in *United States v. United Foods* (2001) the only regulatory purpose was the funding of the advertising.

In all of the cases invalidating exactions to subsidize speech, the speech was, or was presumed to be, that of an entity other than the government itself. \*\*\* Our compelled-subsidy cases have consistently respected the principle that “[c]ompelled support of a private association is fundamentally different from compelled support of government.” *Abood* (Powell, J., concurring in judgment). “Compelled support of government”—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position. “The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.” *Southworth*. We have generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns.\*\*\*

### III

Respondents do not seriously dispute these principles, nor do they contend that, as a general matter, their First Amendment challenge requires them to show only that their checkoff dollars pay for speech with which they disagree. Rather, they assert that the challenged promotional campaigns differ dispositively from the type of government speech that, our cases suggest, is not susceptible to First Amendment challenge. They point to the role of the Beef Board and its Operating Committee in designing the promotional campaigns, and to the use of a mandatory assessment on beef producers to fund the advertising. We consider each in turn.

#### A

The Secretary of Agriculture does not write ad copy himself. Rather, the Beef Board’s promotional campaigns are designed by the Beef Board’s Operating Committee, only half of whose members are Beef Board members appointed by the Secretary. (All members of the Operating Committee are subject to *removal* by the Secretary.) Respondents contend that speech whose content is effectively controlled by a nongovernmental entity—the Operating Committee—cannot be

considered “government speech.” We need not address this contention, because we reject its premise: The message of the promotional campaigns is effectively controlled by the Federal Government itself.

Moreover, the record demonstrates that the Secretary exercises final approval authority over every word used in every promotional campaign. All proposed promotional messages are reviewed by Department officials both for substance and for wording, and some proposals are rejected or rewritten by the Department. Nor is the Secretary’s role limited to final approval or rejection: officials of the Department also attend and participate in the open meetings at which proposals are developed.

This degree of governmental control over the message funded by the checkoff distinguishes these cases from *Keller*. \*\*\* When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.

## B

Respondents also contend that the beef program does not qualify as “government speech” because it is funded by a targeted assessment on beef producers, rather than by general revenues. This funding mechanism, they argue, has two relevant effects: it gives control over the beef program not to politically accountable legislators, but to a narrow interest group that will pay no heed to respondents’ dissenting views, and it creates the perception that the advertisements speak for beef producers such as respondents.

We reject the first point. The compelled-subsidy analysis is altogether unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment. Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object. \*\*\*

Here, the beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions’ content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements’ content, right down to the wording. And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.

As to the second point, respondents’ argument proceeds as follows: They contend that crediting the advertising to “America’s Beef Producers” impermissibly uses not only their money but also their seeming endorsement to promote a message with which they do not agree. Communications cannot be “government speech,” they argue, if they are attributed to someone other than

the government; and the person to whom they are attributed, when he is, by compulsory funding, made the unwilling instrument of communication, may raise a First Amendment objection.

We need not determine the validity of this argument— which relates to compelled *speech* rather than compelled *subsidy*—with regard to respondents’ facial challenge. Since neither the Beef Act nor the Beef Order *requires* attribution, neither can be the cause of any possible First Amendment harm.

Whether the *individual* respondents who are beef producers would be associated with speech labeled as coming from “America’s Beef Producers” is a question on which the trial record is altogether silent. We have only the funding tagline itself, a trademarked term that, standing alone, is not sufficiently specific to convince a reasonable factfinder that any particular beef producer, or all beef producers, would be tarred with the content of each trademarked ad. We therefore conclude that on the record before us an as-applied First Amendment challenge to the individual advertisements affords no basis on which to sustain the Eighth Circuit’s judgment, even in part.

## *Harris v. Quinn* 573 US \_\_\_ (2014)

ALITO, J., DELIVERED THE OPINION OF THE COURT, IN WHICH ROBERTS, C.J AND SCALIA, KENNEDY, AND THOMAS, JOINED. KAGAN, J., FILED A DISSENTING OPINION, IN WHICH GINSBURG, BREYER, AND SOTOMAYOR, JJ., JOINED.

JUSTICE ALITO DELIVERED THE OPINION OF THE COURT.

This case presents the question whether the First Amendment permits a State to compel personal care providers to subsidize speech on matters of public concern by a union that they do not wish to join or support. We hold that it does not, and we therefore reverse the judgment of the Court of Appeals.

I  
A

Millions of Americans, due to age, illness, or injury, are unable to live in their own homes without assistance and are unable to afford the expense of in-home care. In order to prevent these individuals from having to enter a nursing home or other facility, the federal Medicaid program funds state-run programs that provide in-home services to individuals whose conditions would otherwise require institutionalization. A State that adopts such a program receives federal funds to compensate persons who attend to the daily needs of individuals needing in-home care. Almost every State has established such a program.

One of those States is Illinois, which has created the Illinois Department of Human Services Home Services Program, known colloquially as the state “Rehabilitation Program.” “[D]esigned to prevent the unnecessary institutionalization of individuals who may instead be satisfactorily maintained at home at a lesser cost to the State,” the Rehabilitation Program allows

participants to hire a "personal assistant" who provides homecare services tailored to the individual's needs. Many of these personal assistants are relatives of the person receiving care, and some of them provide care in their own homes.

Illinois law establishes an employer-employee relationship between the person receiving the care and the person providing it. The law states explicitly that the person receiving home care—the "customer"—"shall be *the* employer of the [personal assistant]." (emphasis added). A "personal assistant" is defined as "an individual employed *by the customer* to provide . . . varied services that have been approved by the customer's physician," (emphasis added), and the law makes clear that Illinois "shall not have control or input in the employment relationship between the customer and the personal assistants."

Other provisions of the law emphasize the customer's employer status. The customer "is responsible for controlling all aspects of the employment relationship between the customer and the [personal assistant (or PA)], including, without limitation, locating and hiring the PA, training the PA, directing, evaluating and otherwise supervising the work performed by the personal assistant, imposing . . . disciplinary action against the PA, and terminating the employment relationship between the customer and the PA."

\*\*\*In general, the customer "has complete discretion in which Personal Assistant he/she wishes to hire." §684.20(b).

A customer also controls the contents of the document, the Service Plan, that lists the services that the customer will receive. No Service Plan may take effect without the approval of both the customer and the customer's physician. Service Plans are highly individualized. The Illinois State Labor Relations Board noted in 1985 that "[t]here is no typical employment arrangement here, public or otherwise; rather, there simply exists an arrangement whereby the state of Illinois pays individuals . . . to work under the direction and control of private third parties."

While customers exercise predominant control over their employment relationship with personal assistants, the State, subsidized by the federal Medicaid program, pays the personal assistants' salaries. The amount paid varies depending on the services provided, but as a general matter, it "corresponds to the amount the State would expect to pay for the nursing care component of institutionalization if the individual chose institutionalization."

Other than providing compensation, the State's role is comparatively small. The State sets some basic threshold qualifications for employment.

## B

Section 6 of the Illinois Public Labor Relations Act (PLRA) authorizes state employees to join labor unions and to bargain collectively on the terms and conditions of employment. This law applies to "[e]mployees of the State and any

political subdivision of the State," subject to certain exceptions, and it provides for a union to be recognized if it is "designated by the [Public Labor Relations] Board as the representative of the majority of public employees in an appropriate unit . . . ."

The PLRA contains an agency-fee provision, *i.e.*, a provision under which members of a bargaining unit who do not wish to join the union are nevertheless required to pay a fee to the union. Labeled a "fair share" provision, this section of the PLRA provides: "When a collective bargaining agreement is entered into with an exclusive representative, it may include in the agreement a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective-bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment." This payment is "deducted by the employer from the earnings of the nonmember employees and paid to the employee organization."

In the 1980's, the Service Employees International Union (SEIU) petitioned the Illinois Labor Relations Board for permission to represent personal assistants employed by customers in the Rehabilitation Program, but the board rebuffed this effort. The board concluded that "it is clear . . . that [Illinois] does not exercise the type of control over the petitioned-for employees necessary to be considered, in the collective bargaining context envisioned by the [PLRA], their 'employer' or, at least, their sole employer."

In March 2003, however, Illinois' newly elected Governor, Rod Blagojevich, circumvented this decision by issuing Executive Order 2003-08. The order noted the Illinois Labor Relations Board decision but nevertheless called for state recognition of a union as the personal assistants' exclusive representative for the purpose of collective bargaining with the State. This was necessary, Gov. Blagojevich declared, so that the State could "receive feedback from the personal assistants in order to effectively and efficiently deliver home services." Without such representation, the Governor proclaimed, personal assistants "cannot effectively voice their concerns about the organization of the Home Services program, their role in the program, or the terms and conditions of their employment under the Program."

Several months later, the Illinois Legislature codified that executive order by amending the PLRA. While acknowledging "the right of the persons receiving services . . . to hire and fire personal assistants or supervise them," the Act declared personal assistants to be "public employees" of the State of Illinois—but "[s]olely for the purposes of coverage under the Illinois Public Labor Relations Act." The statute emphasized that personal assistants are not state employees for any other purpose, "including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits."

Following a vote, SEIU Healthcare Illinois & Indiana (SEIU-HII) was designated as the personal assistants' exclusive representative for purposes of collective

bargaining. The union and the State subsequently entered into collective-bargaining agreements that require all personal assistants who are not union members to pay a "fair share" of the union dues. These payments are deducted directly from the personal assistants' Medicaid payments. The record in this case shows that each year, personal assistants in Illinois pay SEIU-HII more than \$3.6 million in fees.

## C

Three of the petitioners in the case now before us— Theresa Riffey, Susan Watts, and Stephanie YencerPrice—are personal assistants under the Rehabilitation Program. They all provide in-home services to family members or other individuals suffering from disabilities. \*\*\* Susan Watts, for example, serves as personal assistant for her daughter, who requires constant care due to quadriplegic cerebral palsy and other conditions. In 2010, these petitioners filed a putative class action on behalf of all Rehabilitation Program personal assistants in the United States District Court for the Northern District of Illinois. Their complaint, which named the Governor and the union as defendants, sought an injunction against enforcement of the fair-share provision and a declaration that the Illinois PLRA violates the First Amendment insofar as it requires personal assistants to pay a fee to a union that they do not wish to support.

The District Court dismissed their claims with prejudice, and the Seventh Circuit affirmed in relevant part, concluding that the case was controlled by this Court's decision in *Abood v. Detroit Bd. of Ed.* (1977). The Seventh Circuit held that Illinois and the customers who receive in-home care are "joint employers" of the personal assistants, and the court stated that it had "no difficulty concluding that the State employs personal assistants within the meaning of *Abood*."

Petitioners sought certiorari. Their petition pointed out that other States were following Illinois' lead by enacting laws or issuing executive orders that deem personal assistants to be state employees for the purpose of unionization and the assessment of fair-share fees. Petitioners also noted that Illinois has enacted a law that deems "individual maintenance home health workers"—a category that includes registered nurses, licensed practical nurses, and certain therapists who work in private homes—to be "public employees" for similar purposes.

In light of the important First Amendment questions these laws raise, we granted certiorari.

## II

In upholding the constitutionality of the Illinois law, the Seventh Circuit relied on this Court's decision in *Abood*, which held that state employees who choose not to join a public-sector union may nevertheless be compelled to pay an agency fee to support union work that is related to the collective-bargaining

process. Two Terms ago, in *Knox v. Service Employees* (2012), we pointed out that *Abood* is "something of an anomaly." "'The primary purpose' of permitting unions to collect fees from non-members," we noted, "is 'to prevent nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred.'" But "[s]uch free-rider arguments . . . are generally insufficient to overcome First Amendment objections." For this reason, *Abood* stands out, but the State of Illinois now asks us to sanction what amounts to a very significant expansion of *Abood*—so that it applies, not just to full-fledged public employees, but also to others who are deemed to be public employees solely for the purpose of unionization and the collection of an agency fee. \*\*\*

## D

The *Abood* Court's analysis is questionable on several grounds. Some of these were noted or apparent at or before the time of the decision, but several have become more evident and troubling in the years since then. \*\*\*

*Abood* failed to appreciate the difference between the core union speech involuntarily subsidized by dissenting public-sector employees and the core union speech involuntarily funded by their counterparts in the private sector. In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector. In the years since *Abood*, as state and local expenditures on employee wages and benefits have mushroomed, the importance of the difference between bargaining in the public and private sectors has been driven home.

Recent experience has borne out this concern. See DiSalvo, *The Trouble with Public Sector Unions*, National Affairs No. 5, p. 15 (2010) ("In Illinois, for example, public-sector unions have helped create a situation in which the state's pension funds report a liability of more than \$100 billion, at least 50% of it unfunded").

*Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends. In the private sector, the line is easier to see. Collective bargaining concerns the union's dealings with the employer; political advocacy and lobbying are directed at the government. But in the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government.

*Abood* does not seem to have anticipated the magnitude of the practical administrative problems that would result in attempting to classify public-sector union expenditures as either "chargeable" (in *Abood's* terms, expenditures for "collective-bargaining, contract administration, and grievance-adjustment purposes") or nonchargeable (*i.e.*, expenditures for political or ideological purposes). In the years since *Abood*, the Court has struggled repeatedly with this issue. In *Lehnert v. Ferris Faculty Assn.* (1991), the Court held that "chargeable activities must (1) be 'germane' to collective-bargaining

activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." But as noted in JUSTICE SCALIA's dissent in that case, "each one of the three 'prongs' of the test involves a substantial judgment call (What is 'germane'? What is 'justified'? What is a 'significant' additional burden)."

*Abood* likewise did not foresee the practical problems that would face objecting nonmembers. Employees who suspect that a union has improperly put certain expenses in the "germane" category must bear a heavy burden if they wish to challenge the union's actions. \*\*\*

Finally, a critical pillar of the *Abood* Court's analysis rests on an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop. \*\*\* [T]his assumption is unwarranted.

### III

#### A

Despite all this, the State of Illinois now asks us to approve a very substantial expansion of *Abood's* reach. *Abood* involved full-fledged public employees, but in this case, the status of the personal assistants is much different. The Illinois Legislature has taken pains to specify that personal assistants are public employees for one purpose only: collective bargaining. For all other purposes, Illinois regards the personal assistants as private-sector employees. This approach has important practical consequences.

For one thing, the State's authority with respect to these two groups is vastly different. In the case of full-fledged public employees, the State establishes all of the duties imposed on each employee, as well as all of the qualifications needed for each position. The State vets applicants and chooses the employees to be hired. The State provides or arranges for whatever training is needed, and it supervises and evaluates the employees' job performance and imposes corrective measures if appropriate. If a state employee's performance is deficient, the State may discharge the employee in accordance with whatever procedures are required by law.

With respect to the personal assistants involved in this case, the picture is entirely changed. The job duties of personal assistants are specified in their individualized Service Plans, which must be approved by the customer and the customer's physician. Customers have complete discretion to hire any personal assistant who meets the meager basic qualifications that the State prescribes  
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Customers supervise their personal assistants on a daily basis, and no provision of the Illinois statute or implementing regulations gives the State the right to enter the home in which the personal assistant is employed for the purpose of checking on the personal assistant's job performance. And while

state law mandates an annual review of each personal assistant's work, that evaluation is also controlled by the customer. A state counselor is assigned to assist the customer in performing the review but has no power to override the customer's evaluation. Nor do the regulations empower the State to discharge a personal assistant for substandard performance. Discharge, like hiring, is entirely in the hands of the customer.

Consistent with this scheme, under which personal assistants are almost entirely answerable to the customers and not to the State, Illinois withholds from personal assistants most of the rights and benefits enjoyed by full-fledged state employees. \*\*\*

Just as the State denies personal assistants most of the rights and benefits enjoyed by full-fledged state workers, the State does not assume responsibility for actions taken by personal assistants during the course of their employment. The governing statute explicitly disclaims "vicarious liability in tort." So if a personal assistant steals from a customer, neglects a customer, or abuses a customer, the State washes its hands.

Illinois deems personal assistants to be state employees for one purpose only, collective bargaining \* but the scope of bargaining that may be conducted on their behalf is sharply limited. Under the governing Illinois statute, collective bargaining can occur only for "terms and conditions of employment that are within the State's control." That is not very much.

B  
1

The unusual status of personal assistants has important implications for present purposes. *Abood's* rationale, whatever its strengths and weaknesses, is based on the assumption that the union possesses the full scope of powers and duties generally available under American labor law. Under the Illinois scheme now before us, however, the union's powers and duties are sharply circumscribed, and as a result, even the best argument for the "extraordinary power" that *Abood* allows a union to wield is a poor fit.

In our post-*Abood* cases involving public-sector agency fee issues, *Abood* has been a given, and our task has been to attempt to understand its rationale and to apply it in a way that is consistent with that rationale. In that vein, *Abood's* reasoning has been described as follows. The mere fact that nonunion members benefit from union speech is not enough to justify an agency fee because "private speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for." *Lehnert* (opinion

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\* [fn 10] What is significant is not the label that the State assigns to the personal assistants but the substance of their relationship to the customers and the State. Our decision rests in no way on state-law labels. Indeed, it is because the First Amendment's meaning does not turn on state-law labels that we refuse to allow the state to make a nonemployee a full-fledged employee "[s]olely for purposes of coverage under the Illinois Public Labor Relations Act" \*\*\*

of SCALIA, J.). What justifies the agency fee, the argument goes, is the fact that the State compels the union to promote and protect the interests of nonmembers. Specifically, the union must not discriminate between members and nonmembers in "negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances." This means that the union "cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others." And it has the duty to provide equal and effective representation for nonmembers in grievance proceedings, an undertaking that can be very involved.

This argument has little force in the situation now before us. Illinois law specifies that personal assistants "shall be paid at the hourly rate set by law," and therefore the union cannot be in the position of having to sacrifice higher pay for its members in order to protect the nonmembers whom it is obligated to represent. And as for the adjustment of grievances, the union's authority and responsibilities are narrow, as we have seen. The union has no authority with respect to any grievances that a personal assistant may have with a customer, and the customer has virtually complete control over a personal assistant's work.

The union's limited authority in this area has important practical implications. Suppose, for example that a customer fires a personal assistant because the customer wrongly believes that the assistant stole a fork. Or suppose that a personal assistant is discharged because the assistant shows no interest in the customer's favorite daytime soaps. Can the union file a grievance on behalf of the assistant? The answer is no.

2

Because of *Abood's* questionable foundations, and because the personal assistants are quite different from full-fledged public employees, we refuse to extend *Abood* to the new situation now before us.

It is therefore unnecessary for us to reach petitioners' argument that *Abood* should be overruled, and the dissent's extended discussion of *stare decisis* is beside the point.

*Abood* itself has clear boundaries; it applies to public employees. Extending those boundaries to encompass partial-public employees, quasi-public employees, or simply private employees would invite problems. Consider a continuum, ranging, on the one hand, from full-fledged state employees to, on the other hand, individuals who follow a common calling and benefit from advocacy or lobbying conducted by a group to which they do not belong and pay no dues. A State may not force every person who benefits from this group's efforts to make payments to the group. But what if regulation of this group is increased? What if the Federal Government or a State begins to provide or increases subsidies in this area? At what point, short of the point at which the

individuals in question become full-fledged state employees, should *Abood* apply?

If respondents' and the dissent's views were adopted, a host of workers who receive payments from a governmental entity for some sort of service would be candidates for inclusion within *Abood*'s reach. Medicare-funded home health employees may be one such group. The same goes for adult foster care providers in Oregon and Washington and certain workers under the federal Child Care and Development Fund programs.

If we allowed *Abood* to be extended to those who are not full-fledged public employees, it would be hard to see just where to draw the line, and we therefore confine *Abood*'s reach to full-fledged state employees.

#### IV A

Because *Abood* is not controlling, we must analyze the constitutionality of the payments compelled by Illinois law under generally applicable First Amendment standards. As we explained in *Knox*, "[t]he government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves." see also, *e.g.*, *R.A.V. v. St. Paul*, (1992); *Riley v. National Federation of Blind of N.C.*, (1988) *West Virginia Bd. of Ed. v. Barnette* (1943); *Wooley v. Maynard* (1977). And "compelled funding of the speech of other private speakers or groups" presents the same dangers as compelled speech. *Knox*. As a result, we explained in *Knox* that an agency-fee provision imposes "a 'significant impingement on First Amendment rights,'" and this cannot be tolerated unless it passes "exacting First Amendment scrutiny."

#### B

For present purposes, however, no fine parsing of levels of First Amendment scrutiny is needed because the agency-fee provision here cannot satisfy even the test used in *Knox*. Specifically, this provision does not serve a "compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms." Respondents contend that the agency-fee provision in this case furthers several important interests, but none is sufficient.

#### 1

Focusing on the benefits of the union's status as the exclusive bargaining agent for all employees in the unit, respondents argue that the agency-fee provision promotes "labor peace," but their argument largely misses the point. Petitioners do not contend that they have a First Amendment right to form a rival union. Nor do they challenge the authority of the SEIU-HII to serve as the exclusive representative of all the personal assistants in bargaining with the State. All they seek is the right not to be forced to contribute to the union, with which they broadly disagree.

A union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked. For example, employees in some federal agencies may choose a union to serve as the exclusive bargaining agent for the unit, but no employee is required to join the union or to pay any union fee. Under federal law, in agencies in which unionization is permitted, "[e]ach employee shall have the right to form, join, or assist any labor organization, *or to refrain from any such activity*, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right." \*\*\*

Moreover, even if the agency fee provision at issue here were tied to the union's status as exclusive bargaining agents, features of the Illinois scheme would still undermine the argument that the agency fee plays an important role in maintaining labor peace. For one thing, any threat to labor peace is diminished because the personal assistants do not work together in a common state facility but instead spend all their time in private homes, either the customers' or their own. Federal labor law reflects the fact that the organization of household workers like the personal assistants does not further the interest of labor peace. "[A]ny individual employed . . . in the domestic service of any family or person at his home" is excluded from coverage under the National Labor Relations Act.

The union's very restricted role under the Illinois law is also significant. Since the union is largely limited to petitioning the State for greater pay and benefits, the specter of conflicting demands by personal assistants is lessened. And of course, State officials must deal on a daily basis with conflicting pleas for funding in many contexts.

2

Respondents also maintain that the agency-fee provision promotes the welfare of personal assistants and thus contributes to the success of the Rehabilitation Program. As a result of unionization, they claim, the wages and benefits of personal assistants have been substantially improved; orientation and training programs, background checks, and a program to deal with lost and erroneous paychecks have been instituted; and a procedure was established to resolve grievances arising under the collective-bargaining agreement (but apparently not grievances relating to a Service Plan or actions taken by a customer).

The thrust of these arguments is that the union has been an effective advocate for personal assistants in the State of Illinois, and we will assume that this is correct. But in order to pass exacting scrutiny, more must be shown. The agency-fee provision cannot be sustained unless the cited benefits for personal assistants could not have been achieved if the union had been required to depend for funding on the dues paid by those personal assistants who chose to join. No such showing has been made.

In claiming that the agency fee was needed to bring about the cited improvements, the State is in a curious position. The State is not like the closed-fisted employer that is bent on minimizing employee wages and benefits

and that yields only grudgingly under intense union pressure. As Governor Blagojevich put it in the executive order that first created the Illinois program, the State took the initiative because it was eager for "feedback" regarding the needs and views of the personal assistants. Thereafter, a majority of the personal assistants voted to unionize. When they did so, they must have realized that this would require the payment of union dues, and therefore it may be presumed that a high percentage of these personal assistants became union members and are willingly paying union dues. Why are these dues insufficient to enable the union to provide "feedback" to a State that is highly receptive to suggestions for increased wages and other improvements? A host of organizations advocate on behalf of the interests of persons falling within an occupational group, and many of these groups are quite successful even though they are dependent on voluntary contributions. Respondents' showing falls far short of what the First Amendment demands.

## V

Respondents and their supporting *amici* make two additional arguments that must be addressed.

## A

First, respondents and the Solicitor General urge us to apply a balancing test derived from *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.* (1968). And they claim that under the *Pickering* analysis, the Illinois scheme must be sustained. This argument represents an effort to find a new justification for the decision in *Abood*, because neither in that case nor in any subsequent related case have we seen *Abood* as based on *Pickering* balancing.

\*\*\* [And] even if the permissibility of the agency-shop provision in the collective-bargaining agreement now at issue were analyzed under *Pickering*, that provision could not be upheld.

## B

Respondents contend, finally, that a refusal to extend *Abood* to cover the situation presented in this case will call into question our decisions in *Keller v. State Bar of Cal.* (1990), and *Board of Regents of Univ. of Wis. System v. Southworth* (2000). Respondents are mistaken.

In *Keller*, we considered the constitutionality of a rule applicable to all members of an "integrated" bar, *i.e.*, "an association of attorneys in which membership and dues are required as a condition of practicing law." We held that members of this bar could not be required to pay the portion of bar dues used for political or ideological purposes but that they could be required to pay the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members.

This decision fits comfortably within the framework applied in the present case. Licensed attorneys are subject to detailed ethics rules, and the bar rule requiring the payment of dues was part of this regulatory scheme. The portion of the rule that we upheld served the "State's interest in regulating the legal profession and improving the quality of legal services." States also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices. Thus, our decision in this case is wholly consistent with our holding in *Keller*.

Contrary to respondents' submission, the same is true with respect to *Southworth*. In that case, we upheld the constitutionality of a university-imposed mandatory student activities fee that was used in part to support a wide array of student groups that engaged in expressive activity. The mandatory fee was challenged by students who objected to some of the expression that the fee was used to subsidize, but we rejected that challenge, and our holding is entirely consistent with our decision in this case.

Public universities have a compelling interest in promoting student expression in a manner that is viewpoint neutral. See *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995). This may be done by providing funding for a broad array of student groups. If the groups funded are truly diverse, many students are likely to disagree with things that are said by some groups. And if every student were entitled to a partial exemption from the fee requirement so that no portion of the student's fee went to support a group that the student did not wish to support, the administrative problems would likely be insuperable. Our decision today thus does not undermine *Southworth*.

For all these reasons, we refuse to extend *Abood* in the manner that Illinois seeks. If we accepted Illinois' argument, we would approve an unprecedented violation of the bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support. The First Amendment prohibits the collection of an agency fee from personal assistants in the Rehabilitation Program who do not want to join or support the union.

JUSTICE KAGAN, WITH WHOM JUSTICE GINSBURG, JUSTICE BREYER, AND JUSTICE SOTOMAYOR JOIN, DISSENTING.

*Abood v. Detroit Bd. of Ed.* (1977), answers the question presented in this case. *Abood* held that a government entity may, consistently with the First Amendment, require public employees to pay a fair share of the cost that a union incurs negotiating on their behalf for better terms of employment. That is exactly what Illinois did in entering into collective bargaining agreements with the Service Employees International Union Healthcare (SEIU) which included fair-share provisions. Contrary to the Court's decision, those agreements fall squarely within *Abood's* holding. Here, Illinois employs, jointly with individuals suffering from disabilities, the in-home care providers whom the SEIU

represents. Illinois establishes, following negotiations with the union, the most important terms of their employment, including wages, benefits, and basic qualifications. And Illinois's interests in imposing fair-share fees apply no less to those caregivers than to other state workers. The petitioners' challenge should therefore fail.

And that result would fully comport with our decisions applying the First Amendment to public employment. *Abood* is not, as the majority at one point describes it, "something of an anomaly," allowing uncommon interference with individuals' expressive activities. Rather, the lines it draws and the balance it strikes reflect the way courts generally evaluate claims that a condition of public employment violates the First Amendment. Our decisions have long afforded government entities broad latitude to manage their workforces, even when that affects speech they could not regulate in other contexts. *Abood* is of a piece with all those decisions: While protecting an employee's most significant expression, that decision also enables the government to advance its interests in operating effectively—by bargaining, if it so chooses, with a single employee representative and preventing free riding on that union's efforts.

For that reason, one aspect of today's opinion is cause for satisfaction, though hardly applause. As this case came to us, the principal question it presented was whether to overrule *Abood*: The petitioners devoted the lion's share of their briefing and argument to urging us to overturn that nearly 40-year-old precedent (and the respondents and *amici* countered in the same vein). Today's majority cannot resist taking potshots at *Abood*, but it ignores the petitioners' invitation to depart from principles of *stare decisis*. And the essential work in the majority's opinion comes from its extended (though mistaken) distinction of *Abood*, not from its gratuitous dicta critiquing *Abood*'s foundations. That is to the good—or at least better than it might be. The *Abood* rule is deeply entrenched, and is the foundation for not tens or hundreds, but thousands of contracts between unions and governments across the Nation. Our precedent about precedent, fairly understood and applied, makes it impossible for this Court to reverse that decision.

## I

I begin where this case should also end—with this Court's decision in *Abood*. \*\*\*

This case thus raises a straightforward question: Does *Abood* apply equally to Illinois's care providers as to Detroit's teachers? No one thinks that the fair-share provisions in the two cases differ in any relevant respect. Nor do the petitioners allege that the SEIU is crossing the line *Abood* drew by using their payments for political or ideological activities. The only point in dispute is whether it matters that the personal assistants here are employees not only of the State but also of the disabled persons for whom they care. Just as the Court of Appeals held, that fact should make no difference to the analysis.

To see how easily *Abood* resolves this case, consider how Illinois structured the petitioners' employment, and also why it did so. The petitioners work in

Illinois's Medicaid-funded Rehabilitation Program, which provides in-home services to persons with disabilities who otherwise would face institutionalization. Under the program, each disabled person (the State calls them "customers") receives care from a personal assistant; the total workforce exceeds 20,000. The State could have asserted comprehensive control over all the caregivers' activities. But because of the personalized nature of the services provided, Illinois instead chose (as other States have as well) to share authority with the customers themselves. The result is that each caregiver has joint employers—the State and the customer—with each controlling significant aspects of the assistant's work.

The majority describes the petitioners as "partial" or "quasi" public employees, a label of its own devising. But employment law has a real name—joint employees—for workers subject at once to the authority of two or more employers (a not uncommon phenomenon). And the Department of Labor recently explained that in-home care programs, if structured like Illinois's, establish joint employment relationships.

For its part, Illinois sets all the workforce-wide terms of employment. Most notably, the State determines and pays the employees' wages and benefits, including health insurance (while also withholding taxes). By regulation, Illinois establishes the job's basic qualifications: for example, the assistant must provide references or recommendations and have adequate experience and training for the services given. So too, the State describes the services any personal assistant may provide, and prescribes the terms of standard employment contracts entered into between personal assistants and customers.

Illinois as well structures the individual relationship between the customer and his assistant (in ways the majority barely acknowledges). Along with both the customer and his physician, a state-employed counselor develops a service plan laying out the assistant's specific job responsibilities, hours, and working conditions. That counselor also assists the customer in conducting a state-mandated annual performance review, based on state-established criteria, and mediates any resulting disagreements.

Within the structure designed by the State, the customer of course has crucial responsibilities. He exercises day-to-day supervisory control over the personal assistant. And he gets both to hire a particular caregiver (from among the pool of applicants Illinois has deemed qualified) and to impose any needed discipline, up to and including discharge. But even as to those matters, the State plays a role. Before a customer may hire an assistant, the counselor must sign off on the employee's ability to follow the customer's directions and communicate with him. And although only a customer can actually fire an assistant, the State can effectively do so by refusing to pay one who fails to "meet [state] standards." The majority reads that language narrowly, but the State does not: It has made clear not just in its litigation papers, but also in its collective bargaining agreements and customer guidance that it will withhold payment from an assistant (or altogether disqualify her from the program) based on credible allegations of customer abuse, neglect, or financial exploitation.

Indeed, pursuant to the grievance procedure in the present collective bargaining agreement, the SEIU obtained an arbitration award reversing the State's decision to disqualify an assistant from the program for such reasons.

Given that set of arrangements, *Abood* should control. Although a customer can manage his own relationship with a caregiver, Illinois has sole authority over every workforce-wide term and condition of the assistants' employment—in other words, the issues most likely to be the subject of collective bargaining. In particular, if an assistant wants an increase in pay, she must ask the State, not the individual customer. So too if she wants better benefits. (Although the majority notes that caregivers do not receive *statutory* retirement and health insurance benefits, that is irrelevant: Collective bargaining between the State and SEIU has focused on benefits from the beginning, and has produced state-funded health insurance for personal assistants.) And because it is Illinois that would sit down at a bargaining table to address those subjects—the ones that matter most to employees and so most affect workforce stability—the State's stake in a fair-share provision is the same as in *Abood*. Here too, the State has an interest in promoting effective operations by negotiating with an equitably and adequately funded exclusive bargaining agent over terms and conditions of employment. That Illinois has delegated to program customers various individualized employment issues makes no difference to those state interests. If anything, as the State has contended, the dispersion of employees across numerous workplaces and the absence of day-to-day state supervision provides an additional reason for Illinois to want to "address concerns common to all personal assistants" by negotiating with a single representative: Only in that way, the State explains, can the employees effectively convey their concerns about employment under the Rehabilitation Program.

Indeed, the history of that program forcefully demonstrates Illinois's interest in bargaining with an adequately funded exclusive bargaining agent—that is, the interest *Abood* recognized and protected. Workforce shortages and high turnover have long plagued in-home care programs, principally because of low wages and benefits. That labor instability lessens the quality of care, which in turn, forces disabled persons into institutions and (massively) increases costs to the State. See Brief for Paraprofessional Healthcare Institute as *Amicus Curiae* 16-26; Brief for State of California et al. as *Amici Curiae* 4-5. The individual customers are powerless to address those systemic issues; rather, the State—because of its control over workforce-wide terms of employment—is the single employer that can do so. And here Illinois determined (as have nine other States) that negotiations with an exclusive representative offered the best chance to set the Rehabilitation Program on firmer footing. Because of that bargaining, as the majority acknowledges, home-care assistants have nearly doubled their wages in less than 10 years, obtained state-funded health insurance, and benefited from better training and workplace safety measures. The State, in return, has obtained guarantees against strikes or other work stoppages—and most important, believes it has gotten a more stable workforce providing higher quality care, thereby avoiding the costs associated with institutionalization. Illinois's experience thus might serve as a veritable poster child for *Abood*—not, as the majority would have it, some strange extension of that decision.

It is not altogether easy to understand why the majority thinks what it thinks: Today's opinion takes the tack of throwing everything against the wall in the hope that something might stick. A vain hope, as it turns out. Even once disentangled, the various strands of the majority's reasoning do not distinguish this case from *Abood*.

\*\*\* The majority must agree (this Court has made the point often enough) that "state law labels," adopted for a whole host of reasons, do not determine whether the State is acting as an employer for purposes of the First Amendment. The true issue is whether Illinois has a sufficient stake in, and control over, the petitioners' terms and conditions of employment to implicate *Abood*'s rationales and trigger its application. And once more, that question has a clear answer: As I have shown, Illinois negotiates all workforce-wide terms of the caregivers' employment as part of its effort to promote labor stability and effectively administer its Rehabilitation Program. As contrasted to that all-important fact, whether Illinois incurs vicarious liability for caregivers' torts, or grants them certain statutory benefits like health insurance, is beside the point. And still more so because the State and SEIU can *bargain* over most such matters; for example, as I have noted, the two have reached agreement on providing state-funded health coverage.

Further, the majority claims, "the scope of bargaining" that the SEIU may conduct for caregivers is "circumscribed" because the customer has authority over individualized employment matters like hiring and firing. But (at the risk of sounding like a broken record) so what? Most States limit the scope of permissible bargaining in the public sector—often ruling out of bounds similar, individualized decisions. Here, the scope of collective bargaining—over wages and benefits, as well as basic duties and qualifications—more than suffices to implicate the state interests justifying *Abood*. Those are the matters, after all, most likely to concern employees generally and thus most likely to affect the nature and quality of the State's workforce. The idea that *Abood* applies only if a union can bargain with the State over every issue comes from nowhere and relates to nothing in that decision—and would revolutionize public labor law.

Finally, the majority places weight on an idiosyncrasy of Illinois law: that a regulation requires uniform wages for all personal assistants. According to the majority, that means *Abood*'s free-rider rationale "has little force in the situation now before us": Even absent the duty of fair representation (requiring the union to work on behalf of all employees, members and non-members alike), the union could not bargain one employee's wages against another's.

The majority also suggests in this part of its opinion that even if the union had latitude to demand higher wages only for its own supporters, it would not do so. But why not? A rational union, in the absence of any legal obligation to the contrary, would almost surely take that approach to bargaining.

But that idea is doubly wrong. First, the Illinois regulation applies only to wages. It does not cover, for example, the significant health benefits that the SEIU has obtained for in-home caregivers, or any other benefits for which it

may bargain in the future. Nor does the regulation prevent preferential participation in the grievance process, which governs all disputes between Illinois and caregivers arising from the terms of their agreement. And second, even if the regulation covered everything subject to collective bargaining, the majority's reasoning is a non-sequitur. All the regulation would do then is serve as suspenders to the duty of fair representation's belt: That Illinois has *two* ways to ensure that the results of collective bargaining redound to the benefit of all employees serves to compound, rather than mitigate, the union's free-rider problem.

As far as I can tell, that covers the majority's reasons for distinguishing this case from *Abood*. And even when considered in combination, as the majority does, they do not succeed. What makes matters still worse is the perverse result of the majority's decision: It penalizes the State for giving disabled persons some control over their own care. If Illinois had structured the program, as it could have, to centralize every aspect of the employment relationship, no question could possibly have arisen about *Abood*'s application. Nothing should change because the State chose to respect the dignity and independence of program beneficiaries by allowing them to select and discharge, as well as supervise day-to-day, their own caregivers. A joint employer remains an employer, and here, as I have noted, Illinois kept authority over all workforce-wide terms of employment—the very issues most likely to be the subject of collective bargaining. The State thus should also retain the prerogative—as part of its effort to "ensure efficient and effective delivery of personal care services"—to require all employees to contribute fairly to their bargaining agent.

## II

Perhaps recognizing the difficulty of plausibly distinguishing this case from *Abood*, the petitioners raised a more fundamental question: the continued viability of *Abood* as to *all* public employees, even what the majority calls "full-fledged" ones.

*Abood* is not just any precedent: It is entrenched in a way not many decisions are. Over nearly four decades, we have cited *Abood* favorably numerous times, and we have repeatedly affirmed and applied its core distinction between the costs of collective bargaining (which the government can demand its employees share) and those of political activities (which it cannot). Reviewing those decisions, this Court recently—and unanimously—called the *Abood* rule "a general First Amendment principle." And indeed, the Court has relied on that rule in deciding cases involving compulsory fees outside the labor context—which today's majority reaffirms as good law. Not until two years ago, in *Knox v. Service Employees* (2012), did the Court so much as whisper (there without the benefit of briefing or argument, that it had any misgivings about *Abood*).

Perhaps still more important, *Abood* has created enormous reliance interests. More than 20 States have enacted statutes authorizing fair-share provisions, and on that basis public entities of all stripes have entered into multi-year contracts with unions containing such clauses. "*Stare decisis* has added force,"

we have held, when overturning a precedent would require "States to reexamine [and amend] their statutes."

Readers of today's decision will know that *Abood* does not rank on the majority's top-ten list of favorite precedents—and that the majority could not restrain itself from saying (and saying and saying) so. Yet they will also know that the majority could not, even after receiving full-dress briefing and argument, come up with reasons anywhere near sufficient to reverse the decision. Much has gone wrong in today's ruling, but this has not: Save for an unfortunate hiving off of ostensibly "partial-public" employees, *Abood* remains the law.

This Court, the majority insists, has never "seen *Abood* as based on *Pickering* balancing." But to rely on *Abood's* failure to cite *Pickering* more often, as the majority does, is to miss the essential point. Although stemming from different historic antecedents, the two decisions addressed variants of the same issue: the extent of the government's power to adopt employment conditions affecting expression. And as just discussed, the two gave strikingly parallel answers, providing a coherent framework to adjudicate the constitutionality of those regulations.

To the extent the majority engages with that framework, its analysis founders at the first step, in assessing the First Amendment value of the speech at issue here. A running motif of the majority opinion is that collective bargaining in the public sector raises significant questions about the level of government spending. By financing the SEIU's collective bargaining over wages and benefits, the majority suggests, in-home caregivers—whether they wish to or not—take one side in a debate about those issues.

But that view of the First Amendment interests at stake blinks decades' worth of this Court's precedent. Our decisions (tracing from *Pickering* as well as *Abood*) teach that internal workplace speech about public employees' wages, benefits, and such—that is, the prosaic stuff of collective bargaining—does not become speech of "public concern" just because those employment terms may have broader consequence. To the contrary, we have made clear that except in narrow circumstances we will not allow an employee to make a "federal constitutional issue" out of basic "employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations." Indeed, even *Abood's* original detractors conceded that an employee's interest in expressing views, within the workplace context, about "narrowly defined economic issues [like] salaries and pension benefits" is "relatively insignificant" and "weak." And nowhere has the Court ever suggested, as the majority does today, that if a certain dollar amount is at stake (but how much, exactly?), the constitutional treatment of an employee's expression becomes any different.

Consider an analogy, not involving union fees: Suppose an employee violates a government employer's work rules by demanding, at various inopportune times and places, higher wages for both himself and his co-workers (which, of course, will drive up public spending). The government employer disciplines the

employee, and he brings a First Amendment claim. Would the Court consider his speech a matter of public concern under *Pickering*? I cannot believe it would, and indeed the petitioners' own counsel joins me in that view. He maintained at oral argument that such speech would concern merely an "internal proprietary matter," thus allowing the employer to take disciplinary action. If the majority thinks otherwise, government entities across the country should prepare themselves for unprecedented limitations on their ability to regulate their workforces. But again, I doubt they need to worry, because this Court has never come close to holding that any matter of public employment affecting public spending (which is to say most such matters) becomes for that reason alone an issue of public concern. (And on the off-chance that both the petitioners and I are wrong on that score, I am doubly confident that the government would prevail under *Pickering's* balancing test.)

I can see no reason to treat the expressive interests of workers objecting to payment of union fees, like the petitioners here, as worthy of greater consideration. The subject matter of the speech is the same: wages and benefits for public employees. Or to put the point more fully: In both cases (mine and the real one), the employer is sanctioning employees for choosing either to say or not to say something respecting their terms and conditions of employment. Of course, in my hypothetical, the employer is stopping the employee from speaking, whereas in this or any other case involving union fees, the employer is forcing the employee to support such expression. But I am sure the majority would agree that that difference does not make a difference—in other words, that the "difference between compelled speech and compelled silence" is "without constitutional significance." Hence, in analyzing the kind of expression involved in this case, *Abood* corresponds to *Pickering* (and vice versa)—with each permitting a government to regulate such activity in aid of managing its workforce to provide public services.

This case in fact offers a prime illustration of how a fairshare agreement may serve important government interests. Recall that Illinois decided that collective bargaining with an exclusive representative of in-home caregivers would enable it to provide improved services through its Rehabilitation Program. The State thought such bargaining would enable it to attract a better and more stable workforce to serve disabled patients, preventing their institutionalization and thereby decreasing total state expenditures. The majority does not deny the State's legitimate interest in choosing to negotiate with an exclusive bargaining agent, in service of administering an effective program. But the majority does deny Illinois the means it reasonably deemed appropriate to effectuate that policy—a fair-share provision ensuring that the union has the funds necessary to carry out its responsibilities on behalf of in-home care-givers. The majority does so against the weight of all precedent, and based on "empirical assumption[s]," lacking any foundation. *Abood* got this matter right; the majority gets it wrong: Illinois has a more than sufficient interest, in managing its workforce and administering the Rehabilitation Program, to require employees to pay a fair share of a union's costs of collective bargaining.

### III

For many decades, Americans have debated the pros and cons of right-to-work laws and fair-share requirements. All across the country and continuing to the present day, citizens have engaged in passionate argument about the issue and have made disparate policy choices. The petitioners in this case asked this Court to end that discussion for the entire public sector, by overruling *Abood* and thus imposing a right-to-work regime for all government employees. The good news out of this case is clear: The majority declined that radical request. The Court did not, as the petitioners wanted, deprive every state and local government, in the management of their employees and programs, of the tool that many have thought necessary and appropriate to make collective bargaining work.

The bad news is just as simple: The majority robbed Illinois of that choice in administering its in-home care program. For some 40 years, *Abood* has struck a stable balance—consistent with this Court's general framework for assessing public employees' First Amendment claims— between those employees' rights and government entities' interests in managing their workforces. The majority today misapplies *Abood*, which properly should control this case. Nothing separates, for purposes of that decision, Illinois's personal assistants from any other public employees. The balance *Abood* struck thus should have defeated the petitioners' demand to invalidate Illinois's fair-share agreement. I respectfully dissent.

## Notes

1. In *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), the Court upheld an “agency shop” clause that allowed the assessment of dues on all employees insofar as they were used to finance expenditures by the union for collective bargaining, contract administration and grievance adjustment purposes. How does the Court’s decision in *Harris v. Quinn* alter *Abood*?
2. The status of *Abood* is uncertain. In January 2015, the Court granted certiorari in *Friedrichs v. Cal. Teachers Association* and certified the first question as “Should *Abood* be overruled?” Most commentators believed that the oral argument indicated that a majority of the Court was leaning toward overruling *Abood*. However, a little over a month after Justice Scalia’s death in February 2016, the equally divided Court of 8 Justices issued a per curiam opinion reading in full : “The judgment is affirmed by an equally divided Court.” Thus the Ninth Circuit’s opinion affirming the constitutionality of the California union scheme was upheld.
3. The Court in *Abood* held that the First Amendment prohibited a union (or the employer) from requiring any teacher to contribute to support of an ideological cause he might oppose as a condition of holding a job as a public school teacher. Given the Court’s discussions in *Keller* and *Southworth*, how would you advise a bar association or law school at a university regarding “ideological” causes that might be promoted?

Would this include a mandatory pro bono requirement for attorneys or law students? Or a loan forgiveness program for lawyers employed in “public interest” positions? Or “diversifying” the bar?

4. As footnote 2 in *Johanns* states, the United States Department of Agriculture has administered many similar “programs of promotional advertising, funded by checkoffs, for a number of other agricultural commodities. See 7 CFR §1205.10 et seq. (2004) (cotton); §1207.301 et seq. (potatoes); §1210.301 et seq. (watermelons); §1215.1 et seq. (popcorn); §1216.1 et seq. (peanuts); §1218.1 et seq. (blueberries); §1219.1 et seq. (Hass avocados); §1220.101 et seq. (soybeans); §1230.1 et seq. (pork); §1240.1 et seq. (honey); §1250.301 et seq. (eggs); §1280.101 et seq. (lamb).” If you have ever seen such advertising, or seen the “Beef: It’s What’s for Dinner” advertising, did you think it was sponsored by the federal government?

### C. Compelled Speech and Association

Can an anti-discrimination law or policy violate the First Amendment’s protection of freedom of association? Recall that the text of the First Amendment does not include “association” but that the concept is included within freedom of speech. There is some overlap in these cases between compelled association and compelled speech, although the speech is not necessarily direct.

#### *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* 515 U.S. 557 (1995)

SOUTER, J., DELIVERED THE OPINION FOR A UNANIMOUS COURT.

March 17 is set aside for two celebrations in South Boston. As early as 1737, some people in Boston observed the feast of the apostle to Ireland, and since 1776 the day has marked the evacuation of royal troops and Loyalists from the city, prompted by the guns captured at Ticonderoga and set up on Dorchester Heights under General Washington's command. Washington himself reportedly drew on the earlier tradition in choosing "St. Patrick" as the response to "Boston," the password used in the colonial lines on evacuation day. \*\*\* Although the General Court of Massachusetts did not officially designate March 17 as Evacuation Day until 1938, the City Council of Boston had previously sponsored public celebrations of Evacuation Day, including notable commemorations on the centennial in 1876, and on the 125th anniversary in 1901, with its parade, salute, concert, and fireworks display. \*\*\*

The tradition of formal sponsorship by the city came to an end in 1947, however, when Mayor James Michael Curley himself granted authority to organize and conduct the St. Patrick's Day Evacuation Day Parade to the petitioner South Boston Allied War Veterans Council, an unincorporated association of individuals elected from various South Boston veterans groups. Every year since that time, the Council has applied for and received a permit for the parade, which at times has included as many as 20,000 marchers and drawn up to 1 million watchers. No other applicant has ever applied for that permit. Through 1992, the city allowed the Council to use the city's official seal, and provided printing services as well as direct funding.

1992 was the year that a number of gay, lesbian, and bisexual descendants of the Irish immigrants joined together with other supporters to form the respondent organization, GLIB, to march in the parade as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals who sought to march in New York's St. Patrick's Day Parade. Although the Council denied GLIB's application to take part in the 1992 parade, GLIB obtained a state court order to include its contingent, which marched "uneventfully" among that year's 10,000 participants and 750,000 spectators.

In 1993, after the Council had again refused to admit GLIB to the upcoming parade, the organization and some of its members filed this suit against the Council, the individual petitioner John J. "Wacko" Hurley, and the City of Boston, alleging violations of the State and Federal Constitutions and of the state public accommodations law, which prohibits "any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement." After finding that "[f]or at least the past 47 years, the Parade has traveled the same basic route along the public streets of South Boston, providing entertainment, amusement, and recreation to participants and spectators alike," the state trial court ruled that the parade fell within the statutory definition of a public accommodation, which includes "any place . . . which is open to and accepts or solicits the patronage of the general public and, without limiting the generality of this definition, whether or not it be . . . (6) a boardwalk or other public highway [or] . . . (8) a place of public amusement, recreation, sport, exercise or entertainment," Mass. Gen. Laws §272:92A. The court found that the Council had no written criteria and employed no particular procedures for admission, voted on new applications in batches, had occasionally admitted groups who simply showed up at the parade without having submitted an application, and did "not generally inquire into the specific messages or views of each applicant." The court consequently rejected the Council's contention that the parade was "private" (in the sense of being exclusive), holding instead that "the lack of genuine selectivity in choosing participants and sponsors demonstrates that the Parade is a public event." It found the parade to be "eclectic," containing a wide variety of "patriotic, commercial, political, moral, artistic, religious, athletic, public service, trade union, and eleemosynary themes," as well as conflicting messages. While noting that the Council had indeed excluded the Ku Klux Klan and ROAR (an

antibusing group), it attributed little significance to these facts, concluding ultimately that "[t]he only common theme among the participants and sponsors is their public involvement in the Parade."

The court rejected the Council's assertion that the exclusion of "groups with sexual themes merely formalized [the fact] that the Parade expresses traditional religious and social values," and found the Council's "final position [to be] that GLIB would be excluded because of its values and its message, *i.e.*, its members' sexual orientation." This position, in the court's view, was not only violative of the public accommodations law but "paradoxical" as well, since "a proper celebration of St. Patrick's and Evacuation Day requires diversity and inclusiveness." The court rejected the notion that GLIB's admission would trample on the Council's First Amendment rights since the court understood that constitutional protection of any interest in expressive association would "requir[e] focus on a specific message, theme, or group" absent from the parade. "Given the [Council's] lack of selectivity in choosing participants and failure to circumscribe the marchers' message," the court found it "impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment." It concluded that the parade is "not an exercise of [the Council's] constitutionally protected right of expressive association," but instead "an open recreational event that is subject to the public accommodations law."

If there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing any message beyond the fact of the march itself. Some people might call such a procession a parade, but it would not be much of one. Real "[p]arades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration." S. DAVIS, *PARADES AND POWER: STREET THEATRE IN NINETEENTH CENTURY PHILADELPHIA* 6 (1986). Hence, we use the word "parade" to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way. Indeed a parade's dependence on watchers is so extreme that nowadays, as with Bishop Berkeley's celebrated tree, "if a parade or demonstration receives no media coverage, it may as well not have happened." Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches. In *Gregory v. Chicago* (1969), for example, petitioners had taken part in a procession to express their grievances to the city government, and we held that such a "march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment." Similarly, in *Edwards v. South Carolina* (1963), where petitioners had joined in a march of protest and pride, carrying placards and singing The Star Spangled Banner, we held that the activities "reflect an exercise of these basic constitutional rights in their most pristine and classic form."

The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression. Noting that "[s]ymbolism is a primitive but effective way of communicating ideas," *West Virginia Bd. of Ed. v. Barnette* (1943), our

cases have recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so), wearing an arm band to protest a war, *Tinker v. Des Moines Independent Community School Dist.* (1969), displaying a red flag, *Stromberg v. California* (1931), and even "[m]arching, walking or parading" in uniforms displaying the swastika, *National Socialist Party of America v. Skokie* (1977). As some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a "particularized message," cf. *Spence v. Washington* (1974) (*per curiam*), would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.

Not many marches, then, are beyond the realm of expressive parades, and the South Boston celebration is not one of them. Spectators line the streets; people march in costumes and uniforms, carrying flags and banners with all sorts of messages (*e.g.*, "England get out of Ireland," "Say no to drugs"); marching bands and pipers play, floats are pulled along, and the whole show is broadcast over Boston television. To be sure, we agree with the state courts that in spite of excluding some applicants, the Council is rather lenient in admitting participants. But a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication. Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others. *Turner Broadcasting System, Inc. v. FCC* (1994). For that matter, the presentation of an edited compilation of speech generated by other persons is a staple of most newspapers' opinion pages, which, of course, fall squarely within the core of First Amendment security, as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper. The selection of contingents to make a parade is entitled to similar protection.

Respondents' participation as a unit in the parade was equally expressive. GLIB was formed for the very purpose of marching in it, as the trial court found, in order to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade. The organization distributed a fact sheet describing the members' intentions, and the record otherwise corroborates the expressive nature of GLIB's participation. In 1993, members of GLIB marched behind a shamrock strewn banner with the simple inscription "Irish American Gay, Lesbian and Bisexual Group of Boston." GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own.

The Massachusetts public accommodations law under which respondents brought suit has a venerable history. At common law, innkeepers, smiths, and

others who "made profession of a public employment," were prohibited from refusing, without good reason, to serve a customer.

In the case before us, however, the Massachusetts law has been applied in a peculiar way. Its enforcement does not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade. The petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner. Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade. Although the state courts spoke of the parade as a place of public accommodation, once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation. Under this approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.

"Since *all* speech inherently involves choices of what to say and what to leave unsaid," *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.* (1986) (plurality opinion) (emphasis in original), one important manifestation of the principle of free speech is that one who chooses to speak may also decide "what not to say."

Petitioners' claim to the benefit of this principle of autonomy to control one's own speech is as sound as the South Boston parade is expressive. Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day. Even if this view gives the Council credit for a more considered judgment than it actively made, the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another. The message it disfavored is not difficult to identify. Although GLIB's point (like the Council's) is not wholly articulate, a contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics. The parade's organizers may

not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.

Parades and demonstrations, in contrast [to cable broadcasting] are not understood to be so neutrally presented or selectively viewed. Unlike the programming offered on various channels by a cable network, the parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience. Although each parade unit generally identifies itself, each is understood to contribute something to a common theme, and accordingly there is no customary practice whereby private sponsors disavow "any identity of viewpoint" between themselves and the selected participants. Practice follows practicability here, for such disclaimers would be quite curious in a moving parade. \* \* \* Without deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that in the context of an expressive parade, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole.

Our holding today rests not on any particular view about the Council's message but on the Nation's commitment to protect freedom of speech. Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others. Accordingly, the judgment of the Supreme Judicial Court [of Massachusetts] is reversed \* \* \*

## *Boy Scouts of America v. Dale*

530 U. S. 640 (2000)

REHNQUIST, C. J., DELIVERED THE OPINION OF THE COURT, IN WHICH O'CONNOR, SCALIA, KENNEDY, AND THOMAS, JJ., JOINED. STEVENS, J., FILED A DISSENTING OPINION, IN WHICH SOUTER, GINSBURG, AND BREYER, JJ., JOINED. SOUTER, J., FILED A DISSENTING OPINION, IN WHICH GINSBURG AND BREYER, JJ., JOINED.

CHIEF JUSTICE REHNQUIST DELIVERED THE OPINION OF THE COURT.

Petitioners are the Boy Scouts of America and the Monmouth Council, a division of the Boy Scouts of America (collectively, Boy Scouts). The Boy Scouts is a private, not-for-profit organization engaged in instilling its system of values in young people. The Boy Scouts asserts that homosexual conduct is inconsistent with the values it seeks to instill. Respondent is James Dale, a former Eagle Scout whose adult membership in the Boy Scouts was revoked when the Boy Scouts learned that he is an avowed homosexual and gay rights activist. The New Jersey Supreme Court held that New Jersey's public accommodations law requires that the Boy Scouts readmit Dale. This case

presents the question whether applying New Jersey's public accommodations law in this way violates the Boy Scouts' First Amendment right of expressive association. We hold that it does.

## I

James Dale entered Scouting in 1978 at the age of eight by joining Monmouth Council's Cub Scout Pack 142. Dale became a Boy Scout in 1981 and remained a Scout until he turned 18. By all accounts, Dale was an exemplary Scout. In 1988, he achieved the rank of Eagle Scout, one of Scouting's highest honors.

Dale applied for adult membership in the Boy Scouts in 1989. The Boy Scouts approved his application for the position of assistant scoutmaster of Troop 73. Around the same time, Dale left home to attend Rutgers University. After arriving at Rutgers, Dale first acknowledged to himself and others that he is gay. He quickly became involved with, and eventually became the copresident of, the Rutgers University Lesbian/Gay Alliance. In 1990, Dale attended a seminar addressing the psychological and health needs of lesbian and gay teenagers. A newspaper covering the event interviewed Dale about his advocacy of homosexual teenagers' need for gay role models. In early July 1990, the newspaper published the interview and Dale's photograph over a caption identifying him as the copresident of the Lesbian/ Gay Alliance.

Later that month, Dale received a letter from Monmouth Council Executive James Kay revoking his adult membership. Dale wrote to Kay requesting the reason for Monmouth Council's decision. Kay responded by letter that the Boy Scouts "specifically forbid membership to homosexuals."

In 1992, Dale filed a complaint against the Boy Scouts in the New Jersey Superior Court. The complaint alleged that the Boy Scouts had violated New Jersey's public accommodations statute and its common law by revoking Dale's membership based solely on his sexual orientation. New Jersey's public accommodations statute prohibits, among other things, discrimination on the basis of sexual orientation in places of public accommodation. \*\*\* The New Jersey Supreme Court affirmed the judgment of the Appellate Division [in Dale's favor].

## II

In *Roberts v. United States Jaycees* (1984), we observed that "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas. Government actions that may unconstitutionally burden this freedom may take many forms, one of which is "intrusion into the internal structure or affairs of an association" like a "regulation that forces the group to accept members it does not desire." Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, "[f]reedom of association . . . plainly presupposes a freedom not to associate."

The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a

significant way the group's ability to advocate public or private viewpoints. But the freedom of expressive association, like many freedoms, is not absolute. We have held that the freedom could be overridden "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."

To determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in "expressive association." The First Amendment's protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private.

Because this is a First Amendment case where the ultimate conclusions of law are virtually inseparable from findings of fact, we are obligated to independently review the factual record to ensure that the state court's judgment does not unlawfully intrude on free expression. See *Hurley*. The record reveals the following. The Boy Scouts is a private, nonprofit organization. According to its mission statement:

"It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential.

"The values we strive to instill are based on those found in the Scout Oath and Law:

"Scout Oath

"On my honor I will do my best "To do my duty to God and my country "and to obey the Scout Law; "To help other people at all times; "To keep myself physically strong, "mentally awake, and morally straight.

"A Scout is: "Trustworthy "Loyal "Helpful "Friendly "Courteous "Kind

"Scout Law

Obedient Cheerful Thrifty Brave Clean Reverent. "

Thus, the general mission of the Boy Scouts is clear: "[T]o instill values in young people." The Boy Scouts seeks to instill these values by having its adult leaders spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing. During the time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts' values—both expressly and by example. It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity. See *Roberts* (O'Connor, J., concurring) ("Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement").

Given that the Boy Scouts engages in expressive activity, we must determine whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints. This inquiry necessarily requires us first to explore, to a limited extent, the nature of the Boy Scouts' view of homosexuality.

The values the Boy Scouts seeks to instill are "based on" those listed in the

Scout Oath and Law. The Boy Scouts explains that the Scout Oath and Law provide “a positive moral code for living; they are a list of ‘do’s’ rather than ‘don’ts.’” The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms “morally straight” and “clean.”

Obviously, the Scout Oath and Law do not expressly mention sexuality or sexual orientation. And the terms “morally straight” and “clean” are by no means self-defining. Different people would attribute to those terms very different meanings. For example, some people may believe that engaging in homosexual conduct is not at odds with being “morally straight” and “clean.” And others may believe that engaging in homosexual conduct is contrary to being “morally straight” and “clean.” The Boy Scouts says it falls within the latter category.

The New Jersey Supreme Court analyzed the Boy Scouts’ beliefs and found that the “exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy Scouts’ commitment to a diverse and ‘representative’ membership . . . [and] contradicts Boy Scouts’ overarching objective to reach ‘all eligible youth.’” The court concluded that the exclusion of members like Dale “appears antithetical to the organization’s goals and philosophy.” But our cases reject this sort of inquiry; it is not the role of the courts to reject a group’s expressed values because they disagree with those values or find them internally inconsistent.

The Boy Scouts asserts that it “teach[es] that homosexual conduct is not morally straight,” and that it does “not want to promote homosexual conduct as a legitimate form of behavior.” We accept the Boy Scouts’ assertion. We need not inquire further to determine the nature of the Boy Scouts’ expression with respect to homosexuality. But because the record before us contains written evidence of the Boy Scouts’ view- point, we look to it as instructive, if only on the question of the sincerity of the professed beliefs.

We cannot doubt that the Boy Scouts sincerely holds this view.

We must then determine whether Dale’s presence as an assistant scoutmaster would significantly burden the Boy Scouts’ desire to not “promote homosexual conduct as a legitimate form of behavior.” As we give deference to an association’s assertions regarding the nature of its expression, we must also give deference to an association’s view of what would impair its expression. That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have “become leaders in their community and are open and honest about their sexual orientation.” Dale was the copresident of a gay and lesbian organization at college and remains a gay rights activist. Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.

*Hurley* is illustrative on this point. There we considered whether the application of Massachusetts’ public accommodations law to require the organizers of a

private St. Patrick's Day parade to include among the marchers an Irish-American gay, lesbian, and bisexual group, GLIB, violated the parade organizers' First Amendment rights. We noted that the parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner. \*\*\*

Here, we have found that the Boy Scouts believes that homo- sexual conduct is inconsistent with the values it seeks to instill in its youth members; it will not "promote homosexual conduct as a legitimate form of behavior." As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scout's choice not to propound a point of view contrary to its beliefs.

The New Jersey Supreme Court determined that the Boy Scouts' ability to disseminate its message was not significantly affected by the forced inclusion of Dale as an assistant scoutmaster because of the following findings:

"Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating *any* views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality."

We disagree with the New Jersey Supreme Court's conclusion drawn from these findings.

First, associations do not have to associate for the "purpose" of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection. For example, the purpose of the St. Patrick's Day parade in *Hurley* was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude certain participants nonetheless.

Second, even if the Boy Scouts discourages Scout leaders from disseminating views on sexual issues—a fact that the Boy Scouts disputes with contrary evidence—the First Amendment protects the Boy Scouts' method of expression. If the Boy Scouts wishes Scout leaders to avoid questions of sexuality and teach only by example, this fact does not negate the sincerity of its belief discussed above.

Third, the First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be "expressive association." The Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes. In this same vein, Dale makes much of the claim that the Boy Scouts does not revoke the membership of heterosexual Scout leaders that openly disagree with the Boy Scouts' policy on sexual orientation. But if this is true, it is irrelevant. The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment right to choose to send one message but not the other. The fact that the organization does not trumpet

its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.

Having determined that the Boy Scouts is an expressive association and that the forced inclusion of Dale would significantly affect its expression, we inquire whether the application of New Jersey's public accommodations law to require that the Boy Scouts accept Dale as an assistant scoutmaster runs afoul of the Scouts' freedom of expressive association. We conclude that it does.

In *Hurley*, we applied traditional First Amendment analysis to hold that the application of the Massachusetts public accommodations law to a parade violated the First Amendment rights of the parade organizers. Although we did not explicitly deem the parade in *Hurley* an expressive association, the analysis we applied there is similar to the analysis we apply here. We have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.

We are not, as we must not be, guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message. "While the law is free to pro- mote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."

The judgment of the New Jersey Supreme Court is reversed. \*\*\*

JUSTICE STEVENS, WITH WHOM JUSTICE SOUTER, JUSTICE GINSBURG, AND JUSTICE BREYER JOIN, DISSENTING.

\*\*\* The majority holds that New Jersey's law violates BSA's right to associate and its right to free speech. But that law does not "impos[e] any serious burdens" on BSA's "collective effort on behalf of [its] shared goals," nor does it force BSA to communicate any message that it does not wish to endorse. New Jersey's law, therefore, abridges no constitutional right of BSA.

\*\*\* In this case, BSA contends that it teaches the young boys who are Scouts that homosexuality is immoral. Consequently, it argues, it would violate its right to associate to force it to admit homosexuals as members, as doing so would be at odds with its own shared goals and values. This contention, quite plainly, requires us to look at what, exactly, are the values that BSA actually teaches.

BSA's mission statement reads as follows: "It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in

achieving their full potential.” Its federal charter declares its purpose is “to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred values, using the methods which were in common use by Boy Scouts on June 15, 1916.” BSA describes itself as having a “representative membership,” which it defines as “boy membership [that] reflects proportionately the characteristics of the boy population of its service area.” In particular, the group emphasizes that “[n]either the charter nor the by-laws of the Boy Scouts of America permits the exclusion of any boy. . . . To meet these responsibilities we have made a commitment that our membership shall be representative of *all* the population in every community, district, and council.” (emphasis in original).

To instill its shared values, BSA has adopted a “Scout Oath” and a “Scout Law” setting forth its central tenets. For example, the Scout Law requires a member to promise, among other things, that he will be “obedient.” Accompanying definitions for the terms found in the Oath and Law are provided in the Boy Scout Handbook and the Scoutmaster Handbook. For instance, the Boy Scout Handbook defines “obedient” as follows:

“A Scout is OBEDIENT. A Scout follows the rules of his family, school, and troop. He obeys the laws of his community and country. If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them.”

To bolster its claim that its shared goals include teaching that homosexuality is wrong, BSA directs our attention to two terms appearing in the Scout Oath and Law. The first is the phrase “morally straight,” which appears in the Oath (“On my honor I will do my best . . . To keep myself . . . morally straight”); the second term is the word “clean,” which appears in a list of 12 characteristics together constituting the Scout Law.

The Boy Scout Handbook defines “morally straight,” as such:

“To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant.”

The Scoutmaster Handbook emphasizes these points about being “morally straight”:

“In any consideration of moral fitness, a key word has to be ‘courage.’ A boy’s courage to do what his head and his heart tell him is right. And the courage to refuse to do what his heart and his head say is wrong. Moral fitness, like emotional fitness, will clearly present opportunities for wise guidance by an alert Scoutmaster.”

As for the term “clean,” the Boy Scout Handbook offers the following:

“A Scout is CLEAN. A Scout keeps his body and mind fit and clean. He chooses the company of those who live by these same ideals. He helps keep his home and community clean.”

“You never need to be ashamed of dirt that will wash off. If you play hard and work hard you can’t help getting dirty. But when the game is over or the work is done, that kind of dirt disappears with soap and water. “There’s another kind of dirt that won’t come off by washing. It is the kind that shows up in foul language and harmful thoughts.

“Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are targets of insults.” (emphasis in original).

It is plain as the light of day that neither one of these principles—“morally straight” and “clean”—says the slightest thing about homosexuality. Indeed, neither term in the Boy Scouts’ Law and Oath expresses any position whatsoever on sexual matters.

BSA’s published guidance on that topic underscores this point. Scouts, for example, are directed to receive their sex education at home or in school, but not from the organization: “Your parents or guardian or a sex education teacher should give you the facts about sex that you must know.” To be sure, Scouts are not forbidden from asking their Scoutmaster about issues of a sexual nature, but Scoutmasters are, literally, the last person Scouts are encouraged to ask: “If you have questions about growing up, about relationships, sex, or making good decisions, ask. Talk with your parents, religious leaders, teachers, or Scoutmaster.” Moreover, Scoutmasters are specifically directed to steer curious adolescents to other sources of information:

“If Scouts ask for information regarding . . . sexual activity, answer honestly and factually, but stay within your realm of expertise and comfort. If a Scout has serious concerns that you cannot answer, refer him to his family, religious leader, doctor, or other professional.”

More specifically, BSA has set forth a number of rules for Scoutmasters when these types of issues come up:

“You may have boys asking you for information or advice about sexual matters. . . . “How should you handle such matters? “Rule number 1: *You do not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life. The reasons are that it is not construed to be Scouting’s proper area, and that you are probably not well qualified to do this.*

“Rule number 2: If Scouts come to you to ask questions or to seek advice, you would give it within your competence. A boy who appears to be asking about sexual intercourse, however, may really only be worried about his pimples, so it is well to find out just what information is needed.

“Rule number 3: You should refer boys with sexual problems to persons better qualified than you [are] to handle them. If the boy has a spiritual leader or a doctor who can deal with them, he should go there. If such persons are not available, you may just have to do the best you can. But don’t try to play a highly professional role. And at the other extreme, avoid passing the buck.”

In light of BSA’s self-proclaimed ecumenism, furthermore, it is even more difficult to discern any shared goals or common moral stance on homosexuality. Insofar as religious matters are concerned, BSA’s bylaws state that it is

“absolutely nonsectarian in its attitude toward . . . religious training.” “The BSA does not define what constitutes duty to God or the practice of religion. This is the responsibility of parents and religious leaders.” In fact, many diverse religious organizations sponsor local Boy Scout troops. Because a number of religious groups do not view homosexuality as immoral or wrong and reject discrimination against homosexuals,<sup>3</sup> it is exceedingly difficult to believe that BSA nonetheless adopts a single particular religious or moral philosophy when it comes to sexual orientation. This is especially so in light of the fact that Scouts are advised to seek guidance on sexual matters from their religious leaders (and Scoutmasters are told to refer Scouts to them); BSA surely is aware that some religions do not teach that homosexuality is wrong.

## II

The Court seeks to fill the void by pointing to a statement of “policies and procedures relating to homosexuality and Scouting,” signed by BSA’s President and Chief Scout Executive in 1978 and addressed to the members of the Executive Committee of the national organization. The letter says that the BSA does “not believe that homosexuality and leadership in Scouting are appropriate.” But when the *entire* 1978 letter is read, BSA’s position is far more equivocal:

“4. Q. May an individual who openly declares himself to be a homosexual be employed by the Boy Scouts of America as a professional or non-professional?”

“A. Boy Scouts of America does not knowingly employ homosexuals as professionals or non-professionals. We are unaware of any present laws which would prohibit this policy.

“5. Q. Should a professional or non-professional individual who openly declares himself to be a homosexual be terminated?”

“A. Yes, *in the absence of any law to the contrary*. At the present time we are unaware of any statute or ordinance in the United States which prohibits discrimination against individual’s employment upon the basis of homosexuality. *In the event that such a law was applicable, it would be necessary for the Boy Scouts of America to obey it, in this case as in Paragraph 4 above*. It is our position, however, that homosexuality and professional or non-professional employment in Scouting are not appropriate.”

Four aspects of the 1978 policy statement are relevant to the proper disposition of this case. First, at most this letter simply adopts an exclusionary membership policy. But simply adopting such a policy has never been considered sufficient, by itself, to prevail on a right to associate claim.

Second, the 1978 policy was never publicly expressed—unlike, for example, the Scout’s duty to be “obedient.” It was an internal memorandum, never circulated beyond the few members of BSA’s Executive Committee. It remained, in effect, a secret Boy Scouts policy. Far from claiming any intent to express an idea that would be burdened by the presence of homosexuals, BSA’s *public* posture—to the world and to the Scouts themselves—remained what it had always been: one of tolerance, welcoming all classes of boys and young men. In this respect, BSA’s claim is even weaker than those we have rejected in the past.

Third, it is apparent that the draftsmen of the policy statement foresaw the possibility that laws against discrimination might one day be amended to

protect homosexuals from employment discrimination. Their statement clearly provided that, in the event such a law conflicted with their policy, a Scout's duty to be "obedient" and "obe[y] the laws," even if "he thinks [the laws] are unfair," would prevail in such a contingency. \*\*\*

Fourth, the 1978 statement simply says that homosexuality is not "appropriate." It makes no effort to connect that statement to a shared goal or expressive activity of the Boy Scouts. Whatever values BSA seeks to instill in Scouts, the idea that homosexuality is not "appropriate" appears entirely unconnected to, and is mentioned nowhere in, the myriad of publicly declared values and creeds of the BSA. That idea does not appear to be among any of the principles actually taught to Scouts. Rather, the 1978 policy appears to be no more than a private statement of a few BSA executives that the organization wishes to exclude gays—and that wish has nothing to do with any expression BSA actually engages in.

The majority also relies on four other policy statements that were issued between 1991 and 1993. All of them were written and issued *after* BSA revoked Dale's membership. Accordingly, they have little, if any, relevance to the legal question before this Court. In any event, they do not bolster BSA's claim.

It is clear, then, that nothing in these policy statements supports BSA's claim. The only policy written before the revocation of Dale's membership was an equivocal, undisclosed statement that evidences no connection between the group's discriminatory intentions and its expressive interests. The later policies demonstrate a brief—though ultimately abandoned—attempt to tie BSA's exclusion to its expression, but other than a single sentence, BSA fails to show that it ever taught Scouts that homosexuality is not "morally straight" or "clean," or that such a view was part of the group's collective efforts to foster a belief. Furthermore, BSA's policy statements fail to establish any clear, consistent, and unequivocal position on homosexuality. Nor did BSA have any reason to think Dale's sexual *conduct*, as opposed to his orientation, was contrary to the group's values.

### III

BSA's claim finds no support in our cases. We have recognized "a right to associate for the purpose of engaging in those activities protected by the First Amendment— speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts*, 468 U.S., at 618. And we have acknowledged that "when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association . . . may be implicated." But "[t]he right to associate for expressive purposes is not . . . absolute"; rather, "the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which . . . the constitutionally protected liberty is at stake in a given case." In- deed, the right to associate does not mean "that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution." For example, we have routinely and easily rejected assertions of this right by expressive organizations with discriminatory membership policies, such as private schools, law firms, and labor organizations. In fact, until today, we have never once found a claimed

right to associate in the selection of members to prevail in the face of a State's anti-discrimination law. To the contrary, we have squarely held that a State's antidiscrimination law does not violate a group's right to associate simply because the law conflicts with that group's exclusionary membership policy.

In *Roberts v. United States Jaycees* (1984), we addressed just such a conflict. The Jaycees was a non-profit membership organization "designed to inculcate in the individual membership . . . a spirit of genuine American-ism and civic interest, and . . . to provide . . . an avenue for intelligent participation by young men in the affairs of their community." The organization was divided into local chapters, described as "young men's organization[s]," in which regular membership was restricted to males between the ages of 18 and 35. But Minnesota's Human Rights Act, which applied to the Jaycees, made it unlawful to "deny any person the full and equal enjoyment of . . . a place of public accommodation because of . . . sex." The Jaycees, however, claimed that applying the law to it violated its right to associate—in particular its right to maintain its selective membership policy.

We rejected that claim. Cautioning that the right to associate is not "absolute," we held that "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." We found the State's purpose of eliminating discrimination is a compelling state interest that is unrelated to the suppression of ideas. We also held that Minnesota's law is the least restrictive means of achieving that interest. The Jaycees had "failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association." Though the Jaycees had "taken public positions on a number of diverse issues, [and] . . . regularly engage in a variety of . . . activities worthy of constitutional protection under the First Amendment," there was "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views." "The Act," we held, "requires no change in the Jaycees' creed of promoting the interest of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members."

The evidence before this Court makes it exceptionally clear that BSA has, at most, simply adopted an exclusionary membership policy and has no shared goal of disapproving of homosexuality. BSA's mission statement and federal charter say nothing on the matter; its official membership policy is silent; its Scout Oath and Law—and accompanying definitions—are devoid of any view on the topic; its guidance for Scouts and Scoutmasters on sexuality declare that such matters are "not construed to be Scouting's proper area," but are the province of a Scout's parents and pastor; and BSA's posture respecting religion tolerates a wide variety of views on the issue of homosexuality. Moreover, there is simply no evidence that BSA otherwise teaches anything in this area, or that it instructs Scouts on matters involving homosexuality in ways not conveyed in the Boy Scout or Scoutmaster Handbooks. In short, Boy Scouts of America is simply silent on homosexuality. There is no shared goal or collective effort to foster a belief about homosexuality at all—let alone one that is significantly

burdened by admitting homosexuals.

Equally important is BSA's failure to adopt any clear position on homosexuality. BSA's temporary, though ultimately abandoned, view that homosexuality is incompatible with being "morally straight" and "clean" is a far cry from the clear, unequivocal statement necessary to prevail on its claim. Despite the solitary sentences in the 1991 and 1992 policies, the group continued to disclaim any single religious or moral position as a general matter and actively eschewed teaching any lesson on sexuality. It also continued to define "morally straight" and "clean" in the Boy Scout and Scout-master Handbooks without any reference to homosexuality. As noted earlier, nothing in our cases suggests that a group can prevail on a right to expressive association if it, effectively, speaks out of both sides of its mouth. A State's anti-discrimination law does not impose a "serious burden" or a "substantial restraint" upon the group's "shared goals" if the group itself is unable to identify its own stance with any clarity.

#### IV

The majority pretermits this entire analysis. It finds that BSA in fact "teach[es] that homosexual conduct is not morally straight." This conclusion, remarkably, rests entirely on statements in BSA's briefs. Moreover, the majority insists that we must "give deference to an association's assertions regarding the nature of its expression" and "we must also give deference to an association's view of what would impair its expression." \*\*\*

This is an astounding view of the law. I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further. It is even more astonishing in the First Amendment area, because, as the majority itself acknowledges, "we are obligated to independently review the factual record." It is an odd form of independent review that consists of deferring entirely to whatever a litigant claims. But the majority insists that our inquiry must be "limited," because "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."

But nothing in our cases calls for this Court to do any such thing. An organization can adopt the message of its choice, and it is not this Court's place to disagree with it. But we must inquire whether the group is, in fact, expressing a message (whatever it may be) and whether that message (if one is expressed) is significantly affected by a State's antidiscrimination law. More critically, that inquiry requires our *independent* analysis, rather than deference to a group's litigating posture. Reflection on the subject dictates that such an inquiry is required.

Surely there are instances in which an organization that truly aims to foster a belief at odds with the purposes of a State's antidiscrimination laws will have a First Amendment right to association that precludes forced compliance with those laws. But that right is not a freedom to discriminate at will, nor is it a right to maintain an exclusionary membership policy simply out of fear of what the public reaction would be if the group's membership were opened up. It is an implicit right designed to protect the enumerated rights of the First Amendment, not a license to act on any discriminatory impulse. To prevail in asserting a

right of expressive association as a defense to a charge of violating an anti-discrimination law, the organization must at least show it has adopted and advocated an unequivocal position inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude. If this Court were to defer to whatever position an organization is prepared to assert in its briefs, there would be no way to mark the proper boundary between genuine exercises of the right to associate, on the one hand, and sham claims that are simply attempts to insulate nonexpressive private discrimination, on the other hand.

## V

Even if BSA's right to associate argument fails, it nonetheless might have a First Amendment right to refrain from including debate and dialogue about homosexuality as part of its mission to instill values in Scouts. It can, for example, advise Scouts who are entering adulthood and have questions about sex to talk "with your parents, religious leaders, teachers, or Scoutmaster," and, in turn, it can direct Scoutmasters who are asked such questions "not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life" because "it is not construed to be Scouting's proper area." Dale's right to advocate certain beliefs in a public forum or in a private debate does not include a right to advocate these ideas when he is working as a Scoutmaster. And BSA cannot be compelled to include a message about homosexuality among the values it actually chooses to teach its Scouts, if it would prefer to remain silent on that subject.

In *West Virginia Bd. of Ed. v. Barnette* (1943), we recognized that the government may not "requir[e] affirmation of a belief and an attitude of mind," nor "force an American citizen publicly to profess any statement of belief," even if doing so does not require the person to "forego any contrary convictions of their own." "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley*. Though the majority mistakenly treats this statement as going to the right to associate, it actually refers to a free speech claim. See *Hurley* (noting distinction between free speech and right to associate claims). As with the right to associate claim, though, the court is obligated to engage in an independent inquiry into whether the mere inclusion of homosexuals would actually force BSA to proclaim a message it does not want to send.

In its briefs, BSA implies, even if it does not directly argue, that Dale would use his Scoutmaster position as a "bully pulpit" to convey immoral messages to his troop, and therefore his inclusion in the group would compel BSA to include a message it does not want to impart. Even though the majority does not endorse that argument, I think it is important to explain why it lacks merit, before considering the argument the majority does accept.

BSA has not contended, nor does the record support, that Dale had ever advocated a view on homosexuality to his troop before his membership was revoked.

Though *Hurley* has a superficial similarity to the present case, a close inspection reveals a wide gulf between that case and the one before us today.

First, it was critical to our analysis that GLIB was actually conveying a message by participating in the parade—otherwise, the parade organizers could hardly claim that they were being forced to include any unwanted message at all. Our conclusion that GLIB was conveying a message was inextricably tied to the fact that GLIB wanted to march in a parade, as well as the manner in which it intended to march. We noted the “inherent expressiveness of marching [in a parade] to make a point,” and in particular that GLIB was formed for the purpose of making a particular point about gay pride. More specifically, GLIB “distributed a fact sheet describing the members’ intentions” and, in a previous parade, had “marched behind a shamrock-strewn banner with the simple inscription ‘Irish American Gay, Lesbian and Bisexual Group of Boston.’” “[A] contingent marching behind the organization’s banner,” we said, would clearly convey a message. Indeed, we expressly distinguished between the members of GLIB, who marched as a unit to express their views about their own sexual orientation, on the one hand, and homosexuals who might participate as individuals in the parade without intending to express anything about their sexuality by doing so.

Second, we found it relevant that GLIB’s message “would likely be perceived” as the parade organizers’ own speech. That was so because “[p]arades and demonstrations . . . are not understood to be so neutrally presented or selectively viewed” as, say, a broadcast by a cable operator, who is usually considered to be “merely ‘a conduit’ for the speech” produced by others. Rather, parade organizers are usually understood to make the “customary determination about a unit admitted to the parade.”

Dale’s inclusion in the Boy Scouts is nothing like the case in *Hurley*. His participation sends no cognizable message to the Scouts or to the world. Unlike GLIB, Dale did not carry a banner or a sign; he did not distribute any factsheet; and he expressed no intent to send any message. If there is any kind of message being sent, then, it is by the mere act of joining the Boy Scouts. Such an act does not constitute an instance of symbolic speech under the First Amendment.

It is true, of course, that some acts are so imbued with symbolic meaning that they qualify as “speech” under the First Amendment. See *United States v. O’Brien* (1968). At the same time, however, “[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” Though participating in the Scouts could itself conceivably send a message on some level, it is not the kind of act that we have recognized as speech. Indeed, if merely joining a group did constitute symbolic speech; and such speech were attributable to the group being joined; and that group has the right to exclude that speech (and hence, the right to exclude that person from joining), then the right of free speech effectively becomes a limitless right to exclude for every organization, whether or not it engages in *any* expressive activities. That cannot be, and never has been, the law.

Furthermore, it is not likely that BSA would be understood to send any message, either to Scouts or to the world, simply by admitting someone as a member. Over the years, BSA has generously welcomed over 87 million young Americans into its ranks. In 1992 over one million adults were active BSA

members. The notion that an organization of that size and enormous prestige implicitly endorses the views that each of those adults may express in a non-Scouting context is simply mind boggling. Indeed, in this case there is no evidence that the young Scouts in Dale's troop, or members of their families, were even aware of his sexual orientation, either before or after his public statements at Rutgers University. It is equally farfetched to assert that Dale's open declaration of his homosexuality, reported in a local newspaper, will effectively force BSA to send a message to anyone simply because it allows Dale to be an Assistant Scoutmaster. For an Olympic gold medal winner or a Wimbledon tennis champion, being "openly gay" perhaps communicates a message—for example, that openness about one's sexual orientation is more virtuous than concealment; that a homosexual person can be a capable and virtuous person who should be judged like anyone else; and that homosexuality is not immoral— but it certainly does not follow that they necessarily send a message on behalf of the organizations that sponsor the activities in which they excel.\*\*\*

JUSTICE SOUTER, WITH WHOM JUSTICE GINSBURG AND JUSTICE BREYER JOIN, DISSENTING. [OMITTED]

## Notes

1. The Court in *Hurley* is unanimous while the Justices in *Dale* are closely divided, with Justice Souter, the author of the Court's opinion in *Hurley*, joining the four dissenting Justices in *Dale*. (Justice Souter also writes separately to emphasize that what one feels about homosexuality is not pertinent). What are the distinctions the dissenters draw between the St Patrick's Day parade and the organization of the Boy Scouts? Between GLIB and James Dale?
2. Notice the analytic structure in both *Hurley* and *Dale*. First, the plaintiffs must be engaged in speech or association that has a "message." Second, the person who seeks to be included must also be engaged in speech that has a "message." Third, those messages must be different, so that the plaintiffs are being forced to "say" something they would not otherwise say.
3. In *Elane Photography LLC v. Wilcox*, 309 P.3d 53 (N.M. 2013), the New Mexico Supreme Court held that a photography company violated a state anti-discrimination law when it refused to photograph a same-sex wedding. The court rejected the First Amendment free speech claim of compelled speech derived from "two lines" of cases, concluding that the photographers were not being compelled to speak the government's message (as in *Barnette* and *Wooley*) or being compelled to include a third parties' message that would change its own (as in *Hurley* and *Dale*).

4. As you read the next case, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, consider whether it is more like *Barnette/Wooley* or more like *Hurley/Dale*. Also consider the role of “unconstitutional conditions” in the Court’s analysis.

### III. Combining Unconstitutional Conditions and Compelled Speech

#### *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*

547 U.S. 47 (2006)

ROBERTS, C.J., DELIVERED THE OPINION OF THE COURT, IN WHICH ALL OTHER MEMBERS JOINED, EXCEPT ALITO, J., WHO TOOK NO PART IN THE CONSIDERATION OR DECISION OF THE CASE.

CHIEF JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

When law schools began restricting the access of military recruiters to their students because of disagreement with the Government’s policy on homosexuals in the military, Congress responded by enacting the Solomon Amendment. See 10 U. S. C. §983 (Supp. 2005). That provision specifies that if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds. The law schools responded by suing, alleging that the Solomon Amendment infringed their First Amendment freedoms of speech and association. The District Court disagreed but was reversed by a divided panel of the Court of Appeals for the Third Circuit, which ordered the District Court to enter a preliminary injunction against enforcement of the Solomon Amendment. We granted certiorari.

#### I

Respondent Forum for Academic and Institutional Rights, Inc. (FAIR), is an association of law schools and law faculties. Its declared mission is “to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education.” FAIR members have adopted policies expressing their opposition to discrimination based on, among other factors, sexual orientation. They would like to restrict military recruiting on their campuses because they object to the policy Congress has adopted with respect to homosexuals in the military. The Solomon Amendment, however, forces institutions to choose between enforcing their nondiscrimination policy against military recruiters in this way and continuing to receive specified federal funding.

## II

The Solomon Amendment denies federal funding to an institution of higher education that “has a policy or practice . . . that either prohibits, or in effect prevents” the military “from gaining access to campuses, or access to students . . . on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.” The statute provides an exception for an institution with “a longstanding policy of pacifism based on historical religious affiliation.” The Government and FAIR agree on what this statute requires: In order for a law school and its university to receive federal funding, the law school must offer military recruiters the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access.

## III

The Constitution grants Congress the power to “provide for the common Defence,” “[t]o raise and support Armies,” and “[t]o provide and maintain a Navy.” Art. I, §8, cls. 1, 12–13. Congress’ power in this area “is broad and sweeping,” and there is no dispute in this case that it includes the authority to require campus access for military recruiters. That is, of course, unless Congress exceeds constitutional limitations on its power in enacting such legislation. But the fact that legislation that raises armies is subject to First Amendment constraints does not mean that we ignore the purpose of this legislation when determining its constitutionality; \*\*\* “judicial deference . . . is at its apogee” when Congress legislates under its authority to raise and support armies.

Although Congress has broad authority to legislate on matters of military recruiting, it nonetheless chose to secure campus access for military recruiters indirectly, through its Spending Clause power. The Solomon Amendment gives universities a choice: Either allow military recruiters the same access to students afforded any other recruiter or forgo certain federal funds. Congress’ decision to proceed indirectly does not reduce the deference given to Congress in the area of military affairs. Congress’ choice to promote its goal by creating a funding condition deserves at least as deferential treatment as if Congress had imposed a mandate on universities.

Congress’ power to regulate military recruiting under the Solomon Amendment is arguably greater because universities are free to decline the federal funds. In *Grove City College v. Bell* (1984), we rejected a private college’s claim that conditioning federal funds on its compliance with Title IX of the Education Amendments of 1972 violated the First Amendment. We thought this argument “warrant[ed] only brief consideration” because “Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept.” We concluded that no First Amendment violation had occurred—without reviewing the substance of the First Amendment claims—because Grove City could decline the Government’s funds.

Other decisions, however, recognize a limit on Congress’ ability to place conditions on the receipt of funds. We recently held that “the government may

not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.” *United States v. American Library Assn., Inc.* (2003). Under this principle, known as the unconstitutional conditions doctrine, the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students.

This case does not require us to determine when a condition placed on university funding goes beyond the “reasonable” choice offered in *Grove City* and becomes an unconstitutional condition. It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly. Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment’s access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds.

#### A

The Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military’s congressionally mandated employment policy, all the while retaining eligibility for federal funds. See Tr. of Oral Arg. 25 (Solicitor General acknowledging that law schools “could put signs on the bulletin board next to the door, they could engage in speech, they could help organize student protests”). As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must do—afford equal access to military recruiters—not what they may or may not say.

Nevertheless, the Third Circuit concluded that the Solomon Amendment violates law schools’ freedom of speech in a number of ways. First, in assisting military recruiters, law schools provide some services, such as sending e-mails and distributing flyers, that clearly involve speech. The Court of Appeals held that in supplying these services law schools are unconstitutionally compelled to speak the Government’s message. Second, military recruiters are, to some extent, speaking while they are on campus. The Court of Appeals held that, by forcing law schools to permit the military on campus to express its message, the Solomon Amendment unconstitutionally requires law schools to host or accommodate the military’s speech. Third, although the Court of Appeals thought that the Solomon Amendment regulated speech, it held in the alternative that, if the statute regulates conduct, this conduct is expressive and regulating it unconstitutionally infringes law schools’ right to engage in expressive conduct. We consider each issue in turn.

#### 1

Some of this Court’s leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say. In *West Virginia Bd. of Ed. v. Barnette* (1943), we held unconstitutional a state law requiring schoolchildren to recite the Pledge of Allegiance and to salute the flag. And in *Wooley v. Maynard* (1977), we held unconstitutional another that required New Hampshire motorists to display the state motto—“Live Free or Die”—on their license plates.

The Solomon Amendment does not require any similar expression by law

schools. Nonetheless, recruiting assistance provided by the schools often includes elements of speech. For example, schools may send e-mails or post notices on bulletin boards on an employer's behalf. Law schools offering such services to other recruiters must also send e-mails and post notices on behalf of the military to comply with the Solomon Amendment. As FAIR points out, these compelled statements of fact ("The U. S. Army recruiter will meet interested students in Room 123 at 11 a.m."), like compelled statements of opinion, are subject to First Amendment scrutiny.

This sort of recruiting assistance, however, is a far cry from the compelled speech in *Barnette* and *Wooley*. The Solomon Amendment, unlike the laws at issue in those cases, does not dictate the content of the speech at all, which is only "compelled" if, and to the extent, the school provides such speech for other recruiters. There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse.

The compelled speech to which the law schools point is plainly incidental to the Solomon Amendment's regulation of conduct, and "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading "White Applicants Only" hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct. See *R. A. V. v. St. Paul*, (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct"). Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto "Live Free or Die," and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.

2

Our compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message. We have also in a number of instances limited the government's ability to force one speaker to host or accommodate another speaker's message. \*\*\*

The compelled-speech violation in each of our prior cases, however, resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate. The expressive nature of a parade was central to our holding in *Hurley*. We concluded that because "every participating unit affects the message conveyed by the [parade's] private organizers," a law dictating that a particular group must be included in the parade "alter[s] the expressive content of th[e] parade." As a result, we held that the State's public accommodation law, as applied to a private parade, "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."

In this case, accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions. Unlike a parade organizer's choice of

parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs. A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.

The schools respond that if they treat military and nonmilitary recruiters alike in order to comply with the Solomon Amendment, they could be viewed as sending the message that they see nothing wrong with the military's policies, when they do. We rejected a similar argument in *PruneYard Shopping Center v. Robins* (1980). In that case, we upheld a state law requiring a shopping center owner to allow certain expressive activities by others on its property. We explained that there was little likelihood that the views of those engaging in the expressive activities would be identified with the owner, who remained free to disassociate himself from those views and who was "not . . . being compelled to affirm [a] belief in any governmentally prescribed position or view."

The same is true here. Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies. We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy. Surely students have not lost that ability by the time they get to law school.

3

Having rejected the view that the Solomon Amendment impermissibly regulates speech, we must still consider whether the expressive nature of the conduct regulated by the statute brings that conduct within the First Amendment's protection. In *O'Brien*, we recognized that some forms of " 'symbolic speech' " were deserving of First Amendment protection. But we rejected the view that "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." Instead, we have extended First Amendment protection only to conduct that is inherently expressive. In *Texas v. Johnson* (1989), for example, we applied *O'Brien* and held that burning the American flag was sufficiently expressive to warrant First Amendment protection.

Unlike flag burning, the conduct regulated by the Solomon Amendment is not inherently expressive. Prior to the adoption of the Solomon Amendment's equal-access requirement, law schools "expressed" their disagreement with the military by treating military recruiters differently from other recruiters. But these actions were expressive only because the law schools accompanied their conduct with speech explaining it. For example, the point of requiring military interviews to be conducted on the undergraduate campus is not "overwhelmingly apparent." An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that

they would rather interview someplace else.

The expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it. The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien*. If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into "speech" simply by talking about it. For instance, if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, we would have to apply *O'Brien* to determine whether the Tax Code violates the First Amendment. Neither *O'Brien* nor its progeny supports such a result.

Although the Third Circuit also concluded that *O'Brien* does not apply, it held in the alternative that the Solomon Amendment does not pass muster under *O'Brien* because the Government failed to produce evidence establishing that the Solomon Amendment was necessary and effective. The Court of Appeals surmised that "the military has ample resources to recruit through alternative means," suggesting "loan repayment programs" and "television and radio advertisements." As a result, the Government—according to the Third Circuit—failed to establish that the statute's burden on speech is no greater than essential to furthering its interest in military recruiting.

We disagree with the Court of Appeals' reasoning and result. We have held that "an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." The Solomon Amendment clearly satisfies this requirement. Military recruiting promotes the substantial Government interest in raising and supporting the Armed Forces—an objective that would be achieved less effectively if the military were forced to recruit on less favorable terms than other employers. The Court of Appeals' proposed alternative methods of recruiting are beside the point. The issue is not whether other means of raising an army and providing for a navy might be adequate. That is a judgment for Congress, not the courts. It suffices that the means chosen by Congress add to the effectiveness of military recruitment. Accordingly, even if the Solomon Amendment were regarded as regulating expressive conduct, it would not violate the First Amendment under *O'Brien*.

## B

The Solomon Amendment does not violate law schools' freedom of speech, but the First Amendment's protection extends beyond the right to speak. We have recognized a First Amendment right to associate for the purpose of speaking, which we have termed a "right of expressive association." See, *e.g.*, *Boy Scouts of America v. Dale* (2000). The reason we have extended First Amendment protection in this way is clear: The right to speak is often exercised most effectively by combining one's voice with the voices of others. See *Roberts v. United States Jaycees* (1984). If the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect.

FAIR argues that the Solomon Amendment violates law schools' freedom of

expressive association. According to FAIR, law schools' ability to express their message that discrimination on the basis of sexual orientation is wrong is significantly affected by the presence of military recruiters on campus and the schools' obligation to assist them. Relying heavily on our decision in *Dale*, the Court of Appeals agreed.

The Solomon Amendment, however, does not similarly affect a law school's associational rights. To comply with the statute, law schools must allow military recruiters on campus and assist them in whatever way the school chooses to assist other employers. Law schools therefore "associate" with military recruiters in the sense that they interact with them. But recruiters are not part of the law school. Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association. This distinction is critical. Unlike the public accommodations law in *Dale*, the Solomon Amendment does not force a law school "to accept members it does not desire." The law schools say that allowing military recruiters equal access impairs their own expression by requiring them to associate with the recruiters, but just as saying conduct is undertaken for expressive purposes cannot make it symbolic speech, so too a speaker cannot "erect a shield" against laws requiring access "simply by asserting" that mere association "would impair its message."

FAIR correctly notes that the freedom of expressive association protects more than just a group's membership decisions. For example, we have held laws unconstitutional that require disclosure of membership lists for groups seeking anonymity, *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)* (1982), or impose penalties or withhold benefits based on membership in a disfavored group, *Healy v. James* (1972). Although these laws did not directly interfere with an organization's composition, they made group membership less attractive, raising the same First Amendment concerns about affecting the group's ability to express its message.

The Solomon Amendment has no similar effect on a law school's associational rights. Students and faculty are free to associate to voice their disapproval of the military's message; nothing about the statute affects the composition of the group by making group membership less desirable. The Solomon Amendment therefore does not violate a law school's First Amendment rights. A military recruiter's mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message.

In this case, FAIR has attempted to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect. The law schools object to having to treat military recruiters like other recruiters, but that regulation of conduct does not violate the First Amendment. To the extent that the Solomon Amendment incidentally affects expression, the law schools' effort to cast themselves as just like the schoolchildren in *Barnette*, the parade organizers in *Hurley*, and the Boy Scouts in *Dale* plainly overstates the expressive nature of their activity and the impact of the Solomon Amendment on it, while exaggerating the reach of our First Amendment precedents.

Because Congress could require law schools to provide equal access to military

recruiters without violating the schools' freedoms of speech or association, the Court of Appeals erred in holding that the Solomon Amendment likely violates the First Amendment. We therefore reverse the judgment of the Third Circuit \*\*\*.

## *Agency for International Development v. Alliance for Open Society International, Inc.*

570 US \_\_\_ (2013)

ROBERTS, C. J., DELIVERED THE OPINION OF THE COURT, IN WHICH KENNEDY, GINSBURG, BREYER, ALITO, AND SOTOMAYOR, JJ., JOINED. SCALIA, J., FILED A DISSENTING OPINION, IN WHICH THOMAS, J., JOINED. KAGAN, J., TOOK NO PART IN THE CONSIDERATION OR DECISION OF THE CASE.

CHIEF JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act) outlined a comprehensive strategy to combat the spread of HIV/AIDS around the world. As part of that strategy, Congress authorized the appropriation of billions of dollars to fund efforts by nongovernmental organizations to assist in the fight. The Act imposes two related conditions on that funding: First, no funds made available by the Act “may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.” And second, no funds may be used by an organization “that does not have a policy explicitly opposing prostitution and sex trafficking.” This case concerns the second of these conditions, referred to as the Policy Requirement. The question is whether that funding condition violates a recipient’s First Amendment rights.

### I

Congress passed the Leadership Act in 2003 after finding that HIV/AIDS had “assumed pandemic proportions, spreading from the most severely affected regions, sub-Saharan Africa and the Caribbean, to all corners of the world, and leaving an unprecedented path of death and devastation.” According to congressional findings, more than 65 million people had been infected by HIV and more than 25 million had lost their lives, making HIV/AIDS the fourth highest cause of death worldwide. In sub-Saharan Africa alone, AIDS had claimed the lives of more than 19 million individuals and was projected to kill a full quarter of the population of that area over the next decade. The disease not only directly endangered those infected, but also increased the potential for social and political instability and economic devastation, posing a security issue for the entire international community.

In the Leadership Act, Congress directed the President to establish a “comprehensive, integrated” strategy to combat HIV/AIDS around the world. The Act sets out 29 different objectives the President’s strategy should seek to fulfill, reflecting a multitude of approaches to the problem. The strategy must include, among other things, plans to increase the availability of treatment for infected individuals, prevent new infections, support the care of those affected by the disease, promote training for physicians and other health care workers,

and accelerate research on HIV/AIDS prevention methods, all while providing a framework for cooperation with international organizations and partner countries to further the goals of the program.

The Act “make[s] the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts.” The Act’s approach to reducing behavioral risks is multi-faceted. The President’s strategy for addressing such risks must, for example, promote abstinence, encourage monogamy, increase the availability of condoms, promote voluntary counseling and treatment for drug users, and, as relevant here, “educat[e] men and boys about the risks of procuring sex commercially” as well as “promote alternative livelihoods, safety, and social reintegration strategies for commercial sex workers.” Congress found that the “sex industry, the trafficking of individuals into such industry, and sexual violence” were factors in the spread of the HIV/AIDS epidemic, and determined that “it should be the policy of the United States to eradicate” prostitution and “other sexual victimization.”

The United States has enlisted the assistance of non- governmental organizations to help achieve the many goals of the program. Such organizations “with experience in health care and HIV/AIDS counseling,” Congress found, “have proven effective in combating the HIV/AIDS pandemic and can be a resource in . . . provid[ing] treatment and care for individuals infected with HIV/AIDS.” Since 2003, Congress has authorized the appropriation of billions of dollars for funding these organizations’ fight against HIV/AIDS around the world.

Those funds, however, come with two conditions: First, no funds made available to carry out the Leadership Act “may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.” Second, no funds made available may “provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except . . . to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.” It is this second condition—the Policy Requirement—that is at issue here.

The Department of Health and Human Services (HHS) and the United States Agency for International Development (USAID) are the federal agencies primarily responsible for overseeing implementation of the Leadership Act. To enforce the Policy Requirement, the agencies have directed that the recipient of any funding under the Act agree in the award document that it is opposed to “prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children.”

## II

Respondents are a group of domestic organizations engaged in combating HIV/AIDS overseas. In addition to substantial private funding, they receive billions annually in financial assistance from the United States, including under the Leadership Act. Their work includes programs aimed at limiting injection drug use in Uzbekistan, Tajikistan, and Kyrgyzstan, preventing mother-to-child HIV transmission in Kenya, and promoting safer sex practices in India. Respondents fear that adopting a policy explicitly opposing

prostitution may alienate certain host governments, and may diminish the effectiveness of some of their programs by making it more difficult to work with prostitutes in the fight against HIV/AIDS. They are also concerned that the Policy Requirement may require them to censor their privately funded discussions in publications, at conferences, and in other forums about how best to prevent the spread of HIV/AIDS among prostitutes.

In 2005, respondents Alliance for Open Society International and Pathfinder International commenced this litigation, seeking a declaratory judgment that the Government's implementation of the Policy Requirement violated their First Amendment rights. Respondents sought a preliminary injunction barring the Government from cutting off their funding under the Act for the duration of the litigation, from unilaterally terminating their cooperative agreements with the United States, or from otherwise taking action solely on the basis of respondents' own privately funded speech. The District Court granted such a preliminary injunction, and the Government appealed.

While the appeal was pending, HHS and USAID issued guidelines on how recipients of Leadership Act funds could retain funding while working with affiliated organizations not bound by the Policy Requirement. The guidelines permit funding recipients to work with affiliated organizations that "engage[] in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking" as long as the recipients retain "objective integrity and independence from any affiliated organization." Whether sufficient separation exists is determined by the totality of the circumstances, including "but not . . . limited to" (1) whether the organizations are legally separate; (2) whether they have separate personnel; (3) whether they keep separate accounting records; (4) the degree of separation in the organizations' facilities; and (5) the extent to which signs and other forms of identification distinguish the organizations.

The Court of Appeals summarily remanded the case to the District Court to consider whether the preliminary injunction was still appropriate in light of the new guidelines. On remand, the District Court issued a new preliminary injunction along the same lines as the first, and the Government renewed its appeal.

The Court of Appeals affirmed, concluding that respondents had demonstrated a likelihood of success on the merits of their First Amendment challenge under this Court's "unconstitutional conditions" doctrine. Under this doctrine, the court reasoned, "the government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance." And a condition that compels recipients "to espouse the government's position" on a subject of international debate could not be squared with the First Amendment. The court concluded that "the Policy Requirement, as implemented by the Agencies, falls well beyond what the Supreme Court . . . ha[s] upheld as permissible funding conditions."

Judge Straub dissented, expressing his view that the Policy Requirement was an "entirely rational exercise of Congress's powers pursuant to the Spending Clause."

We granted certiorari.

### III

The Policy Requirement mandates that recipients of Leadership Act funds explicitly agree with the Government's policy to oppose prostitution and sex trafficking. It is, however, a basic First Amendment principle that "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (2006) (citing *West Virginia Bd. of Ed. v. Barnette* (1943), and *Wooley v. Maynard* (1977)). "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." Were it enacted as a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment. The question is whether the Government may nonetheless impose that requirement as a condition on the receipt of federal funds.

#### A

The Spending Clause of the Federal Constitution grants Congress the power "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, §8, cl. 1. The Clause provides Congress broad discretion to tax and spend for the "general Welfare," including by funding particular state or private programs or activities. That power includes the authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends. *Rust v. Sullivan* (1991) ("Congress' power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use.").

As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights.

At the same time, however, we have held that the Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." In some cases, a funding condition can result in an unconstitutional burden on First Amendment rights.

The dissent thinks that can only be true when the condition is not relevant to the objectives of the program (although it has its doubts about that), or when the condition is actually coercive, in the sense of an offer that cannot be refused. \*\*\* Our precedents, however, are not so limited. In the present context, the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself. The line is hardly clear, in part because the definition of a particular program can always be manipulated to subsume the challenged condition. We have held, however, that "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to

a simple semantic exercise.” *Legal Services Corporation v. Velazquez* (2001).

## B

As noted, the distinction drawn in these cases—between conditions that define the federal program and those that reach outside it—is not always self-evident. As Justice Cardozo put it in a related context, “Definition more precise must abide the wisdom of the future.” *Steward Machine Co. v. Davis*, 301 U. S. 548, 591 (1937). Here, however, we are confident that the Policy Requirement falls on the unconstitutional side of the line.

To begin, it is important to recall that the Leadership Act has two conditions relevant here. The first—unchallenged in this litigation—prohibits Leadership Act funds from being used “to promote or advocate the legalization or practice of prostitution or sex trafficking.” \*\*\*

The Policy Requirement therefore must be doing something more—and it is. The dissent views the Requirement as simply a selection criterion by which the Government identifies organizations “who believe in its ideas to carry them to fruition.” As an initial matter, whatever purpose the Policy Requirement serves in selecting funding recipients, its effects go beyond selection. The Policy Requirement is an ongoing condition on recipients’ speech and activities, a ground for terminating a grant after selection is complete. In any event, as the Government acknowledges, it is not simply seeking organizations that oppose prostitution. Rather, it explains, “Congress has expressed its purpose ‘to eradicate’ prostitution and sex trafficking, and it wants recipients to *adopt* a similar stance” (emphasis added). This case is not about the Government’s ability to enlist the assistance of those with whom it already agrees. It is about compelling a grant recipient to adopt a particular belief as a condition of funding.

By demanding that funding recipients adopt—as their own—the Government’s view on an issue of public concern, the condition by its very nature affects “protected conduct outside the scope of the federally funded program.” *Rust*. A recipient cannot avow the belief dictated by the Policy Requirement when spending Leadership Act funds, and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime. By requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient.

The Government contends that the affiliate guidelines, established while this litigation was pending, save the program. Under those guidelines, funding recipients are permitted to work with affiliated organizations that do not abide by the condition, as long as the recipients retain “objective integrity and independence” from the unfettered affiliates. The Government suggests the guidelines alleviate any unconstitutional burden on the respondents’ First Amendment rights by allowing them to either: (1) accept Leadership Act funding and comply with Policy Requirement, but establish affiliates to communicate contrary views on prostitution; or (2) decline funding themselves (thus remaining free to express their own views or remain neutral), while creating affiliates whose sole purpose is to receive and administer Leadership Act funds, thereby “cabin[ing] the effects” of the Policy Requirement within the scope of the

federal program.

Neither approach is sufficient. When we have noted the importance of affiliates in this context, it has been because they allow an organization bound by a funding condition to exercise its First Amendment rights outside the scope of the federal program. Affiliates cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own. If the affiliate is distinct from the recipient, the arrangement does not afford a means for the recipient to express its beliefs. If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy. The guidelines themselves make that clear. See 45 CFR §89.3 (allowing funding recipients to work with affiliates whose conduct is “inconsistent with the *recipient’s opposition* to the practices of prostitution and sex trafficking” (emphasis added)).

The Government suggests that the Policy Requirement is necessary because, without it, the grant of federal funds could free a recipient’s private funds “to be used to promote prostitution or sex trafficking.” That argument assumes that federal funding will simply supplant private funding, rather than pay for new programs or expand existing ones. The Government offers no support for that assumption as a general matter, or any reason to believe it is true here. \*\*\*

The Government cites but one case to support that argument, *Holder v. Humanitarian Law Project*. That case concerned the quite different context of a ban on providing material support to terrorist organizations, where the record indicated that support for those organizations’ nonviolent operations was funneled to support their violent activities.

Pressing its argument further, the Government contends that “if organizations awarded federal funds to implement Leadership Act programs could at the same time promote or affirmatively condone prostitution or sex trafficking, whether using public or private funds, it would undermine the government’s program and confuse its message opposing prostitution and sex trafficking.” But the Policy Requirement goes beyond preventing recipients from using private funds in a way that would undermine the federal program. It requires them to pledge allegiance to the Government’s policy of eradicating prostitution. As to that, we cannot improve upon what Justice Jackson wrote for the Court 70 years ago: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *Barnette*.

The Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program. In so doing, it violates the First Amendment and cannot be sustained. The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, WITH WHOM JUSTICE THOMAS JOINS, DISSENTING.

The Leadership Act provides that “any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking” may not receive

funds appropriated under the Act. This Policy Requirement is nothing more than a means of selecting suitable agents to implement the Government's chosen strategy to eradicate HIV/AIDS. That is perfectly permissible under the Constitution.

The First Amendment does not mandate a viewpoint-neutral government. Government must choose between rival ideas and adopt some as its own: competition over cartels, solar energy over coal, weapon development over disarmament, and so forth. Moreover, the government may enlist the assistance of those who believe in its ideas to carry them to fruition; and it need not enlist for that purpose those who oppose or do not support the ideas. That seems to me a matter of the most common common sense. For example: One of the purposes of America's foreign-aid programs is the fostering of good will towards this country. If the organization Hamas—reputed to have an efficient system for delivering welfare—were excluded from a program for the distribution of U. S. food assistance, no one could reasonably object. And that would remain true if Hamas were an organization of United States citizens entitled to the protection of the Constitution. So long as the unfunded organization remains free to engage in its activities (including anti-American propaganda) “without federal assistance,” refusing to make use of its assistance for an enterprise to which it is opposed does not abridge its speech. And the same is true when the rejected organization is not affirmatively opposed to, but merely unsupportive of, the object of the federal program, which appears to be the case here. (Respondents do not promote prostitution, but neither do they wish to oppose it.) A federal program to encourage healthy eating habits need not be administered by the American Gourmet Society, which has nothing against healthy food but does not insist upon it.

The argument is that this commonsense principle will enable the government to discriminate against, and injure, points of view to which it is opposed. Of course the Constitution does not prohibit government spending that discriminates against, and injures, points of view to which the government is opposed; every government program which takes a position on a controversial issue does that. Anti-smoking programs injure cigar aficionados, programs encouraging sexual abstinence injure free-love advocates, etc. The constitutional prohibition at issue here is not a prohibition against discriminating against or injuring opposing points of view, but the First Amendment's prohibition against the coercing of speech. I am frankly dubious that a condition for eligibility to participate in a minor federal program such as this one runs afoul of that prohibition even when the condition is irrelevant to the goals of the program. Not every disadvantage is a coercion.

But that is not the issue before us here. Here the views that the Government demands an applicant forswear—or that the Government insists an applicant favor—are relevant to the program in question. The program is valid only if the Government is entitled to disfavor the opposing view (here, advocacy of or toleration of prostitution). And if the program can disfavor it, so can the selection of those who are to administer the program. There is no risk that this principle will enable the Government to discriminate arbitrarily against positions it disfavors. It would not, for example, permit the Government to exclude from bidding on defense contracts anyone who refuses to abjure

prostitution. But here a central part of the Government's HIV/AIDS strategy is the suppression of prostitution, by which HIV is transmitted. It is entirely reasonable to admit to participation in the program only those who believe in that goal.

According to the Court, however, this transgresses a constitutional line between conditions that operate inside a spending program and those that control speech outside of it. I am at a loss to explain what this central pillar of the Court's opinion—this distinction that the Court itself admits is “hardly clear” and “not always self-evident,” —has to do with the First Amendment. The distinction was alluded to, to be sure, in *Rust v. Sullivan* (1991), but not as (what the Court now makes it) an invariable requirement for First Amendment validity. That the pro-abortion speech prohibition was limited to “inside the program” speech was relevant in *Rust* because the program itself was not an anti-abortion program. The Government remained neutral on that controversial issue, but did not wish abortion to be promoted within its family-planning-services program. The statutory objective could not be impaired, in other words, by “outside the program” pro-abortion speech. The purpose of the limitation was to prevent Government funding from providing the *means* of pro-abortion propaganda, which the Government did not wish (and had no constitutional obligation) to provide. The situation here is vastly different. Elimination of prostitution is an objective of the HIV/AIDS program, and *any* promotion of prostitution— whether made inside or outside the program—does harm the program.

Of course the most obvious manner in which the admission to a program of an ideological opponent can frustrate the purpose of the program is by freeing up the opponent's funds for use in its ideological opposition. To use the Hamas example again: Subsidizing that organization's provision of social services enables the money that it would otherwise use for that purpose to be used, instead, for anti-American propaganda. Perhaps that problem does not exist in this case since the respondents do not affirmatively promote prostitution. But the Court's analysis categorically rejects that justification for ideological requirements in all cases, demanding “record indica[tion]” that “federal funding will simply supplant private funding, rather than pay for new programs.” This seems to me quite naive. Money is fungible. The economic reality is that when NGOs can conduct their AIDS work on the Government's dime, they can expend greater resources on policies that undercut the Leadership Act. The Government need not establish by record evidence that this will happen. To make it a valid consideration in determining participation in federal programs, it suffices that this is a real and obvious risk.

The Court makes a head-fake at the unconstitutional conditions doctrine, but that doctrine is of no help. There is no case of ours in which a condition that is relevant to a statute's valid purpose and that is not in itself unconstitutional (e.g., a religious-affiliation condition that violates the Establishment Clause) has been held to violate the doctrine. Moreover, as I suggested earlier, the contention that the condition here “coerces” respondents' speech is on its face implausible. Those organizations that wish to take a different tack with respect to prostitution “are as unconstrained now as they were before the enactment of [the Leadership Act].” As the Court acknowledges, “[a]s a general matter, if a

party objects to a condition on the receipt of federal funding, its recourse is to decline the funds,” and to draw on its own coffers.

The majority cannot credibly say that this speech condition is coercive, so it does not. It pussyfoots around the lack of coercion by invalidating the Leadership Act for “requiring recipients to profess a specific belief” and “*demanding* that funding recipients adopt—as their own—the Government’s view on an issue of public concern.” But like King Cnut’s commanding of the tides, here the Government’s “requiring” and “demanding” have no coercive effect. In the end, and in the circumstances of this case, “compell[ing] *as a condition* of federal funding the affirmation of a belief,” is no compulsion at all. It is the reasonable price of admission to a limited government-spending program that each organization remains free to accept or reject. \*\*\*

Ideological-commitment requirements such as the one here are quite rare; but making the choice between competing applicants on relevant ideological grounds is undoubtedly quite common. As far as the Constitution is concerned, it is quite impossible to distinguish between the two. If the government cannot demand a relevant ideological commitment as a condition of application, neither can it distinguish between applicants on a relevant ideological ground. And that is the real evil of today’s opinion. One can expect, in the future, frequent challenges to the denial of government funding for relevant ideological reasons.

The Court’s opinion contains stirring quotations from cases like *West Virginia Bd. of Ed. v. Barnette* (1943), and *Turner Broadcasting System, Inc. v. FCC* (1994). They serve only to distract attention from the elephant in the room: that the Government is not forcing *anyone* to say *anything*. What Congress has done here—requiring an ideological commitment relevant to the Government task at hand—is approved by the Constitution itself. Americans need not support the Constitution; they may be Communists or anarchists. But “[t]he Senators and Representatives . . . , and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support [the] Constitution.” U. S. Const., Art. VI, cl. 3. The Framers saw the wisdom of imposing affirmative ideological commitments prerequisite to assisting in the government’s work. And so should we.

## Notes

1. In *USAID v. Alliance for Open Society*, the Court explicitly recognizes the doctrine of unconstitutional conditions in the First Amendment free speech context. The Court articulates the “relevant distinction” as “between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize” (which would be presumably constitutional) and “conditions that seek to leverage funding to regulate speech outside the contours of the program itself” (which could be unconstitutional). As the Court states, this “line is hardly clear, in part because the definition of a

particular program can always be manipulated to subsume the challenged condition.”

If you were a Congressperson who wanted to enact a new version of The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act (Leadership Act), how might you “manipulate” a program within the Act to “subsume” the condition of the anti-prostitution pledge?

2. Given the inside/outside distinction in USAID, how would this have applied if the Court had found a First Amendment violation in *Rumsfeld v. FAIR*? Recall that the Solomon Amendment penalized failure of the law school to include military recruiters as denying funding from the Departments of Defense, Homeland Security, Transportation, Labor, Health and Human Services, and Education, and the Central Intelligence Agency and the National Nuclear Security Administration of the Department of Energy universitywide.

3. An “unconstitutional conditions” challenge requires government funding and speech. A compelled speech challenge requires government compulsion to speak, either by conveying the government’s message or by including the speech of third parties. These doctrines can overlap with other doctrines, including forum and time, place, or manner doctrines discussed in the next chapter.

# Chapter Seven: FORUMS AND TIME, PLACE, MANNER RESTRICTIONS

This chapter considers the doctrines of “public forums” (as opposed to private property) and “time place or manner” (TPM) (as opposed to content). These doctrines - - - which often intersect - - - have developed to govern situations in which the government is regulating speech in a variety of contexts including protests, leafleting, state-sponsored groups, and the particularly vexing problem of signs. The possibility of government speaking rather than regulating operates as an “escape clause” to these doctrines.

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Notes

# I. Historical Perspectives on Public Assembly and Public Forums

## *Note: The Assembly Clause*

Recall that the text of the First Amendment provides “Congress shall make no law . . . . abridging . . . the right of the people peaceably to assemble.”

The Assembly Clause has not been given a robust role in First Amendment doctrine. Perhaps this is unsurprising given the history of its inclusion in the text. The following is adapted from RUTHANN ROBSON, *DRESSING CONSTITUTIONALLY* (2013):

When the members of the First Congress debated including the right to assemble in what is now the First Amendment, Representative Theodore Sedgwick of Massachusetts argued that the assembly clause was unnecessary: it was encompassed by the speech clause; it was self-evident; it would never be called into question; and it was derogatory to the dignity of the House of Representatives to descend into such minutiae. In support of all his arguments, Sedgwick contended the amendment might just as well declare “a man should have a right to wear his hat if he pleased.”

It proved not to be the best analogy. As Representative John Page noted, just as “a man has been obliged to pull off his hat when he appeared before the face of authority,” so too have people “been prevented from assembling together on their lawful occasions.” This reference had tremendous resonance for the members of the First Congress who would have understood it as alluding to William Penn’s famous trial. A decade before Penn would receive the large land grant in America that would become the state of Pennsylvania, Penn and his co-defendant William Mead were prosecuted in England for “tumultuous assembly” and disturbing the peace. They had preached outside a Quaker meeting house that had recently been closed by Restoration regulations limiting religious dissent from the recently re-established Church of England. Originally a pamphlet and purported trial transcript, *The Peoples Ancient and Just Liberties Asserted, In the Tryal of William Penn and William Mead at the Old Bailey, 22 Charles II 1670, written by themselves*, became an essential American document. It portrayed Penn and Mead as heroes seeking their rights as Englishmen under the Magna Carta but stymied by arbitrary officials in the King’s court.

Their hats were central to this portrait. As Quakers, Penn and Mead denied so-called “hat honor,” the male practice of doffing one’s cap to a superior including removing one’s hat in court. The refusal of hat honor, intended to challenge hierarchy, had become a well-known characteristic of the Quakers; a fair number of Quakers had been beaten, jailed, whipped, or fined because of their practice by the time of the Penn and Mead trial. Thus, this colloquy was not surprising:

RECORDER. Do you know where you are?

PENN. Yes.

RECORDER. Do you know it is the King's Court?

PENN. I know it to be a Court, and I suppose it to be the King's Court.

RECORDER. Do you not know there is respect due to the Court?

PENN. Yes.

RECORDER. Why do you not pay it then?

PENN. I do so.

RECORDER. Why do you not put off your hat then?

PENN. Because I do not believe that to be any respect.

RECORDER. Well, the Court sets forty marks a piece upon your heads as a fine for your contempt of the Court.

However, shortly before this interchange, Penn and Mead had been waiting, hatless, for their case to be called. When an official noticed their hats were off, he ordered an officer to “put on their hats again.” Seemingly, this command was merely for the purpose of immediately issuing the order to Penn to remove his hat, an order the court would have known as problematic for the Quaker William Penn. Immediately after the Recorder’s fine, Penn and Mead both spoke:

PENN. I desire it might be observed, that we came into the Court with our hats off (that is, taken off) and if they have been put on since, it was by order from the Bench, and therefore not we but the Bench should be fined.

MEAD. I have a question to ask the Recorder. Am I fined also?

RECORDER. Yes.

MEAD. I desire the jury and all people to take notice of this injustice of the recorder, who spake not to me to pull off my hat, and yet hath he put a fine upon my head.

The court’s actions regarding the hats - - - provocative, arbitrary, and lacking the essentials of fairness - - - set the scene for the remaining injustices of the trial, the eventual jury acquittal, the prosecution of the jurors for that acquittal, and the imprisonment of Penn and Mead for contempt for failure to remove their hats.

Thus, Representative Sedgwick’s comparison of the right to wear or not wear a hat and the right to assembly as equally trivial rights was not likely to be accepted by those familiar with the Penn and Mead trial. Sedgwick’s motion to strike “assembly” from the text of the First Amendment failed by a large margin. But perhaps Sedgwick was correct. Recent constitutional doctrine tends to support the argument that assembly is mere surplusage and the right is encompassed by freedom of speech, although there is an argument that the Assembly Clause should be more relevant. See John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TULANE LAW REVIEW 565 (2010).

## ***Davis v. Commonwealth of Massachusetts***

167 U.S. 43 (1897)

WHITE [EDWARD DOUGLAS], J., DELIVERED THE OPINION FOR A UNANIMOUS COURT.

[Revised Ordinances of the City of Boston (1893), Section 66 provided:

Sec. 66. No person shall, in or upon any of the public grounds, make any public address, discharge any cannon or firearm, expose for sale any goods, wares or merchandise, erect or maintain any booth, stand, tent or apparatus for the purposes of public amusement or show, except in accordance with a permit from the mayor.

The Court held “A city ordinance providing that no person shall make any public address in any of the public grounds of the city, ‘except in accordance with a permit from the mayor,’ does not violate the fourteenth amendment to the constitution of the United States.”]

It is therefore conclusively determined there was no right in the plaintiff in error to use the common except in such mode and subject to such regulations as the legislature, in its wisdom may have deemed proper to prescribe. The fourteenth amendment to the constitution of the United States does not destroy the power of the states to enact police regulations as to the subjects within their control and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the state.

The assertion that, although it be conceded that the power existed in the state or municipality to absolutely control the use of the common, the particular ordinance in question is nevertheless void, because arbitrary and unreasonable, in that it vests in the mayor the power to determine when he will grant a permit, in truth, while admitting on the one hand the power to control, on the other denies its existence. The right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser. The finding of the court of last resort of the state of Massachusetts, being that no particular right was possessed by the plaintiff in error to the use of the common, is in reason, therefore, conclusive of the controversy which the record presents, entirely aside from the fact that the power conferred upon the chief executive officer of the city of Boston by the ordinance in question may be fairly claimed to be a mere administrative function vested in the mayor in order to effectuate the purpose for which the common was maintained and by which its use was regulated. The plaintiff in error cannot avail himself of the right granted by the state, and yet obtain exemption from the lawful regulations to which this right on his part was subjected by law.

### ***Hague v. Committee for Industrial Organization [CIO]***

307 U.S. 496 (1939)

ROBERTS, J., DELIVERED THE OPINION IN WHICH BLACK, J., CONCURS. STONE, J., ISSUED AN OPINION IN WHICH REED, J., CONCURS. HUGHES, C.J., ISSUED A CONCURRING OPINION. McREYNOLDS, J., AND BUTLER, J., ISSUED DISSENTING OPINIONS. FRANKFURTER, J., AND DOUGLAS, J., TOOK NO PART IN THE CONSIDERATION OR DECISION OF THE CASE.

ROBERTS, J. :

We granted certiorari as the case presents important questions in respect of the asserted privilege and immunity of citizens of the United States to advocate action pursuant to a federal statute, by distribution of printed matter and oral discussion in peaceable assembly; and the jurisdiction of federal courts of suits to restrain the abridgment of such privilege and immunity. The respondents individual citizens, unincorporated labor organizations composed of such citizens and a membership corporation, brought suit in the United States District Court against the petitioners, the Mayor, the Director of Public Safety, and the Chief of Police of Jersey City, New Jersey, and the Board of Commissioners, the governing body of the city.

The bill alleges that acting under a city ordinance forbidding the leasing of any hall, without a permit from the Chief of Police, for a public meeting at which a speaker shall advocate obstruction of the Government of the United States or a state, or a change of government by other than lawful means, the petitioners, and their subordinates, have denied respondents the right to hold lawful meetings in Jersey City on the ground that they are Communists or Communist organizations; that pursuant to an unlawful plan, the petitioners have caused the eviction from the municipality of persons they considered undesirable because of their labor organization activities, and have announced that they will continue so to do. It further alleges that acting under an ordinance which forbids any person to 'distribute or cause to be distributed or strewn about any street or public place any newspapers, paper, periodical, book magazine, circular, card or pamphlet', the petitioners have discriminated against the respondents by prohibiting and interfering with distribution of leaflets and pamphlets by the respondents while permitting others to distribute similar printed matter; that pursuant to a plan and conspiracy to deny the respondents their Constitutional rights as citizens of the United States, the petitioners have caused respondents, and those acting with them, to be arrested for distributing printed matter in the streets, and have caused them, and their associates, to be carried beyond the limits of the city or to remote places therein, and have compelled them to board ferry boats destined for New York; have, with violence and force, interfered with the distribution of pamphlets discussing the rights of citizens under the National Labor Relations Act, 29 U.S.C. 151 et seq.; have unlawfully searched persons coming into the city and seized printed matter in their possession; have arrested and prosecuted respondents, and those acting with them, for attempting to distribute such printed matter; and have threatened that if respondents attempt to hold public meetings in the city to discuss rights afforded by the National Labor Relations Act, they would be arrested; and unless restrained, the petitioners will continue in their unlawful conduct. The bill further alleges that respondents have repeatedly applied for permits to hold public meetings in the city for the stated purpose, as required by ordinance,<sup>1</sup> although they do not admit the validity of the ordinance; but in execution of a common plan and purpose, the petitioners have consistently refused to issue any permits for meetings to be held by, or sponsored by, respondents, and have thus prevented the holding of such meetings; that the respondents did not, and do not, purpose to advocate the destruction or overthrow of the government of the United States, or that of New Jersey, but that their sole purpose is to explain to workingmen the purposes of the National Labor Relations act, the benefits to be derived from it, and the aid which the Committee for Industrial Organization would furnish workingmen to that end; and all the activities in which they seek to engage in Jersey City were, and are, to be performed peacefully, without intimidation, fraud, violence, or other unlawful methods.

The bill charges that the suit is to redress 'the deprivation, under color of state law, statute and ordinance, of rights privileges and immunities secured by the Constitution of the United States and of rights secured by laws of the United States providing for equal rights of citizens of the United States ....' It charges that the petitioners' conduct 'is in violation of their (respondents) rights and privileges as guaranteed by the Constitution of the United States.' It alleges that

the petitioners' conduct has been 'in pursuance of an unlawful conspiracy ... to injure oppress threaten and intimidate citizens of the United States, including the individual plaintiffs herein, ... in the free exercise and enjoyment of the rights and privileges secured to them by the Constitution and laws of the United States. ...'

The bill charges that the ordinances are unconstitutional and void, or are being enforced against respondents in an unconstitutional and discriminatory way; and that the petitioners, as officials of the city, purporting to act under the ordinances, have deprived respondents of the privileges of free speech and peaceable assembly secured to them, as citizens of the United States, by the Fourteenth Amendment \*\*\*

The question now presented is whether freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against State abridgment by Section 1 of the Fourteenth Amendment \*\*\* This is the narrow question presented by the record, and we confine our decision to it, without consideration of broader issues which the parties urge. The bill, the answer and the findings fully present the question. The bill alleges, and the findings sustain the allegation, that the respondents had no other purpose than to inform citizens of Jersey City by speech, and by the written word, respecting matters growing out of national legislation, the constitutionality of which this court has sustained.

Although it has been held that the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against state abridgment, it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects. \*\*\*

We have no occasion to determine whether, on the facts disclosed, the *Davis* Case [*Davis v. Commonwealth of Massachusetts* (1897)] was rightly decided, but we cannot agree that it rules the instant case. Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

We think the court below was right in holding the ordinance \*\*\* void upon its face. It does not make comfort or convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.' It can thus, as the record discloses, be made the instrument of

arbitrary suppression of free expression of views on national affairs for the prohibition of all speaking will undoubtedly 'prevent' such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right.

MR. JUSTICE STONE.

I do not doubt that the decree below, modified as has been proposed, is rightly affirmed, but I am unable to follow the path by which some of my brethren have attained that end, and I think the matter is of sufficient importance to merit discussion in some detail.

It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment, *Gitlow v. New York* (1925); *Whitney v. California* (1927) \*\*\* . It has never been held that either is a privilege or immunity peculiar to citizenship of the United States, to which alone the privileges and immunities clause refers, and neither can be brought within the protection of that clause without enlarging the category of privileges and immunities of United States citizenship as it has hitherto been defined. \*\*\*

MR. JUSTICE BUTLER, DISSENTING.

I am of opinion that the challenged ordinance is not void on its face; that in principle it does not differ from the Boston ordinance, as applied and upheld by this Court, speaking through Mr. Justice White, in *Davis v. Massachusetts*, affirming the Supreme Judicial Court of Massachusetts, speaking through Mr. Justice Holmes, in *Commonwealth v. Davis*, and that the decree of the Circuit Court of Appeals should be reversed.

## Notes

1. Much of the disagreement in *Hague v. CIO* concerns jurisdictional issues that intersect with whether the First Amendment is applicable to the states through the Fourteenth Amendment's Privileges or Immunities Clause (as in Justice Roberts's plurality opinion) or the Due Process Clause (as in Justice Stone's opinion). It is Justice Stone's opinion, citing cases such as *Gitlow* and *Whitney* that had previously found the First Amendment applicable to the states through the Due Process Clause, that remains consistent with current doctrine.

Writing for the Court in an opinion soon after *Hague*, Justice Roberts noted that

This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

*Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 161, (1939). The Court held the four ordinances before it prohibiting or restricting handbilling or leafletting unconstitutional. In a footnote, Justice Roberts cited both *Gitlow* and *Whitney* and stated:

There is no averment or proof in any of the cases that the appellants or petitioners are citizens of the United States, and in the Young case, No. 13, the applicable provisions of the municipal code were challenged on the sole ground that they infringed the due process clause of the Fourteenth Amendment.

*Id.* at 160n.8

2. Justice Roberts’s opinion in *Hague v. CIO* is generally read as establishing public forum doctrine. Its most famous passage regards “streets and parks” as having “immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”

3. As Mayor of Jersey City, New Jersey, Frank Hague was opposed to the labor organizing efforts of the CIO at a time of great social unrest. For a discussion of *Hague v. CIO* as an important labor case and Mayor Hague’s interesting relations with labor and unions, see Kenneth M. Casebeer, “Public . . . Since Time Immemorial”: *The Labor History of Hague v. CIO*, 66 RUTGERS L. REV. 147 (2013).

4. What might a robust interpretation of the Assembly Clause add to First Amendment doctrine? Should “assembly” and “leafleting” be distinguished as First Amendment activities?

## II. Public and Other Forums

### *Southeastern Promotions, Ltd. v. Conrad*

420 U.S. 546 (1975)

BLACKMUN, J., DELIVERED THE OPINION OF THE COURT, IN WHICH BRENNAN, STEWART, MARSHALL, AND POWELL, JJ., JOINED. DOUGLAS, J., FILED AN OPINION DISSENTING IN PART AND CONCURRING IN THE RESULT IN PART. WHITE, J., FILED A DISSENTING OPINION, IN WHICH BURGER, C. J., JOINED. REHNQUIST, J., FILED A DISSENTING OPINION.

JUSTICE BLACKMUN DELIVERED THE OPINION OF THE COURT.

The issue in this case is whether First Amendment rights were abridged when respondents denied petitioner the use of a municipal facility in Chattanooga, Tenn., for the showing of the controversial rock musical "Hair." It is established, of course, that the Fourteenth Amendment has made applicable to the States the First Amendment's guarantee of free speech.

## I

Petitioner, Southeastern Promotions, Ltd., is a New York corporation engaged in the business of promoting and presenting theatrical productions for profit. On October 29, 1971, it applied for the use of the Tivoli, a privately owned Chattanooga theater under long-term lease to the city, to present "Hair" there for six days beginning November 23. This was to be a road company showing of the musical that had played for three years on Broadway, and had appeared in over 140 cities in the United States.

Respondents are the directors of the Chattanooga Memorial Auditorium, a municipal theater. Shortly after receiving Southeastern's application, the directors met, and, after a brief discussion, voted to reject it. None of them had seen the play or read the script, but they understood from outside reports that the musical, as produced elsewhere, involved nudity and obscenity on stage. Although no conflicting engagement was scheduled for the Tivoli, respondents determined that the production would not be "in the best interest of the community." Southeastern was so notified but no written statement of reasons was provided.

On November 1 petitioner, alleging that respondents' action abridged its First Amendment rights, sought a preliminary injunction from the United States District Court for the Eastern District of Tennessee. Respondents did not then file an answer to the complaint. A hearing was held on November 4. The District Court took evidence as to the play's content, and respondent Conrad gave the following account of the board's decision:

"We use the general terminology in turning down the request for its use that we felt it was not in the best interest of the community and I can't speak beyond that. That was the board's determination.

"Now, I would have to speak for myself, the policy to which I would refer, as I mentioned, basically indicates that we will, as a board, allow those productions which are clean and healthful and culturally uplifting, or words to that effect. They are quoted in the original dedication booklet of the Memorial Auditorium."

The court denied preliminary relief, concluding that petitioner had failed to show that it would be irreparably harmed pending a final judgment since scheduling was "purely a matter of financial loss or gain" and was compensable.

Southeastern some weeks later pressed for a permanent injunction permitting it to use the larger auditorium, rather than the Tivoli, on Sunday, April 9, 1972. The District Court held three days of hearings beginning April 3. On the issue of obscenity vel non, presented to an advisory jury, it took evidence consisting of the full script and libretto, with production notes and stage instructions, a recording of the musical numbers, a souvenir program, and the testimony of seven witnesses who had seen the production elsewhere. The jury returned a verdict that "Hair" was obscene. The District Court agreed. It concluded that conduct in the production - group nudity and simulated sex - would violate city

ordinances and state statutes 5 making public nudity and obscene acts criminal offenses. This criminal conduct, the court reasoned, was neither speech nor symbolic speech, and was to be viewed separately from the musical's speech elements. Being pure conduct, comparable to rape or murder, it was not entitled to First Amendment protection. Accordingly, the court denied the injunction.

On appeal, the United States Court of Appeals for the Sixth Circuit, by a divided vote, affirmed. The majority relied primarily on the lower court's reasoning. Neither the judges of the Court of Appeals nor the District Court saw the musical performed. Because of the First Amendment overtones, we granted certiorari.

Petitioner urges reversal on the grounds that (1) respondents' action constituted an unlawful prior restraint, (2) the courts below applied an incorrect standard for the determination of the issue of obscenity vel non, and (3) the record does not support a finding that "Hair" is obscene. We do not reach the latter two contentions, for we agree with the first. We hold that respondents' rejection of petitioner's application to use this public forum accomplished a prior restraint under a system lacking in constitutionally required minimal procedural safeguards. Accordingly, on this narrow ground, we reverse.

## II

Respondents' action here is indistinguishable in its censoring effect from the official actions consistently identified as prior restraints in a long line of this Court's decisions. In these cases, the plaintiffs asked the courts to provide relief where public officials had forbidden the plaintiffs the use of public places to say what they wanted to say. The restraints took a variety of forms, with officials exercising control over different kinds of public places under the authority of particular statutes. All, however, had this in common: they gave public officials the power to deny use of a forum in advance of actual expression.

Invariably, the Court has felt obliged to condemn systems in which the exercise of such authority was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste for censorship - reflecting the natural distaste of a free people - is deep-written in our law.

\*\*\* In *Hague v. CIO* (1939) a Jersey City ordinance that forbade public assembly in the streets or parks without a permit from the local director of safety, who was empowered to refuse the permit upon his opinion that he would thereby prevent "riots, disturbances or disorderly assemblage," was held void on its face. (opinion of Roberts, J.).

In *Cantwell v. Connecticut* (1940) a unanimous Court held invalid an act which proscribed the solicitation of money or any valuable thing for "any alleged religious, charitable or philanthropic cause" unless that cause was approved by the secretary of the public welfare council. \*\*\*

The elements of prior restraint identified in *Cantwell* and other cases were clearly present in the system by which the Chattanooga board regulated the use

of its theaters. One seeking to use a theater was required to apply to the board. The board was empowered to determine whether the applicant should be granted permission - in effect, a license or permit - on the basis of its review of the content of the proposed production. Approval of the application depended upon the board's affirmative action. Approval was not a matter of routine; instead, it involved the "appraisal of facts, the exercise of judgment, and the formation of an opinion" by the board.

The board's judgment effectively kept the musical off stage. Respondents did not permit the show to go on and rely on law enforcement authorities to prosecute for anything illegal that occurred. Rather, they denied the application in anticipation that the production would violate the law. See *New York Times Co. v. United States* (1971) (White, J., concurring).

Respondents' action was no less a prior restraint because the public facilities under their control happened to be municipal theaters. The Memorial Auditorium and the Tivoli were public forums designed for and dedicated to expressive activities. There was no question as to the usefulness of either facility for petitioner's production. There was no contention by the board that these facilities could not accommodate a production of this size. None of the circumstances qualifying as an established exception to the doctrine of prior restraint was present. Petitioner was not seeking to use a facility primarily serving a competing use. Nor was rejection of the application based on any regulation of time, place, or manner related to the nature of the facility or applications from other users. No rights of individuals in surrounding areas were violated by noise or any other aspect of the production. There was no captive audience.

Whether petitioner might have used some other, privately owned, theater in the city for the production is of no consequence. There is reason to doubt on this record whether any other facility would have served as well as these, since none apparently had the seating capacity, acoustical features, stage equipment, and electrical service that the show required. Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. \*\*\*

Only if we were to conclude that live drama is unprotected by the First Amendment - or subject to a totally different standard from that applied to other forms of expression - could we possibly find no prior restraint here. Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems. By its nature, theater usually is the acting out - or singing out - of the written word, and frequently mixes speech with live action or conduct. But that is no reason to hold theater subject to a drastically different standard. \*\*\*

### III

Labeling respondents' action a prior restraint does not end the inquiry. Prior restraints are not unconstitutional per se. See *Near v. Minnesota ex rel. Olson*, (1931) [Chapter 4]. \*\*\*

Any system of prior restraint, however, "comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times Co. v. United*

*States; Near v. Minnesota ex rel. Olson.* The presumption against prior restraints is heavier - and the degree of protection broader - than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

In order to be held lawful, respondents' action, first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and, second, must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech. We do not decide whether the performance of "Hair" fits within such an exception or whether, as a substantive matter, the board's standard for resolving that question was correct, for we conclude that the standard, whatever it may have been, was not implemented by the board under a system with appropriate and necessary procedural safeguards.

\*\*\* [A] system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.

\*\*\* If a scheme that restricts access to the mails must furnish the procedural safeguards set forth in *Freedman v. Maryland* (1965), no less must be expected of a system that regulates use of a public forum. Respondents here had the same powers of licensing and censorship exercised by postal officials in *Blount v. Rizzi* (1971) and by boards and officials in other cases.

The theory underlying the requirement of safeguards is applicable here with equal if not greater force. An administrative board assigned to screening stage productions - and keeping off stage anything not deemed culturally uplifting or healthful may well be less responsive than a court, an independent branch of government, to constitutionally protected interests in free expression. 10 And if judicial review is made unduly onerous, by reason of delay or otherwise, the board's determination in practice may be final.

\*\*\* The perils of prior restraint are well illustrated by this case, where neither the Board nor the lower courts could have known precisely the extent of nudity or simulated sex in the musical, or even that either would appear, before the play was actually performed.

Procedural safeguards were lacking here in several respects. The board's system did not provide a procedure for prompt judicial review. Although the District Court commendably held a hearing on petitioner's motion for a preliminary injunction within a few days of the board's decision, it did not review the merits of the decision at that time. The question at the hearing was whether petitioner should receive preliminary relief. *i.e.*, whether there was likelihood of success on the merits and whether petitioner would suffer irreparable injury pending full review. Effective review on the merits was not obtained until more than five

months later. Throughout, it was petitioner, not the board, that bore the burden of obtaining judicial review. It was petitioner that had the burden of persuasion at the preliminary hearing if not at the later stages of the litigation. Respondents did not file a formal answer to the complaint for five months after petitioner sought review. During the time prior to judicial determination, the restraint altered the status quo. Petitioner was forced to forgo the initial dates planned for the engagement and to seek to schedule the performance at a later date. The delay and uncertainty inevitably discouraged use of the forum.

The procedural shortcomings that form the basis for our decision are unrelated to the standard that the board applied. Whatever the reasons may have been for the board's exclusion of the musical, it could not escape the obligation to afford appropriate procedural safeguards. We need not decide whether the standard of obscenity applied by respondents or the courts below was sufficiently precise or substantively correct, or whether the production is in fact obscene. The standard, whatever it may be, must be implemented under a system that assures prompt judicial review with a minimal restriction of First Amendment rights necessary under the circumstances.

*Reversed.*

JUSTICE DOUGLAS, DISSENTING IN PART AND CONCURRING IN THE RESULT IN PART.

While I agree with the Court's conclusion that the actions of the respondents constituted an impermissible prior restraint upon the performance of petitioner's rock musical, I am compelled to write separately in order to emphasize my view that the injuries inflicted upon petitioner's First Amendment rights cannot be treated adequately or averted in the future by the simple application of a few procedural band-aids. The critical flaw in this case lies, not in the absence of procedural safeguards, but rather in the very nature of the content screening in which respondents have engaged.

\*\*\* A municipal theater is no less a forum for the expression of ideas than is a public park, or a sidewalk; the forms of expression adopted in such a forum may be more expensive and more structured than those typically seen in our parks and streets, but they are surely no less entitled to the shelter of the First Amendment. As soon as municipal officials are permitted to pick and choose, as they are in all existing socialist regimes, between those productions which are "clean and healthful and culturally uplifting" in content and those which are not, the path is cleared for a regime of censorship under which full voice can be given only to those views which meet with the approval of the powers that be.

There was much testimony in the District Court concerning the pungent social and political commentary which the musical "Hair" levels against various sacred cows of our society: the Vietnam war, the draft, and the puritanical conventions of the Establishment. This commentary is undoubtedly offensive to some, but its contribution to social consciousness and intellectual ferment is a positive one. In this respect, the musical's often ribald humor and trenchant social satire may someday merit comparison to the most highly regarded works of Aristophanes, a fellow debunker of established tastes and received wisdom, yet one whose offerings would doubtless meet with a similarly cold reception at the

hands of Establishment censors. No matter how many procedural safeguards may be imposed, any system which permits governmental officials to inhibit or control the flow of disturbing and unwelcome ideas to the public threatens serious diminution of the breadth and richness of our cultural offerings.

JUSTICE WHITE, WITH WHOM THE CHIEF JUSTICE JOINS, DISSENTING.

\*\*\* The Court asserts that "Hair" contains a nude scene and that this is "the most controversial portion" of the musical. This almost completely ignores the District Court's description of the play as involving not only nudity but repeated "simulated acts of anal intercourse, frontal intercourse, heterosexual intercourse, homosexual intercourse, and group intercourse . . . ."

Given this description of "Hair," the First Amendment in my view does not compel municipal authorities to permit production of the play in municipal facilities. Whether or not a production as described by the District Court is obscene and may be forbidden to adult audiences, it is apparent to me that the State of Tennessee could constitutionally forbid exhibition of the musical to children, and that Chattanooga may reserve its auditorium for productions suitable for exhibition to all the citizens of the city, adults and children alike. "Hair" does not qualify in this respect, and without holding otherwise, it is improvident for the Court to mandate the showing of "Hair" in the Chattanooga auditorium.

JUSTICE REHNQUIST, DISSENTING.

The Court treats this case as if it were on all fours with *Freedman v. Maryland*, (1965), which it is not. *Freedman* dealt with the efforts of the State of Maryland to prohibit the petitioner in that case from showing a film "at his Baltimore theater." Petitioner here did not seek to show the musical production "Hair" at its Chattanooga theater, but rather at a Chattanooga theater owned by the city of Chattanooga.

The Court glosses over this distinction by treating a community-owned theater as if it were the same as a city park or city street, which it is not. The Court's decisions have recognized that city streets and parks are traditionally open to the public, and that permits or licenses to use them are not ordinarily required. "[O]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word." The Court has therefore held that where municipal authorities seek to exact a license or permit for those who wish to use parks or streets for the purpose of exercising their right of free speech, the standards governing the licensing authority must be objective, definite, and nondiscriminatory. But until this case the Court has not equated a public auditorium, which must of necessity schedule performances by a process of inclusion and exclusion, with public streets and parks.

\*\*\* The Court \*\*\* [insists] that the municipal auditorium and the theater were "public forums designed for and dedicated to expressive activities," and that the rejection of petitioner's application was not based on "any regulation of time, place, or manner related to the nature of the facility or applications from other users." But the apparent effect of the Court's decision is to tell the managers of

municipal auditoriums that they may exercise no selective role whatsoever in deciding what performances may be booked. The auditoriums in question here have historically been devoted to "clean, healthful entertainment"; they have accepted only productions not inappropriate for viewing by children so that the facilities might serve as a place for entertaining the whole family. Viewed apart from any constitutional limitations, such a policy would undoubtedly rule out much worthwhile adult entertainment. But if it is the desire of the citizens of Chattanooga, who presumably have paid for and own the facilities, that the attractions to be shown there should not be of the kind which would offend any substantial number of potential theatergoers, I do not think the policy can be described as arbitrary or unreasonable. Whether or not the production of the version of "Hair" here under consideration is obscene, the findings of fact made by the District Court and affirmed on appeal do indicate that it is not entertainment designed for the whole family.

If every municipal theater or auditorium which is "designed for and dedicated to expressive activities" becomes subject to the rule enunciated by the Court in this case, consequences unforeseen and perhaps undesired by the Court may well ensue. May an opera house limit its productions to operas, or must it also show rock musicals? May a municipal theater devote an entire season to Shakespeare, or is it required to book any potential producer on a first come, first served basis? These questions are real ones in light of the Court's opinion, which by its terms seems to give no constitutionally permissible role in the way of selection to the municipal authorities.

But these substantive aspects of the Court's opinion are no more troubling than the farrago of procedural requirements with which it has saddled municipal authorities. \*\*\*

## ***Perry Education Assn. v. Perry Local Educators' Assn.***

460 U.S. 37 (1983)

WHITE, J., DELIVERED THE OPINION OF THE COURT, IN WHICH BURGER, C. J., AND BLACKMUN, REHNQUIST, AND O'CONNOR, JJ., JOINED. BRENNAN, J., FILED A DISSENTING OPINION, IN WHICH MARSHALL, POWELL, AND STEVENS, JJ., JOINED.

JUSTICE WHITE DELIVERED THE OPINION OF THE COURT.

Perry Education Association is the duly elected exclusive bargaining representative for the teachers of the Metropolitan School District of Perry Township, Ind. A collective-bargaining agreement with the Board of Education provided that Perry Education Association, but no other union, would have access to the interschool mail system and teacher mail-boxes in the Perry Township schools. The issue in this case is whether the denial of similar access to the Perry Local Educators' Association, a rival teacher group, violates the First and Fourteenth Amendments.

The Metropolitan School District of Perry Township, Ind., operates a public school system of 13 separate schools. Each school building contains a set of mailboxes for the teachers. Interschool delivery by school employees permits messages to be delivered rapidly to teachers in the District. The primary function of this internal mail system is to transmit official messages among the teachers and between the teachers and the school administration. In addition, teachers use the system to send personal messages, and individual school building principals have allowed delivery of messages from various private organization.

Prior to 1977, both the Perry Education Association (PEA) and the Perry Local Educators' Association (PLEA) represented teachers in the School District and apparently had equal access to the interschool mail system. In 1977, PLEA challenged PEA's status as de facto bargaining representative for the Perry Township teachers by filing an election petition with the Indiana Education Employment Relations Board (Board). PEA won the election and was certified as the exclusive representative, as provided by Indiana law.

The Board permits a school district to provide access to communication facilities to the union selected for the discharge of the exclusive representative duties of representing the bargaining unit and its individual members without having to provide equal access to rival unions. Following the election, PEA and the School District negotiated a labor contract in which the School Board gave PEA "access to teachers' mailboxes in which to insert material" and the right to use the interschool mail delivery system to the extent that the School District incurred no extra expense by such use. The labor agreement noted that these access rights were being accorded to PEA "acting as the representative of the teachers" and went on to stipulate that these access rights shall not be granted to any other "school employee organization" - a term of art defined by Indiana law to mean "any organization which has school employees as members and one of whose primary purposes is representing school employees in dealing with their school employer." The PEA contract with these provisions was renewed in 1980 and is presently in force.

The exclusive-access policy applies only to use of the mail-boxes and school mail system. PLEA is not prevented from using other school facilities to communicate with teachers. PLEA may post notices on school bulletin boards; may hold meetings on school property after school hours; and may, with approval of the building principals, make announcements on the public address system. Of course, PLEA also may communicate with teachers by word of mouth, telephone, or the United States mail. Moreover, under Indiana law, the preferential access of the bargaining agent may continue only while its status as exclusive representative is insulated from challenge. While a representation contest is in progress, unions must be afforded equal access to such communication facilities.

PLEA and two of its members filed this action under 42 U.S.C. 1983 against PEA and individual members of the Perry Township School Board. Plaintiffs contended that PEA's preferential access to the internal mail system violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. They sought injunctive and declaratory relief and damages. Upon

cross-motions for summary judgment, the District Court entered judgment for the defendants.

The Court of Appeals for the Seventh Circuit reversed. The court held that once the School District "opens its internal mail system to PEA but denies it to PLEA, it violates both the Equal Protection Clause and the First Amendment." It acknowledged that PEA had "legal duties to the teachers that PLEA does not have" but reasoned that "[w]ithout an independent reason why equal access for other labor groups and individual teachers is undesirable, the special duties of the incumbent do not justify opening the system to the incumbent alone."

PEA now seeks review of this judgment by way of appeal. We postponed consideration of our jurisdiction to the hearing of the case on the merits.

## II

[The Court discussed the jurisdictional issue]. Nevertheless, the decision below is subject to our review by writ of certiorari. The constitutional issues presented are important and the decision below conflicts with the judgment of other federal and state courts. Therefore, regarding PEA's jurisdictional statement as a petition for a writ of certiorari, we grant certiorari.

## III

The primary question presented is whether the First Amendment, applicable to the States by virtue of the Fourteenth Amendment, is violated when a union that has been elected by public school teachers as their exclusive bargaining representative is granted access to certain means of communication, while such access is denied to a rival union. There is no question that constitutional interests are implicated by denying PLEA use of the interschool mail system. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines School District* (1969). The First Amendment's guarantee of free speech applies to teacher's mailboxes as surely as it does elsewhere within the school, *Tinker* and on sidewalks outside. But this is not to say that the First Amendment requires equivalent access to all parts of a school building in which some form of communicative activity occurs. \*\*\* The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.

## A

In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO* (1939). In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it

must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

A second category consists of public property which the State has opened for use by the public as a place for expressive activity. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.

Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. As we have stated on several occasions, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."

The school mail facilities at issue here fall within this third category. The Court of Appeals recognized that Perry School District's interschool mail system is not a traditional public forum: "We do not hold that a school's internal mail system is a public forum in the sense that a school board may not close it to all but official business if it chooses." On this point the parties agree. Nor do the parties dispute that, as the District Court observed, the "normal and intended function [of the school mail facilities] is to facilitate internal communication of school-related matters to the teachers." The internal mail system, at least by policy, is not held open to the general public. It is instead PLEA's position that the school mail facilities have become a "limited public forum" from which it may not be excluded because of the periodic use of the system by private non-school-connected groups, and PLEA's own unrestricted access to the system prior to PEA's certification as exclusive representative.

Neither of these arguments is persuasive. The use of the internal school mail by groups not affiliated with the schools is no doubt a relevant consideration. If by policy or by practice the Perry School District has opened its mail system for indiscriminate use by the general public, then PLEA could justifiably argue a public forum has been created. This, however, is not the case. As the case comes before us, there is no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public. Permission to use the system to communicate with teachers must be secured from the individual building principal. There is no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material. We can only conclude

that the schools do allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities. This type of selective access does not transform government property into a public forum.  
\*\*\*

Moreover, even if we assume that by granting access to the Cub Scouts, YMCA's, and parochial schools, the School District has created a "limited" public forum, the constitutional right of access would in any event extend only to other entities of similar character. While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club, and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as PLEA, which is concerned with the terms and conditions of teacher employment.

PLEA also points to its ability to use the school mailboxes and delivery system on an equal footing with PEA prior to the collective-bargaining agreement signed in 1978. Its argument appears to be that the access policy in effect at that time converted the school mail facilities into a limited public forum generally open for use by employee organizations, and that once this occurred, exclusions of employee organizations thereafter must be judged by the constitutional standard applicable to public forums. The fallacy in the argument is that it is not the forum, but PLEA itself, which has changed. Prior to 1977, there was no exclusive representative for the Perry School District teachers. PEA and PLEA each represented its own members. Therefore the School District's policy of allowing both organizations to use the school mail facilities simply reflected the fact that both unions represented the teachers and had legitimate reasons for use of the system. PLEA's previous access was consistent with the School District's preservation of the facilities for school-related business, and did not constitute creation of a public forum in any broader sense.

Because the school mail system is not a public forum, the School District had no "constitutional obligation per se to let any organization use the school mail boxes." In the Court of Appeals' view, however, the access policy adopted by the Perry schools favors a particular viewpoint, that of PEA, on labor relations, and consequently must be strictly scrutinized regardless of whether a public forum is involved. There is, however, no indication that the School Board intended to discourage one viewpoint and advance another. We believe it is more accurate to characterize the access policy as based on the status of the respective unions rather than their views. Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

## B

The differential access provided PEA and PLEA is reasonable because it is wholly consistent with the District's legitimate interest in "preserv[ing] the

property . . . for the use to which it is lawfully dedicated." Use of school mail facilities enables PEA to perform effectively its obligations as exclusive representative of all Perry Township teachers. Conversely, PLEA does not have any official responsibility in connection with the School District and need not be entitled to the same rights of access to school mailboxes. We observe that providing exclusive access to recognized bargaining representatives is a permissible labor practice in the public sector. We have previously noted that the "designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones." *Aboud v. Detroit Bd. of Ed.* (1977). Moreover, exclusion of the rival union may reasonably be considered a means of insuring labor peace within the schools. The policy "serves to prevent the District's schools from becoming a battlefield for inter-union squabbles."

The Court of Appeals accorded little or no weight to PEA's special responsibilities. In its view these responsibilities, while justifying PEA's access, did not justify denying equal access to PLEA. The Court of Appeals would have been correct if a public forum were involved here. But the internal mail system is not a public forum. As we have already stressed, when government property is not dedicated to open communication the government may - without further justification - restrict use to those who participate in the forum's official business.

Finally, the reasonableness of the limitations on PLEA's access to the school mail system is also supported by the substantial alternative channels that remain open for union-teacher communication to take place. These means range from bulletin boards to meeting facilities to the United States mail. During election periods, PLEA is assured of equal access to all modes of communication. There is no showing here that PLEA's ability to communicate with teachers is seriously impinged by the restricted access to the internal mail system. The variety and type of alternative modes of access present here compare favorably with those in other nonpublic forum cases where we have upheld restrictions on access.

#### IV

The Court of Appeals also held that the differential access provided the rival unions constituted impermissible content discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. We have rejected this contention when cast as a First Amendment argument, and it fares no better in equal protection garb. \*\*\*

#### V

The Court of Appeals invalidated the limited privileges PEA negotiated as the bargaining voice of the Perry Township teachers by misapplying our cases that have dealt with the rights of free expression on streets, parks, and other fora generally open for assembly and debate. Virtually every other court to consider this type of exclusive-access policy has upheld it as constitutional, and today, so do we. The judgment of the Court of Appeals is

*Reversed.*

JUSTICE BRENNAN, WITH WHOM JUSTICE MARSHALL, JUSTICE POWELL, AND JUSTICE STEVENS JOIN, DISSENTING.

The Court today holds that an incumbent teachers' union may negotiate a collective-bargaining agreement with a school board that grants the incumbent access to teachers' mailboxes and to the interschool mail system and denies such access to a rival union. Because the exclusive-access provision in the collective-bargaining agreement amounts to viewpoint discrimination that infringes the respondents' First Amendment rights and fails to advance any substantial state interest, I dissent.

The Court properly acknowledges that teachers have protected First Amendment rights within the school context. See *Tinker v. Des Moines School District* (1969). In particular, we have held that teachers may not be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work." *Pickering v. Board of Education* (1968).  
\*\*\*

From this point of departure the Court veers sharply off course. Based on a finding that the interschool mail system is not a "public forum," the Court states that the respondents have no right of access to the system, *ibid.*, and that the School Board is free "to make distinctions in access on the basis of subject matter and speaker identity if the distinctions are "reasonable in light of the purpose which the forum at issue serves." According to the Court, the petitioner's status as the exclusive bargaining representative provides a reasonable basis for the exclusive-access policy.

The Court fundamentally misperceives the essence of the respondents' claims and misunderstands the thrust of the Court of Appeals' well-reasoned opinion. This case does not involve an "absolute access" claim. It involves an "equal access" claim. As such it does not turn on whether the internal school mail system is a "public forum." In focusing on the public forum issue, the Court disregards the First Amendment's central proscription against censorship, in the form of viewpoint discrimination, in any forum, public or nonpublic.

\*\*\* Once the government permits discussion of certain subject matter, it may not impose restrictions that discriminate among viewpoints on those subjects whether a nonpublic forum is involved or not. \*\*\* We have never held that government may allow discussion of a subject and then discriminate among viewpoints on that particular topic, even if the government for certain reasons may entirely exclude discussion of the subject from the forum. In this context, the greater power does not include the lesser because for First Amendment purposes exercise of the lesser power is more threatening to core values. Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of "free speech."

Against this background, it is clear that the Court's approach to this case is flawed. By focusing on whether the interschool mail system is a public forum,

the Court disregards the independent First Amendment protection afforded by the prohibition against viewpoint discrimination. This case does not involve a claim of an absolute right of access to the forum to discuss any subject whatever. If it did, public forum analysis might be relevant. This case involves a claim of equal access to discuss a subject that the Board has approved for discussion in the forum. In essence, the respondents are not asserting a right of access at all; they are asserting a right to be free from discrimination. The critical inquiry, therefore, is whether the Board's grant of exclusive access to the petitioner amounts to prohibited viewpoint discrimination.

\*\*\* Addressing the question of viewpoint discrimination directly, free of the Court's irrelevant public forum analysis, it is clear that the exclusive-access policy discriminates on the basis of viewpoint. The Court of Appeals found that "[t]he access policy adopted by the Perry schools, in form a speaker restriction, favors a particular viewpoint on labor relations in the Perry schools . . . : the teachers inevitably will receive from [the petitioner] self-laudatory descriptions of its activities on their behalf and will be denied the critical perspective offered by [the respondents]." This assessment of the effect of the policy is eminently reasonable. Moreover, certain other factors strongly suggest that the policy discriminates among viewpoints. \*\*\*

\*\*\* In this case the Board has infringed the respondents' First Amendment rights by granting exclusive access to an effective channel of communication to the petitioner and denying such access to the respondents. In view of the petitioner's failure to establish even a substantial state interest that is advanced by the exclusive-access policy, the policy must be held to be constitutionally infirm. The decision of the Court of Appeals should be affirmed.

## Notes

1. The Court in *Perry* identifies three types of public fora. Along with an additional category that might be called a non-forum ("not a forum"), these are the fora in current First Amendment doctrine.

A forum analysis involves two separate steps:

First, define the forum and then apply that definition to any set of facts.

Second, articulate the standard for that forum and apply that standard to the facts.

2. The relationship of forum doctrine to other First Amendment doctrines is complex and often highly contested in individual cases. The briefly excerpted but extensive dissenting opinion in *Perry* joined by four dissenting Justices essentially argues that a forum analysis should be irrelevant.

3. Reconsidering *Conrad* after *Perry*, is there an argument that the theater was not a (full) public forum?

## *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*

561 U.S. 661 (2010)

GINSBURG, J., DELIVERED THE OPINION OF THE COURT, IN WHICH STEVENS, KENNEDY, BREYER, AND SOTOMAYOR, JJ., JOINED. STEVENS, J., AND KENNEDY, J., FILED CONCURRING OPINIONS. ALITO, J., FILED A DISSENTING OPINION, IN WHICH ROBERTS, C. J., AND SCALIA AND THOMAS, JJ., JOINED.

JUSTICE GINSBURG DELIVERED THE OPINION OF THE COURT.

In a series of decisions, this Court has emphasized that the First Amendment generally precludes public universities from denying student organizations access to school-sponsored forums because of the groups' viewpoints. This case concerns a novel question regarding student activities at public universities: May a public law school condition its official recognition of a student group--and the attendant use of school funds and facilities--on the organization's agreement to open eligibility for membership and leadership to all students?

In the view of petitioner Christian Legal Society (CLS), an accept-all-comers policy impairs its First Amendment rights to free speech, expressive association, and free exercise of religion by prompting it, on pain of relinquishing the advantages of recognition, to accept members who do not share the organization's core beliefs about religion and sexual orientation. From the perspective of respondent Hastings College of the Law (Hastings or the Law School), CLS seeks special dispensation from an across-the-board open-access requirement designed to further the reasonable educational purposes underpinning the school's student-organization program.

In accord with the District Court and the Court of Appeals, we reject CLS's First Amendment challenge. Compliance with Hastings' all-comers policy, we conclude, is a reasonable, viewpoint-neutral condition on access to the student-organization forum. In requiring CLS--in common with all other student organizations--to choose between welcoming all students and forgoing the benefits of official recognition, we hold, Hastings did not transgress constitutional limitations. CLS, it bears emphasis, seeks not parity with other organizations, but a preferential exemption from Hastings' policy. The First Amendment shields CLS against state prohibition of the organization's expressive activity, however exclusionary that activity may be. But CLS enjoys no constitutional right to state subvention of its selectivity.

### I

Founded in 1878, Hastings was the first law school in the University of California public-school system. Like many institutions of higher education, Hastings encourages students to form extracurricular associations that "contribute to the Hastings community and experience." These groups offer students "opportunities to pursue academic and social interests outside of the

classroom [to] further their education" and to help them "develo[p] leadership skills."

Through its "Registered Student Organization" (RSO) program, Hastings extends official recognition to student groups. Several benefits attend this school-approved status. RSOs are eligible to seek financial assistance from the Law School, which subsidizes their events using funds from a mandatory student-activity fee imposed on all students. RSOs may also use Law-School channels to communicate with students: They may place announcements in a weekly Office-of-Student-Services newsletter, advertise events on designated bulletin boards, send e-mails using a Hastings-organization address, and participate in an annual Student Organizations Fair designed to advance recruitment efforts. In addition, RSOs may apply for permission to use the Law School's facilities for meetings and office space. Finally, Hastings allows officially recognized groups to use its name and logo.

In exchange for these benefits, RSOs must abide by certain conditions. Only a "non-commercial organization whose membership is limited to Hastings students may become [an RSO]." A prospective RSO must submit its bylaws to Hastings for approval, and if it intends to use the Law School's name or logo, it must sign a license agreement. Critical here, all RSOs must undertake to comply with Hastings' "Policies and Regulations Applying to College Activities, Organizations and Students."

The Law School's Policy on Nondiscrimination (Nondiscrimination Policy), which binds RSOs, states:

"[Hastings] is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, [Hastings]-owned student residence facilities and programs sponsored by [Hastings], are governed by this policy of nondiscrimination. [Hastings's] policy on nondiscrimination is to comply fully with applicable law.

"[Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities."

Hastings interprets the Nondiscrimination Policy, as it relates to the RSO program, to mandate acceptance of all comers: School-approved groups must "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs." Other law schools have adopted similar all-comers policies. See, e.g., Georgetown University Law Center, Office of Student Life: Student Organizations, available at <http://www.law.georgetown.edu/StudentLife/StudentOrgs/NewGroup.htm> (Membership in registered groups must be "open to all students."); Hofstra Law School Student Handbook 2009-2010, p. 49, available at [http://law.hofstra.edu/pdf/StudentLife/StudentAffairs/Handbook/stuhb\\_handbook.pdf](http://law.hofstra.edu/pdf/StudentLife/StudentAffairs/Handbook/stuhb_handbook.pdf) ("[Student] organizations are open to all students."). From Hastings' adoption of its Nondiscrimination Policy in 1990 until the events stirring this litigation, "no student organization at Hastings ... ever sought an exemption from the Policy."

In 2004, CLS became the first student group to do so. At the beginning of the academic year, the leaders of a predecessor Christian organization--which had been an RSO at Hastings for a decade--formed CLS by affiliating with the national Christian Legal Society (CLS-National). CLS-National, an association of Christian lawyers and law students, charters student chapters at law schools throughout the country. CLS chapters must adopt bylaws that, inter alia, require members and officers to sign a "Statement of Faith" and to conduct their lives in accord with prescribed principles. Among those tenets is the belief that sexual activity should not occur outside of marriage between a man and a woman; CLS thus interprets its bylaws to exclude from affiliation anyone who engages in "unrepentant homosexual conduct." CLS also excludes students who hold religious convictions different from those in the Statement of Faith.

On September 17, 2004, CLS submitted to Hastings an application for RSO status, accompanied by all required documents, including the set of bylaws mandated by CLS-National. Several days later, the Law School rejected the application; CLS's bylaws, Hastings explained, did not comply with the Nondiscrimination Policy because CLS barred students based on religion and sexual orientation.

CLS formally requested an exemption from the Nondiscrimination Policy, but Hastings declined to grant one. "[T]o be one of our student-recognized organizations," Hastings reiterated, "CLS must open its membership to all students irrespective of their religious beliefs or sexual orientation." If CLS instead chose to operate outside the RSO program, Hastings stated, the school "would be pleased to provide [CLS] the use of Hastings facilities for its meetings and activities." CLS would also have access to chalkboards and generally available campus bulletin boards to announce its events. In other words, Hastings would do nothing to suppress CLS's endeavors, but neither would it lend RSO-level support for them.

Refusing to alter its bylaws, CLS did not obtain RSO status. It did, however, operate independently during the 2004-2005 academic year. CLS held weekly Bible-study meetings and invited Hastings students to Good Friday and Easter Sunday church services. It also hosted a beach barbeque, Thanksgiving dinner, campus lecture on the Christian faith and the legal practice, several fellowship dinners, an end-of-year banquet, and other informal social activities.

On October 22, 2004, CLS filed suit against various Hastings officers and administrators under 42 U. S. C. §1983. Its complaint alleged that Hastings' refusal to grant the organization RSO status violated CLS's First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion. The suit sought injunctive and declaratory relief.

On cross-motions for summary judgment, the U. S. District Court for the Northern District of California ruled in favor of Hastings. The Law School's all-comers condition on access to a limited public forum, the court held, was both reasonable and viewpoint neutral, and therefore did not violate CLS's right to free speech.

Nor, in the District Court's view, did the Law School impermissibly impair CLS's right to expressive association. "Hastings is not directly ordering CLS to admit [any] studen[t]," the court observed; "[r]ather, Hastings has merely placed

conditions on" the use of its facilities and funds, *ibid.* "Hastings' denial of official recognition," the court added, "was not a substantial impediment to CLS's ability to meet and communicate as a group."

The court also rejected CLS's Free Exercise Clause argument. "[T]he Nondiscrimination Policy does not target or single out religious beliefs," the court noted; rather, the policy "is neutral and of general applicability." "CLS may be motivated by its religious beliefs to exclude students based on their religion or sexual orientation," the court explained, "but that does not convert the reason for Hastings' [Nondiscrimination Policy] to be one that is religiously-based."

On appeal, the Ninth Circuit affirmed [in a brief opinion]. We granted certiorari and now affirm the Ninth Circuit's judgment.

## II

Before considering the merits of CLS's constitutional arguments, we must resolve a preliminary issue: CLS urges us to review the Nondiscrimination Policy as written--prohibiting discrimination on several enumerated bases, including religion and sexual orientation--and not as a requirement that all RSOs accept all comers. The written terms of the Nondiscrimination Policy, CLS contends, "target[t] solely those groups whose beliefs are based on religion or that disapprove of a particular kind of sexual behavior," and leave other associations free to limit membership and leadership to individuals committed to the group's ideology. For example, "[a] political ... group can insist that its leaders support its purposes and beliefs," CLS alleges, but "a religious group cannot."

CLS's assertion runs headlong into the stipulation of facts it jointly submitted with Hastings at the summary-judgment stage. In that filing, the parties specified:

"Hastings requires that registered student organizations allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs. Thus, for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization."

App. 221 (Joint Stipulation ¶18) (emphasis added; citations omitted).

Under the District Court's local rules, stipulated facts are deemed "undisputed." Civil Local Rule 56-2 (ND Cal. 2010). See also *Pet. for Cert. 2* ("The material facts of this case are undisputed.").

Litigants, we have long recognized, "[a]re entitled to have [their] case tried upon the assumption that ... facts, stipulated into the record, were established." This entitlement is the bookend to a party's undertaking to be bound by the factual stipulations it submits. \*\*\*

Time and again, the dissent races away from the facts to which CLS stipulated. But factual stipulations are "formal concessions ... that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Thus, a judicial admission ... is conclusive in the case."

In light of the joint stipulation, both the District Court and the Ninth Circuit trained their attention on the constitutionality of the all-comers requirement, as described in the parties' accord. See 319 Fed. Appx., at 645-646; App. to Pet. for Cert. 32a; *id.*, at 36a. We reject CLS's unseemly attempt to escape from the stipulation and shift its target to Hastings' policy as written. This opinion, therefore, considers only whether conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution.

### III

#### A

In support of the argument that Hastings' all-comers policy treads on its First Amendment rights to free speech and expressive association, CLS draws on two lines of decisions. First, in a progression of cases, this Court has employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech. Recognizing a State's right "to preserve the property under its control for the use to which it is lawfully dedicated," *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.* (1985) the Court has permitted restrictions on access to a limited public forum, like the RSO program here, with this key caveat: Any access barrier must be reasonable and viewpoint neutral.

Second, as evidenced by another set of decisions, this Court has rigorously reviewed laws and regulations that constrain associational freedom. In the context of public accommodations, we have subjected restrictions on that freedom to close scrutiny; such restrictions are permitted only if they serve "compelling state interests" that are "unrelated to the suppression of ideas"--interests that cannot be advanced "through ... significantly less restrictive [means]." *Roberts v. United States Jaycees* (1984). See also, e.g., *Boy Scouts of America v. Dale* (2000). "Freedom of association," we have recognized, "plainly presupposes a freedom not to associate." *Roberts*. Insisting that an organization embrace unwelcome members, we have therefore concluded, "directly and immediately affects associational rights." *Dale*.

CLS would have us engage each line of cases independently, but its expressive-association and free-speech arguments merge: Who speaks on its behalf, CLS reasons, colors what concept is conveyed. It therefore makes little sense to treat CLS's speech and association claims as discrete. Instead, three observations lead us to conclude that our limited-public-forum precedents supply the appropriate framework for assessing both CLS's speech and association rights.

First, the same considerations that have led us to apply a less restrictive level of scrutiny to speech in limited public forums as compared to other environments, apply with equal force to expressive association occurring in limited public forums. As just noted, speech and expressive-association rights are closely linked. *Roberts* (Associational freedom is "implicit in the right to engage in activities protected by the First Amendment."). When these intertwined rights arise in exactly the same context, it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association.

That result would be all the more anomalous in this case, for CLS suggests that its expressive-association claim plays a part auxiliary to speech's starring role.

Second, and closely related, the strict scrutiny we have applied in some settings to laws that burden expressive association would, in practical effect, invalidate a defining characteristic of limited public forums--the State may "reserv[e] [them] for certain groups." See also *Perry Ed. Assn.*, ("Implicit in the concept" of a limited public forum is the State's "right to make distinctions in access on the basis of ... speaker identity.").

An example sharpens the tip of this point: Schools, including Hastings, ordinarily, and without controversy, limit official student-group recognition to organizations comprising only students--even if those groups wish to associate with nonstudents. The same ground rules must govern both speech and association challenges in the limited-public-forum context, lest strict scrutiny trump a public university's ability to "confine a [speech] forum to the limited and legitimate purposes for which it was created."

Third, this case fits comfortably within the limited-public-forum category, for CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition. The expressive-association precedents on which CLS relies, in contrast, involved regulations that compelled a group to include unwanted members, with no choice to opt out. See, e.g., *Dale* (regulation "forc[ed] [the Boy Scouts] to accept members it [did] not desire" (internal quotation marks omitted)); *Roberts* ("There can be no clearer example of an intrusion into the internal structure or affairs of an association than" forced inclusion of unwelcome participants.).

In diverse contexts, our decisions have distinguished between policies that require action and those that withhold benefits. Application of the less-restrictive limited-public-forum analysis better accounts for the fact that Hastings, through its RSO program, is dangling the carrot of subsidy, not wielding the stick of prohibition.

In sum, we are persuaded that our limited-public-forum precedents adequately respect both CLS's speech and expressive-association rights, and fairly balance those rights against Hastings' interests as property owner and educational institution. We turn to the merits of the instant dispute, therefore, with the limited-public-forum decisions as our guide.

## B

As earlier pointed out, we do not write on a blank slate; we have three times before considered clashes between public universities and student groups seeking official recognition or its attendant benefits. First, in *Healy v. James* (1972), a state college denied school affiliation to a student group that wished to form a local chapter of Students for a Democratic Society (SDS). Characterizing SDS's mission as violent and disruptive, and finding the organization's philosophy repugnant, the college completely banned the SDS chapter from campus; in its effort to sever all channels of communication between students and the group, university officials went so far as to disband a meeting of SDS members in a campus coffee shop. The college, we noted, could require "that a

group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law," including "reasonable standards respecting conduct." But a public educational institution exceeds constitutional bounds, we held, when it "restrict[s] speech or association simply because it finds the views expressed by [a] group to be abhorrent."

We later relied on *Healy in Widmar v. Vincent* (1981). In that case, a public university, in an effort to avoid state support for religion, had closed its facilities to a registered student group that sought to use university space for religious worship and discussion. "A university's mission is education," we observed, "and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." But because the university singled out religious organizations for disadvantageous treatment, we subjected the university's regulation to strict scrutiny. The school's interest "in maintaining strict separation of church and State," we held, was not "sufficiently compelling to justify ... [viewpoint] discrimination against ... religious speech."

Most recently and comprehensively, in *Rosenberger v. Rector and Visitors of Univ. of Virginia* (1995), we reiterated that a university generally may not withhold benefits from student groups because of their religious outlook. The officially recognized student group in *Rosenberger* was denied student-activity-fee funding to distribute a newspaper because the publication discussed issues from a Christian perspective. By "select[ing] for disfavored treatment those student journalistic efforts with religious editorial viewpoints," we held, the university had engaged in "viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations."

In all three cases, we ruled that student groups had been unconstitutionally singled out because of their points of view. "Once it has opened a limited [public] forum," we emphasized, "the State must respect the lawful boundaries it has itself set." The constitutional constraints on the boundaries the State may set bear repetition here: "The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, ... nor may it discriminate against speech on the basis of ... viewpoint."

## C

We first consider whether Hastings' policy is reasonable taking into account the RSO forum's function and "all the surrounding circumstances."

## 1

Our inquiry is shaped by the educational context in which it arises: "First Amendment rights," we have observed, "must be analyzed in light of the special characteristics of the school environment." *Widmar*. This Court is the final arbiter of the question whether a public university has exceeded constitutional constraints, and we owe no deference to universities when we consider that question. Cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, we have cautioned courts in

various contexts to resist "substitut[ing] their own notions of sound educational policy for those of the school authorities which they review."

A college's commission--and its concomitant license to choose among pedagogical approaches--is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process. Schools, we have emphasized, enjoy "a significant measure of authority over the type of officially recognized activities in which their students participate." We therefore "approach our task with special caution," mindful that Hastings' decisions about the character of its student-group program are due decent respect.

2

With appropriate regard for school administrators' judgment, we review the justifications Hastings offers in defense of its all-comers requirement. First, the open-access policy "ensures that the leadership, educational, and social opportunities afforded by [RSOs] are available to all students." Just as "Hastings does not allow its professors to host classes open only to those students with a certain status or belief," so the Law School may decide, reasonably in our view, "that the ... educational experience is best promoted when all participants in the forum must provide equal access to all students." RSOs, we count it significant, are eligible for financial assistance drawn from mandatory student-activity fees; the all-comers policy ensures that no Hastings student is forced to fund a group that would reject her as a member.

Second, the all-comers requirement helps Hastings police the written terms of its Nondiscrimination Policy without inquiring into an RSO's motivation for membership restrictions. To bring the RSO program within CLS's view of the Constitution's limits, CLS proposes that Hastings permit exclusion because of belief but forbid discrimination due to status. See Tr. of Oral Arg. 18. But that proposal would impose on Hastings a daunting labor. How should the Law School go about determining whether a student organization cloaked prohibited status exclusion in belief-based garb? If a hypothetical Male-Superiority Club barred a female student from running for its presidency, for example, how could the Law School tell whether the group rejected her bid because of her sex or because, by seeking to lead the club, she manifested a lack of belief in its fundamental philosophy?

This case itself is instructive in this regard. CLS contends that it does not exclude individuals because of sexual orientation, but rather "on the basis of a conjunction of conduct and the belief that the conduct is not wrong." Our decisions have declined to distinguish between status and conduct in this context. See *Lawrence v. Texas* (2003).

Third, the Law School reasonably adheres to the view that an all-comers policy, to the extent it brings together individuals with diverse backgrounds and beliefs, "encourages tolerance, cooperation, and learning among students." And if the policy sometimes produces discord, Hastings can rationally rank among RSO-program goals development of conflict-resolution skills, toleration, and readiness to find common ground.

Fourth, Hastings' policy, which incorporates--in fact, subsumes--state-law proscriptions on discrimination, conveys the Law School's decision "to decline

to subsidize with public monies and benefits conduct of which the people of California disapprove." State law, of course, may not command that public universities take action impermissible under the First Amendment. But so long as a public university does not contravene constitutional limits, its choice to advance state-law goals through the school's educational endeavors stands on firm footing.

In sum, the several justifications Hastings asserts in support of its all-comers requirement are surely reasonable in light of the RSO forum's purposes.

3

The Law School's policy is all the more creditworthy in view of the "substantial alternative channels that remain open for [CLS-student] communication to take place." *Perry Ed. Assn.* If restrictions on access to a limited public forum are viewpoint discriminatory, the ability of a group to exist outside the forum would not cure the constitutional shortcoming. But when access barriers are viewpoint neutral, our decisions have counted it significant that other available avenues for the group to exercise its First Amendment rights lessen the burden created by those barriers.

In this case, Hastings offered CLS access to school facilities to conduct meetings and the use of chalkboards and generally available bulletin boards to advertise events. Although CLS could not take advantage of RSO-specific methods of communication, the advent of electronic media and social-networking sites reduces the importance of those channels. See App. 114-115 (CLS maintained a Yahoo! message group to disseminate information to students.); *Christian Legal Society v. Walker*, 453 F. 3d 853, 874 (CA7 2006) (Wood, J., dissenting) ("Most universities and colleges, and most college-aged students, communicate through email, websites, and hosts like MySpace ... . If CLS had its own website, any student at the school with access to Google--that is, all of them--could easily have found it."). See also Brief for Associated Students of the University of California, Hastings College of Law as Amicus Curiae 14-18 (describing host of ways CLS could communicate with Hastings' students outside official channels).

Private groups, from fraternities and sororities to social clubs and secret societies, commonly maintain a presence at universities without official school affiliation. Based on the record before us, CLS was similarly situated: It hosted a variety of activities the year after Hastings denied it recognition, and the number of students attending those meetings and events doubled. "The variety and type of alternative modes of access present here," in short, "compare favorably with those in other [limited public] forum cases where we have upheld restrictions on access." *Perry Ed. Assn.* It is beyond dissenter's license, we note again, constantly to maintain that nonrecognition of a student organization is equivalent to prohibiting its members from speaking.

4

CLS nevertheless deems Hastings' all-comers policy "frankly absurd." "There can be no diversity of viewpoints in a forum," it asserts, "if groups are not permitted to form around viewpoints." This catchphrase confuses CLS's preferred policy with constitutional limitation--the advisability of Hastings'

policy does not control its permissibility. Instead, we have repeatedly stressed that a State's restriction on access to a limited public forum "need not be the most reasonable or the only reasonable limitation."

CLS also assails the reasonableness of the all-comers policy in light of the RSO forum's function by forecasting that the policy will facilitate hostile takeovers; if organizations must open their arms to all, CLS contends, saboteurs will infiltrate groups to subvert their mission and message. This supposition strikes us as more hypothetical than real. CLS points to no history or prospect of RSO-hijackings at Hastings. Students tend to self-sort and presumably will not endeavor en masse to join--let alone seek leadership positions in--groups pursuing missions wholly at odds with their personal beliefs. And if a rogue student intent on sabotaging an organization's objectives nevertheless attempted a takeover, the members of that group would not likely elect her as an officer.

RSOs, moreover, in harmony with the all-comers policy, may condition eligibility for membership and leadership on attendance, the payment of dues, or other neutral requirements designed to ensure that students join because of their commitment to a group's vitality, not its demise. Several RSOs at Hastings limit their membership rolls and officer slates in just this way. See, e.g., App. 192 (members must "[p]lay their dues on a timely basis" and "attend meetings regularly"); *id.*, at 173 (members must complete an application and pay dues; "[a]ny active member who misses a semester of regularly scheduled meetings shall be dropped from rolls"); App. to Pet. for Cert. 129a ("Only Hastings students who have held membership in this organization for a minimum of one semester shall be eligible to be an officer.").

Hastings, furthermore, could reasonably expect more from its law students than the disruptive behavior CLS hypothesizes--and to build this expectation into its educational approach. A reasonable policy need not anticipate and preemptively close off every opportunity for avoidance or manipulation. If students begin to exploit an all-comers policy by hijacking organizations to distort or destroy their missions, Hastings presumably would revisit and revise its policy.

Finally, CLS asserts (and the dissent repeats) that the Law School lacks any legitimate interest--let alone one reasonably related to the RSO forum's purposes--in urging "religious groups not to favor co-religionists for purposes of their religious activities." CLS's analytical error lies in focusing on the benefits it must forgo while ignoring the interests of those it seeks to fence out: Exclusion, after all, has two sides. Hastings, caught in the crossfire between a group's desire to exclude and students' demand for equal access, may reasonably draw a line in the sand permitting all organizations to express what they wish but no group to discriminate in membership.

#### D

We next consider whether Hastings' all-comers policy is viewpoint neutral.

Although this aspect of limited-public-forum analysis has been the constitutional sticking point in our prior decisions, as earlier recounted, we need not dwell on it here. It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring all student groups to accept all comers. In contrast to Healy, Widmar, and Rosenberger, in which universities singled out organizations for disfavored treatment because of their points of view, Hastings' all-comers requirement draws no distinction between groups based on their message or perspective. An all-comers condition on access to RSO status, in short, is textbook viewpoint neutral.

## 2

Conceding that Hastings' all-comers policy is "nominally neutral," CLS attacks the regulation by pointing to its effect: The policy is vulnerable to constitutional assault, CLS contends, because "it systematically and predictably burdens most heavily those groups whose viewpoints are out of favor with the campus mainstream." This argument stumbles from its first step because "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism* (1989).

Even if a regulation has a differential impact on groups wishing to enforce exclusionary membership policies, "[w]here the [State] does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R. A. V. v. St. Paul* (1992).

Hastings' requirement that student groups accept all comers, we are satisfied, "is justified without reference to the content [or viewpoint] of the regulated speech." The Law School's policy aims at the act of rejecting would-be group members without reference to the reasons motivating that behavior: Hastings' "desire to redress th[e] perceived harms" of exclusionary membership policies "provides an adequate explanation for its [all-comers condition] over and above mere disagreement with [any student group's] beliefs or biases." *Wisconsin v. Mitchell* (1993). CLS's conduct--not its Christian perspective--is, from Hastings' vantage point, what stands between the group and RSO status. "In the end," as Hastings observes, "CLS is simply confusing its own viewpoint-based objections to ... nondiscrimination laws (which it is entitled to have and [to] voice) with viewpoint discrimination." Brief for Hastings 31.

Finding Hastings' open-access condition on RSO status reasonable and viewpoint neutral, we reject CLS' free-speech and expressive-association claims.

## IV

In its reply brief, CLS contends that "[t]he peculiarity, incoherence, and suspect history of the all-comers policy all point to pretext." Neither the District Court nor the Ninth Circuit addressed an argument that Hastings selectively enforces its all-comers policy, and this Court is not the proper forum to air the issue in the first instance. On remand, the Ninth Circuit may consider CLS's pretext argument if, and to the extent, it is preserved.

For the foregoing reasons, we affirm the Court of Appeals' ruling that the all-comers policy is constitutional and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE STEVENS, CONCURRING.

The Court correctly confines its discussion to the narrow issue presented by the record, and correctly upholds the all-comers policy. I join its opinion without reservation. Because the dissent has volunteered an argument that the school's general Nondiscrimination Policy would be "plainly" unconstitutional if applied to this case (opinion of Alito, J.), a brief response is appropriate. In my view, both policies are plainly legitimate. \*\*\*

It is critical, in evaluating CLS's challenge to the Nondiscrimination Policy, to keep in mind that an RSO program is a limited forum--the boundaries of which may be delimited by the proprietor. When a religious association, or a secular association, operates in a wholly public setting, it must be allowed broad freedom to control its membership and its message, even if its decisions cause offense to outsiders. Profound constitutional problems would arise if the State of California tried to "demand that all Christian groups admit members who believe that Jesus was merely human." (Alito, J., dissenting). But the CLS chapter that brought this lawsuit does not want to be just a Christian group; it aspires to be a recognized student organization. The Hastings College of Law is not a legislature. And no state actor has demanded that anyone do anything outside the confines of a discrete, voluntary academic program. Although it may be the case that to some "university students, the campus is their world," it does not follow that the campus ought to be equated with the public square.

The campus is, in fact, a world apart from the public square in numerous respects, and religious organizations, as well as all other organizations, must abide by certain norms of conduct when they enter an academic community. Public universities serve a distinctive role in a modern democratic society. Like all specialized government entities, they must make countless decisions about how to allocate resources in pursuit of their role. Some of those decisions will be controversial; many will have differential effects across populations; virtually all will entail value judgments of some kind. As a general matter, courts should respect universities' judgments and let them manage their own affairs.

The RSO forum is no different. It is not an open commons that Hastings happens to maintain. It is a mechanism through which Hastings confers certain benefits and pursues certain aspects of its educational mission. Having exercised its discretion to establish an RSO program, a university must treat all participants evenhandedly. But the university need not remain neutral--indeed it could not remain neutral--in determining which goals the program will serve and which rules are best suited to facilitate those goals. These are not legal questions but policy questions; they are not for the Court but for the university to make. When any given group refuses to comply with the rules, the RSO sponsor need not admit that group at the cost of undermining the program and the values reflected therein. On many levels, a university administrator has a

"greater interest in the content of student activities than the police chief has in the content of a soapbox oration." *Widmar v. Vincent* (1981) (Stevens, J., concurring in judgment).

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JUSTICE KENNEDY, CONCURRING.

To be effective, a limited forum often will exclude some speakers based on their affiliation (e.g., student versus nonstudent) or based on the content of their speech, interests, and expertise (e.g., art professor not chosen as speaker for conference on public transit). When the government does exclude from a limited forum, however, other content-based judgments may be impermissible. For instance, an otherwise qualified and relevant speaker may not be excluded because of hostility to his or her views or beliefs. \*\*\*

In the instant case, however, if the membership qualification were enforced, it would contradict a legitimate purpose for having created the limited forum in the first place. Many educational institutions, including respondent Hastings College of Law, have recognized that the process of learning occurs both formally in a classroom setting and informally outside of it. Students may be shaped as profoundly by their peers as by their teachers. Extracurricular activities, such as those in the Hastings "Registered Student Organization" program, facilitate interactions between students, enabling them to explore new points of view, to develop interests and talents, and to nurture a growing sense of self. The Hastings program is designed to allow all students to interact with their colleagues across a broad, seemingly unlimited range of ideas, views, and activities. See *Regents of Univ. of Cal. v. Bakke* (1978) (opinion of Powell, J.) ("[A] great deal of learning ... occurs through interactions among students ... who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world" (alteration in original; internal quotation marks omitted)).

Law students come from many backgrounds and have but three years to meet each other and develop their skills. They do so by participating in a community that teaches them how to create arguments in a convincing, rational, and respectful manner and to express doubt and disagreement in a professional way. A law school furthers these objectives by allowing broad diversity in registered student organizations. But these objectives may be better achieved if students can act cooperatively to learn from and teach each other through interactions in social and intellectual contexts. A vibrant dialogue is not possible if students wall themselves off from opposing points of view.

The school's objectives thus might not be well served if, as a condition to membership or participation in a group, students were required to avow particular personal beliefs or to disclose private, off-campus behavior. Students whose views are in the minority at the school would likely fare worse in that regime. Indeed, were those sorts of requirements to become prevalent, it might undermine the principle that in a university community--and in a law school community specifically--speech is deemed persuasive based on its substance, not the identity of the speaker. The era of loyalty oaths is behind us. A school

quite properly may conclude that allowing an oath or belief-affirming requirement, or an outside conduct requirement, could be divisive for student relations and inconsistent with the basic concept that a view's validity should be tested through free and open discussion. The school's policy therefore represents a permissible effort to preserve the value of its forum. \*\*\*

JUSTICE ALITO, WITH WHOM THE CHIEF JUSTICE, JUSTICE SCALIA, AND JUSTICE THOMAS JOIN, DISSENTING.

The proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate." *United States v. Schwimmer*, (1929) (Holmes, J., dissenting). Today's decision rests on a very different principle: no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning.

\*\*\* While I think that *Healy [v. James]* (1972) is largely controlling, I am content to address the constitutionality of Hastings' actions under our limited public forum cases, which lead to exactly the same conclusion.

In this case, the forum consists of the RSO program. Once a public university opens a limited public forum, it "must respect the lawful boundaries it has itself set." *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995). The university "may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.'" And the university must maintain strict viewpoint neutrality. *Board of Regents of Univ. of Wis. System v. Southworth* (2000); *Rosenberger*.

This requirement of viewpoint neutrality extends to the expression of religious viewpoints. \*\*\*

We have applied this analysis in cases in which student speech was restricted because of the speaker's religious viewpoint, and we have consistently concluded that such restrictions constitute viewpoint discrimination.

\*\*\* The accept-all-comers policy is antithetical to the design of the RSO forum for the same reason that a state-imposed accept-all-comers policy would violate the First Amendment rights of private groups if applied off campus. As explained above, a group's First Amendment right of expressive association is burdened by the "forced inclusion" of members whose presence would "affect in a significant way the group's ability to advocate public or private viewpoints." *Dale*. The Court has therefore held that the government may not compel a group that engages in "expressive association" to admit such a member unless the government has a compelling interest, " 'unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.' "

There can be no dispute that this standard would not permit a generally applicable law mandating that private religious groups admit members who do not share the groups' beliefs. Religious groups like CLS obviously engage in expressive association, and no legitimate state interest could override the powerful effect that an accept-all-comers law would have on the ability of religious groups to express their views. The State of California surely could not demand that all Christian groups admit members who believe that Jesus was

merely human. Jewish groups could not be required to admit anti-Semites and Holocaust deniers. Muslim groups could not be forced to admit persons who are viewed as slandering Islam.

While there can be no question that the State of California could not impose such restrictions on all religious groups in the State, the Court now holds that Hastings, a state institution, may impose these very same requirements on students who wish to participate in a forum that is designed to foster the expression of diverse viewpoints. \*\*\*

I do not think it is an exaggeration to say that today's decision is a serious setback for freedom of expression in this country. Our First Amendment reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, (1964). Even if the United States is the only Nation that shares this commitment to the same extent, I would not change our law to conform to the international norm. I fear that the Court's decision marks a turn in that direction. Even those who find CLS's views objectionable should be concerned about the way the group has been treated--by Hastings, the Court of Appeals, and now this Court. I can only hope that this decision will turn out to be an aberration.

## Notes

1. *Christian Legal Society (CLS) v. Martinez* again illustrates that First Amendment cases often present a dizzying array of different doctrines to analyze and decide any particular dispute. How does the forum analysis shape the outcome for the Court's opinion?

2. In the dissenting opinion, Justice Alito argues that he is "content to address the constitutionality of Hastings' actions under our limited public forum cases, which lead to exactly the same conclusion" and explains that "the forum consists of the RSO program." However, the dissenting opinion also states

The accept-all-comers policy is antithetical to the design of the RSO forum for the same reason that a state-imposed accept-all-comers policy would violate the First Amendment rights of private groups if applied off campus.

Does this mean the forum analysis is irrelevant?

3. Recall that in *Board of Regents of Univ. of Wisconsin System v. Southworth*, 529 U.S. 217 (2000) [Chapter 6] the Court held invalid the collection of a student fee awarded to RSO's. The Court noted:

Our public forum cases are instructive here by close analogy. This is true even though the student activities fund is not a public forum in the traditional sense of the term and despite the circumstance that those cases most often involve a demand for access, not a claim to be exempt from supporting speech.

It added that the university “is free to enact viewpoint neutral rules restricting off-campus travel or other expenditures by RSO's, for it may create what is tantamount to a limited public forum if the principles of viewpoint neutrality are respected.” It then distinguished this from situations in which “the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different,” citing *Rust v. Sullivan* (1991).

Would it be possible for a law school (or university) to require RSO's to be “dedicated to social justice”?

### ***Note: Trespassing in a Public Forum?***

In *Virginia v. Hicks*, 539 U.S. 113 (2003), Justice Scalia wrote for a unanimous Court and upheld the constitutionality of a housing authority's trespass policy. As the Court explained:

The Richmond Redevelopment and Housing Authority (RRHA) owns and operates a housing development for low-income residents called Whitcomb Court. Until June 23, 1997, the city of Richmond owned the streets within Whitcomb Court. The city council decided, however, to "privatize" these streets in an effort to combat rampant crime and drug dealing in Whitcomb Court--much of it committed and conducted by nonresidents. \*\*\*

The city then conveyed these streets by a recorded deed to the RRHA (which is a political subdivision of the Commonwealth of Virginia). This deed required the RRHA to " 'give the appearance that the closed street, particularly at the entrances, are no longer public streets and that they are in fact private streets.' " To this end, the RRHA posted red-and-white signs on each apartment building--and every 100 feet along the streets--of Whitcomb Court, which state: " 'NO TRESPASSING[.] PRIVATE PROPERTY[.] YOU ARE NOW ENTERING PRIVATE PROPERTY AND STREETS OWNED BY RRHA. UNAUTHORIZED PERSONS WILL BE SUBJECT TO ARREST AND PROSECUTION. UNAUTHORIZED VEHICLES WILL BE TOWED AT OWNERS EXPENSE.' " The RRHA also enacted a policy authorizing the Richmond police "to serve notice, either orally or in writing, to any person who is found on Richmond Redevelopment and Housing Authority property when such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises. Such notice shall forbid the person from returning to the property. Finally, Richmond Redevelopment and Housing Authority authorizes Richmond Police Department officers to arrest any person for trespassing after such person, having been duly notified, either stays upon or returns to Richmond Redevelopment and Housing Authority property.' "

Respondent Kevin Hicks, a nonresident of Whitcomb Court, received a notice from the manager excluding him from the property; he was later convicted for trespassing at Whitcomb Court.

At trial, Hicks maintained that the RRHA's policy limiting access to Whitcomb Court was both unconstitutionally overbroad and void for vagueness. On appeal of his conviction, a three-judge panel of the Court of Appeals of Virginia initially

rejected Hicks' contentions, but the en banc Court of Appeals reversed. That court held that the streets of Whitcomb Court were a "traditional public forum," notwithstanding the city ordinance declaring them closed, and vacated Hicks' conviction on the ground that RRHA's policy violated the First Amendment. The Virginia Supreme Court affirmed the en banc Court of Appeals, but for different reasons. Without deciding whether the streets of Whitcomb Court were a public forum, the Virginia Supreme Court concluded that the RRHA policy was unconstitutionally overbroad. While acknowledging that the policy was "designed to punish activities that are not protected by the First Amendment," the court held that "the policy also prohibits speech and conduct that are clearly protected by the First Amendment." The court found the policy defective because it vested too much discretion in Whitcomb Court's manager to determine whether an individual's presence at Whitcomb Court is "authorized," allowing her to "prohibit speech that she finds personally distasteful or offensive even though such speech may be protected by the First Amendment."

The Court concluded:

Even assuming the streets of Whitcomb Court are a public forum, the notice-barment rule subjects to arrest those who reenter after trespassing and after being warned not to return-- regardless of whether, upon their return, they seek to engage in speech. Neither the basis for the barment sanction (the prior trespass) nor its purpose (preventing future trespasses) has anything to do with the First Amendment. Punishing its violation by a person who wishes to engage in free speech no more implicates the First Amendment than would the punishment of a person who has (pursuant to lawful regulation) been banned from a public park after vandalizing it, and who ignores the ban in order to take part in a political demonstration. Here, as there, it is Hicks' nonexpressive conduct--his entry in violation of the notice-barment rule--not his speech, for which he is punished as a trespasser.

Most importantly, both the notice-barment rule and the "legitimate business or social purpose" rule apply to all persons who enter the streets of Whitcomb Court, not just to those who seek to engage in expression. The rules apply to strollers, loiterers, drug dealers, roller skaters, bird watchers, soccer players, and others not engaged in constitutionally protected conduct--a group that would seemingly far outnumber First Amendment speakers.

The Court further noted that

Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating). Applications of the RRHA policy that violate the First Amendment can still be remedied through as-applied litigation, but the Virginia Supreme Court should not have used the "strong medicine" of overbreadth to invalidate the entire RRHA trespass policy.

Does the Court's outcome undermine the language from *Hague v. CIO* (1939) regarding the use of streets - wherever the title may rest - as "immemorially" held "in trust" for the use of the public? Is the Court's conclusion that Hicks was engaged in nonexpressive conduct convincing?

### III. Time, Place, or Manner

Government regulation that is not directed at content (or viewpoint) may be “merely” a time, place, or manner restriction subject to a more lenient level of judicial scrutiny.

#### *Ward v. Rock Against Racism*

491 U.S. 781 (1989)

KENNEDY, J., DELIVERED THE OPINION OF THE COURT, IN WHICH REHNQUIST, C.J., AND WHITE, O'CONNOR, , AND SCALIA, JJ., JOINED. BLACKMUN, J., CONCURRED IN THE RESULT. MARSHALL, J., FILED A DISSENTING OPINION, IN WHICH BRENNAN AND STEVENS, JJ., JOINED.

JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

In the southeast portion of New York City's Central Park, about 10 blocks upward from the park's beginning point at 59th Street, there is an amphitheater and stage structure known as the Naumberg Acoustic Bandshell. The bandshell faces west across the remaining width of the park. In close proximity to the bandshell, and lying within the directional path of its sound, is a grassy open area called the Sheep Meadow. The city has designated the Sheep Meadow as a quiet area for passive recreations like reclining, walking, and reading. Just beyond the park, and also within the potential sound range of the bandshell, are the apartments and residences of Central Park West.

This case arises from the city's attempt to regulate the volume of amplified music at the bandshell so the performances are satisfactory to the audience without intruding upon those who use the Sheep Meadow or live on Central Park West and in its vicinity.

The city's regulation requires bandshell performers to use sound-amplification equipment and a sound technician provided by the city. The challenge to this volume control technique comes from the sponsor of a rock concert. The trial court sustained the noise control measures, but the Court of Appeals for the Second Circuit reversed. We granted certiorari to resolve the important First Amendment issues presented by the case.

#### I

Rock Against Racism, respondent in this case, is an unincorporated association which, in its own words, is "dedicated to the espousal and promotion of antiracist views." Each year from 1979 through 1986, RAR has sponsored a program of speeches and rock music at the bandshell. RAR has furnished the sound equipment and sound technician used by the various performing groups at these annual events.

Over the years, the city received numerous complaints about excessive sound amplification at respondent's concerts from park users and residents of areas adjacent to the park. On some occasions RAR was less than cooperative when city officials asked that the volume be reduced; at one concert, police felt

compelled to cut off the power to the sound system, an action that caused the audience to become unruly and hostile.

Before the 1984 concert, city officials met with RAR representatives to discuss the problem of excessive noise. It was decided that the city would monitor sound levels at the edge of the concert ground, and would revoke respondent's event permit if specific volume limits were exceeded. Sound levels at the concert did exceed acceptable levels for sustained periods of time, despite repeated warnings and requests that the volume be lowered. Two citations for excessive volume were issued to respondent during the concert. When the power was eventually shut off, the audience became abusive and disruptive.

The following year, when respondent sought permission to hold its upcoming concert at the bandshell, the city declined to grant an event permit, citing its problems with noise and crowd control at RAR's previous concerts. The city suggested some other city-owned facilities as alternative sites for the concert. RAR declined the invitation and filed suit in United States District Court against the city, its mayor, and various police and parks department officials, seeking an injunction directing issuance of an event permit. After respondent agreed to abide by all applicable regulations, the parties reached agreement and a permit was issued.

The city then undertook to develop comprehensive New York City Parks Department Use Guidelines for the Naumberg Bandshell. A principal problem to be addressed by the guidelines was controlling the volume of amplified sound at bandshell events. A major concern was that at some bandshell performances the event sponsors had been unable to "provide the amplification levels required and `crowds unhappy with the sound became disappointed or unruly.'" The city found that this problem had several causes, including inadequate sound equipment, sound technicians who were either unskilled at mixing sound outdoors or unfamiliar with the acoustics of the bandshell and its surroundings, and the like. Because some performers compensated for poor sound mix by raising volume, these factors tended to exacerbate the problem of excess noise.

The city considered various solutions to the sound-amplification problem. The idea of a fixed decibel limit for all performers using the bandshell was rejected because the impact on listeners of a single decibel level is not constant, but varies in response to changes in air temperature, foliage, audience size, and like factors. The city also rejected the possibility of employing a sound technician to operate the equipment provided by the various sponsors of bandshell events, because the city's technician might have had difficulty satisfying the needs of sponsors while operating unfamiliar, and perhaps inadequate, sound equipment. Instead, the city concluded that the most effective way to achieve adequate but not excessive sound amplification would be for the city to furnish high quality sound equipment and retain an independent, experienced sound technician for all performances at the bandshell. After an extensive search the city hired a private sound company capable of meeting the needs of all the varied users of the bandshell.

The Use Guidelines were promulgated on March 21, 1986. After learning that it would be expected to comply with the guidelines at its upcoming annual concert in May 1986, respondent returned to the District Court and filed a

motion for an injunction against the enforcement of certain aspects of the guidelines. The District Court preliminarily enjoined enforcement of the sound-amplification rule on May 1, 1986. Under the protection of the injunction, and alone among users of the bandshell in the 1986 season, RAR was permitted to use its own sound equipment and technician, just as it had done in prior years. RAR's 1986 concert again generated complaints about excessive noise from park users and nearby residents.

After the concert, respondent amended its complaint to seek damages and a declaratory judgment striking down the guidelines as facially invalid. After hearing five days of testimony about various aspects of the guidelines, the District Court issued its decision upholding the sound-amplification guideline. The court found that the city had been "motivated by a desire to obtain top-flight sound equipment and experienced operators" in selecting an independent contractor to provide the equipment and technician for bandshell events, and that the performers who did use the city's sound system in the 1986 season, in performances "which ran the full cultural gamut from grand opera to salsa to reggae," were uniformly pleased with the quality of the sound provided.

Although the city's sound technician controlled both sound volume and sound mix by virtue of his position at the mixing board, the court found that "[t]he City's practice for events at the Bandshell is to give the sponsor autonomy with respect to the sound mix: balancing treble with bass, highlighting a particular instrument or voice, and the like," and that the city's sound technician "does all he can to accommodate the sponsor's desires in those regards." *Ibid.* Even with respect to volume control, the city's practice was to confer with the sponsor before making any decision to turn the volume down. In some instances, as with a New York Grand Opera performance, the sound technician accommodated the performers' unique needs by integrating special microphones with the city's equipment. The court specifically found that "[t]he City's implementation of the Bandshell guidelines provides for a sound amplification system capable of meeting RAR's technical needs and leaves control of the sound 'mix' in the hands of RAR." Applying this Court's three-part test for judging the constitutionality of government regulation of the time, place, or manner of protected speech, the court found the city's regulation valid.

The Court of Appeals reversed. After recognizing that "[c]ontent neutral time, place and manner regulations are permissible so long as they are narrowly tailored to serve a substantial government interest and do not unreasonably limit alternative avenues of expression," the court added the proviso that "the method and extent of such regulation must be reasonable, that is, it must be the least intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation." Applying this test, the court determined that the city's guideline was valid only to the extent necessary to achieve the city's legitimate interest in controlling excessive volume, but found there were various alternative means of controlling volume without also intruding on respondent's ability to control the sound mix. For example, the city could have directed respondent's sound technician to keep the volume below specified levels. Alternatively, a volume-limiting device could have been installed; and as a "last resort," the court suggested, "the plug can be pulled on the sound to enforce the volume limit." In view of the potential availability of

these seemingly less restrictive alternatives, the Court of Appeals concluded that the sound-amplification guideline was invalid because the city had failed to prove that its regulation "was the least intrusive means of regulating the volume."

We granted certiorari to clarify the legal standard applicable to governmental regulation of the time, place, or manner of protected speech. Because the Court of Appeals erred in requiring the city to prove that its regulation was the least intrusive means of furthering its legitimate governmental interests, and because the ordinance is valid on its face, we now reverse.

## II

Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. See 2 DIALOGUES OF PLATO, REPUBLIC, bk. 3, pp. 231, 245-248 (B. Jowett transl., 4th ed. 1953) ("Our poets must sing in another and a nobler strain"); *Musical Freedom and Why Dictators Fear It*, N. Y. TIMES, Aug. 23, 1981, section 2, p. 1, col. 5; *Soviet Schizophrenia toward Stravinsky*, N. Y. TIMES, June 26, 1982, section 1, p. 25, col. 2; *Symphonic Voice from China Is Heard Again*, N. Y. TIMES, Oct. 11, 1987, section 2, p. 27, col. 1. The Constitution prohibits any like attempts in our own legal order. Music, as a form of expression and communication, is protected under the First Amendment. In the case before us the performances apparently consisted of remarks by speakers, as well as rock music, but the case has been presented as one in which the constitutional challenge is to the city's regulation of the musical aspects of the concert; and, based on the principle we have stated, the city's guideline must meet the demands of the First Amendment. The parties do not appear to dispute that proposition.

We need not here discuss whether a municipality which owns a bandstand or stage facility may exercise, in some circumstances, a proprietary right to select performances and control their quality. See *Southeastern Promotions, Ltd. v. Conrad* (1975) (Rehnquist, J., dissenting). Though it did demonstrate its own interest in the effort to insure high quality performances by providing the equipment in question, the city justifies its guideline as a regulatory measure to limit and control noise. Here the bandshell was open, apparently, to all performers; and we decide the case as one in which the bandshell is a public forum for performances in which the government's right to regulate expression is subject to the protections of the First Amendment. Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." We consider these requirements in turn.

The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech."

The principal justification for the sound-amplification guideline is the city's desire to control noise levels at bandshell events, in order to retain the character of the Sheep Meadow and its more sedate activities, and to avoid undue intrusion into residential areas and other areas of the park. This justification for the guideline "ha[s] nothing to do with content," and it satisfies the requirement that time, place, or manner regulations be content neutral.

The only other justification offered below was the city's interest in "ensur[ing] the quality of sound at Bandshell events." Respondent urges that this justification is not content neutral because it is based upon the quality, and thus the content, of the speech being regulated. In respondent's view, the city is seeking to assert artistic control over performers at the bandshell by enforcing a bureaucratically determined, value-laden conception of good sound. That all performers who have used the city's sound equipment have been completely satisfied is of no moment, respondent argues, because "[t]he First Amendment does not permit and cannot tolerate state control of artistic expression merely because the State claims that [its] efforts will lead to 'top-quality' results."

While respondent's arguments that the government may not interfere with artistic judgment may have much force in other contexts, they are inapplicable to the facts of this case. The city has disclaimed in express terms any interest in imposing its own view of appropriate sound mix on performers. To the contrary, as the District Court found, the city requires its sound technician to defer to the wishes of event sponsors concerning sound mix. On this record, the city's concern with sound quality extends only to the clearly content-neutral goals of ensuring adequate sound amplification and avoiding the volume problems associated with inadequate sound mix. Any governmental attempt to serve purely esthetic goals by imposing subjective standards of acceptable sound mix on performers would raise serious First Amendment concerns, but this case provides us with no opportunity to address those questions. As related above, the District Court found that the city's equipment and its sound technician could meet all of the standards requested by the performers, including RAR.

Respondent argues further that the guideline, even if not content based in explicit terms, is nonetheless invalid on its face because it places unbridled discretion in the hands of city officials charged with enforcing it. According to respondent, there is nothing in the language of the guideline to prevent city officials from selecting wholly inadequate sound equipment or technicians, or even from varying the volume and quality of sound based on the message being conveyed by the performers.

As a threshold matter, it is far from clear that respondent should be permitted to bring a facial challenge to this aspect of the regulation. Our cases permitting facial challenges to regulations that allegedly grant officials unconstrained authority to regulate speech have generally involved licensing schemes that "ves[t] unbridled discretion in a government official over whether to permit or deny expressive activity." The grant of discretion that respondent seeks to challenge here is of an entirely different, and lesser, order of magnitude, because respondent does not suggest that city officials enjoy unfettered discretion to deny bandshell permits altogether. Rather, respondent contends only that the city, by exercising what is concededly its right to regulate amplified sound, could choose to provide inadequate sound for performers based on the content of their speech. Since respondent does not claim that city officials enjoy unguided discretion to deny the right to speak altogether, it is open to question whether respondent's claim falls within the narrow class of permissible facial challenges to allegedly unconstrained grants of regulatory authority.

We need not decide, however, whether the "extraordinary doctrine" that permits facial challenges to some regulations of expression should be extended to the circumstances of this case, for respondent's facial challenge fails on its merits. The city's guideline states that its goals are to "provide the best sound for all events" and to "insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of [the] Sheep Meadow." While these standards are undoubtedly flexible, and the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity. By its own terms the city's sound-amplification guideline must be interpreted to forbid city officials purposely to select inadequate sound systems or to vary the sound quality or volume based on the message being delivered by performers. The guideline is not vulnerable to respondent's facial challenge.

Even if the language of the guideline were not sufficient on its face to withstand challenge, our ultimate conclusion would be the same, for the city has interpreted the guideline in such a manner as to provide additional guidance to the officials charged with its enforcement. The District Court expressly found that the city's policy is to defer to the sponsor's desires concerning sound quality. With respect to sound volume, the city retains ultimate control, but city officials "mak[e] it a practice to confer with the sponsor if any questions of excessive sound arise, before taking any corrective action." The city's goal of ensuring that "the sound amplification [is] sufficient to reach all listeners within the defined concertground," serves to limit further the discretion of the officials on the scene. Administrative interpretation and implementation of a regulation are, of course, highly relevant to our analysis, for "[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered." Any inadequacy on the face of the guideline would have been more than remedied by the city's narrowing construction.

## B

The city's regulation is also "narrowly tailored to serve a significant governmental interest." Despite respondent's protestations to the contrary, it can no longer be doubted that government "ha[s] a substantial interest in protecting its citizens from unwelcome noise." This interest is perhaps at its greatest when government seeks to protect "the well-being, tranquility, and privacy of the home," but it is by no means limited to that context, for the government may act to protect even such traditional public forums as city streets and parks from excessive noise.

We think it also apparent that the city's interest in ensuring the sufficiency of sound amplification at bandshell events is a substantial one. The record indicates that inadequate sound amplification has had an adverse affect on the ability of some audiences to hear and enjoy performances at the bandshell. The city enjoys a substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer, from amplified music to silent meditation.

\*\*\* The Court of Appeals erred in sifting through all the available or imagined alternative means of regulating sound volume in order to determine whether the city's solution was "the least intrusive means" of achieving the desired end. This "less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation." Instead, our cases quite clearly hold that restrictions on the time, place, or manner of protected speech are not invalid "simply because there is some imaginable alternative that might be less burdensome on speech."

The Court of Appeals apparently drew its least-intrusive-means requirement from *United States v. O'Brien*, the case in which we established the standard for judging the validity of restrictions on expressive conduct. The court's reliance was misplaced, however, for we have held that the *O'Brien* test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions." \*\*\*

Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. "The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for

promoting significant government interests" or the degree to which those interests should be promoted.

It is undeniable that the city's substantial interest in limiting sound volume is served in a direct and effective way by the requirement that the city's sound technician control the mixing board during performances. Absent this requirement, the city's interest would have been served less well, as is evidenced by the complaints about excessive volume generated by respondent's past concerts. The alternative regulatory methods hypothesized by the Court of Appeals reflect nothing more than a disagreement with the city over how much control of volume is appropriate or how that level of control is to be achieved. The Court of Appeals erred in failing to defer to the city's reasonable determination that its interest in controlling volume would be best served by requiring bandshell performers to utilize the city's sound technician.

The city's second content-neutral justification for the guideline, that of ensuring "that the sound amplification [is] sufficient to reach all listeners within the defined concert-ground," also supports the city's choice of regulatory methods. By providing competent sound technicians and adequate amplification equipment, the city eliminated the problems of inexperienced technicians and insufficient sound volume that had plagued some bandshell performers in the past. No doubt this concern is not applicable to respondent's concerts, which apparently were characterized by more-than-adequate sound amplification. But that fact is beside the point, for the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case. Here, the regulation's effectiveness must be judged by considering all the varied groups that use the bandshell, and it is valid so long as the city could reasonably have determined that its interests overall would be served less effectively without the sound-amplification guideline than with it. Considering these proffered justifications together, therefore, it is apparent that the guideline directly furthers the city's legitimate governmental interests and that those interests would have been less well served in the absence of the sound-amplification guideline.

Respondent nonetheless argues that the sound-amplification guideline is not narrowly tailored because, by placing control of sound mix in the hands of the city's technician, the guideline sweeps far more broadly than is necessary to further the city's legitimate concern with sound volume. According to respondent, the guideline "targets . . . more than the exact source of the `evil' it seeks to remedy."

If the city's regulatory scheme had a substantial deleterious effect on the ability of bandshell performers to achieve the quality of sound they desired, respondent's concerns would have considerable force. The District Court found, however, that pursuant to city policy, the city's sound technician "give[s] the sponsor autonomy with respect to the sound mix . . . [and] does all that he can to accommodate the sponsor's desires in those regards." The court squarely rejected respondent's claim that the city's "technician is not able properly to implement a sponsor's instructions as to sound quality or mix," finding that "[n]o evidence to that effect was offered at trial; as noted, the evidence is to the contrary." In view of these findings, which were not disturbed by the Court of

Appeals, we must conclude that the city's guideline has no material impact on any performer's ability to exercise complete artistic control over sound quality. Since the guideline allows the city to control volume without interfering with the performer's desired sound mix, it is not "substantially broader than necessary" to achieve the city's legitimate ends and thus it satisfies the requirement of narrow tailoring.

### C

The final requirement, that the guideline leave open ample alternative channels of communication, is easily met. Indeed, in this respect the guideline is far less restrictive than regulations we have upheld in other cases, for it does not attempt to ban any particular manner or type of expression at a given place or time. Rather, the guideline continues to permit expressive activity in the bandshell, and has no effect on the quantity or content of that expression beyond regulating the extent of amplification. That the city's limitations on volume may reduce to some degree the potential audience for respondent's speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate.

### III

The city's sound-amplification guideline is narrowly tailored to serve the substantial and content-neutral governmental interests of avoiding excessive sound volume and providing sufficient amplification within the bandshell concert ground, and the guideline leaves open ample channels of communication. Accordingly, it is valid under the First Amendment as a reasonable regulation of the place and manner of expression. The judgment of the Court of Appeals is

*Reversed.*

JUSTICE BLACKMUN CONCURS IN THE RESULT [WITHOUT SEPARATE OPINION].

JUSTICE MARSHALL, WITH WHOM JUSTICE BRENNAN AND JUSTICE STEVENS JOIN, DISSENTING.

No one can doubt that government has a substantial interest in regulating the barrage of excessive sound that can plague urban life. Unfortunately, the majority plays to our shared impatience with loud noise to obscure the damage that it does to our First Amendment rights. Until today, a key safeguard of free speech has been government's obligation to adopt the least intrusive restriction necessary to achieve its goals. By abandoning the requirement that time, place, and manner regulations must be narrowly tailored, the majority replaces constitutional scrutiny with mandatory deference. The majority's willingness to give government officials a free hand in achieving their policy ends extends so far as to permit, in this case, government control of speech in advance of its dissemination. Because New York City's Use Guidelines (Guidelines) are not narrowly tailored to serve its interest in regulating loud noise, and because they constitute an impermissible prior restraint, I dissent.

### I

The majority sets forth the appropriate standard for assessing the constitutionality of the Guidelines. A time, place, and manner regulation of expression must be content neutral, serve a significant government interest, be narrowly tailored to serve that interest, and leave open ample alternative channels of communication. The Guidelines indisputably are content neutral as they apply to all bandshell users irrespective of the message of their music. They also serve government's significant interest in limiting loud noise in public places by giving the city exclusive control of all sound equipment.

My complaint is with the majority's serious distortion of the narrow tailoring requirement. Our cases have not, as the majority asserts, "clearly" rejected a less-restrictive-alternative test. \*\*\* In *Schneider v. State* (1939)], for example, the Court invalidated a ban on handbill distribution on public streets, notwithstanding that it was the most effective means of serving government's legitimate interest in minimizing litter, noise, and traffic congestion, and in preventing fraud. The Court concluded that punishing those who actually litter or perpetrate frauds was a much less intrusive, albeit not quite as effective, means to serve those significant interests.

The Court's past concern for the extent to which a regulation burdens speech more than would a satisfactory alternative is noticeably absent from today's decision. The majority requires only that government show that its interest cannot be served as effectively without the challenged restriction. It will be enough, therefore, that the challenged regulation advances the government's interest only in the slightest, for any differential burden on speech that results does not enter the calculus. Despite its protestations to the contrary, the majority thus has abandoned the requirement that restrictions on speech be narrowly tailored in any ordinary use of the phrase. Indeed, after today's decision, a city could claim that bans on handbill distribution or on door-to-door solicitation are the most effective means of avoiding littering and fraud, or that a ban on loudspeakers and radios in a public park is the most effective means of avoiding loud noise. Logically extended, the majority's analysis would permit such far-reaching restrictions on speech. \*\*\*

Had the majority not abandoned the narrow tailoring requirement, the Guidelines could not possibly survive constitutional scrutiny. Government's interest in avoiding loud sounds cannot justify giving government total control over sound equipment, any more than its interest in avoiding litter could justify a ban on handbill distribution. In both cases, government's legitimate goals can be effectively and less intrusively served by directly punishing the evil - the persons responsible for excessive sounds and the persons who litter. Indeed, the city concedes that it has an ordinance generally limiting noise but has chosen not to enforce it.

By holding that the Guidelines are valid time, place, and manner restrictions, notwithstanding the availability of less intrusive but effective means of controlling volume, the majority deprives the narrow tailoring requirement of all meaning. Today, the majority enshrines efficacy but sacrifices free speech.

## II

The majority's conclusion that the city's exclusive control of sound equipment is constitutional is deeply troubling for another reason. It places the Court's imprimatur on a quintessential prior restraint, incompatible with fundamental First Amendment values. \*\*\*

### III

Today's decision has significance far beyond the world of rock music. Government no longer need balance the effectiveness of regulation with the burdens on free speech. After today, government need only assert that it is most effective to control speech in advance of its expression. Because such a result eviscerates the First Amendment, I dissent.

## *McCullen v. Coakley*

573 U. S. \_\_\_\_ (2014)

ROBERTS, C. J., DELIVERED THE OPINION OF THE COURT, IN WHICH GINSBURG, BREYER, SOTOMAYOR, AND KAGAN, JJ., JOINED. SCALIA, J., FILED AN OPINION CONCURRING IN THE JUDGMENT, IN WHICH KENNEDY AND THOMAS, JJ., JOINED. ALITO, J., FILED AN OPINION CONCURRING IN THE JUDGMENT.

CHIEF JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

A Massachusetts statute makes it a crime to knowingly stand on a "public way or sidewalk" within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed. Mass. Gen. Laws, ch. 266, §§120E½(a), (b) (West 2012). Petitioners are individuals who approach and talk to women outside such facilities, attempting to dissuade them from having abortions. The statute prevents petitioners from doing so near the facilities' entrances. The question presented is whether the statute violates the First Amendment.

### I

#### A

In 2000, the Massachusetts Legislature enacted the Massachusetts Reproductive Health Care Facilities Act, Mass. Gen. Laws, ch. 266, §120E½ (West 2000). The law was designed to address clashes between abortion opponents and advocates of abortion rights that were occurring outside clinics where abortions were performed. The Act established a defined area with an 18-foot radius around the entrances and driveways of such facilities. §120E½(b). Anyone could enter that area, but once within it, no one (other than certain exempt individuals) could knowingly approach within six feet of another person--unless that person consented--"for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." A separate provision subjected to criminal punishment anyone who "knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility." §120E½(e).

The statute was modeled on a similar Colorado law that this Court had upheld in *Hill v. Colorado* (2000). Relying on *Hill*, the United States Court of Appeals for

the First Circuit sustained the Massachusetts statute against a First Amendment challenge.

By 2007, some Massachusetts legislators and law enforcement officials had come to regard the 2000 statute as inadequate. At legislative hearings, multiple witnesses recounted apparent violations of the law. Massachusetts Attorney General Martha Coakley, for example, testified that protestors violated the statute "on a routine basis." To illustrate this claim, she played a video depicting protestors approaching patients and clinic staff within the buffer zones, ostensibly without the latter individuals' consent. Clinic employees and volunteers also testified that protestors congregated near the doors and in the driveways of the clinics, with the result that prospective patients occasionally retreated from the clinics rather than try to make their way to the clinic entrances or parking lots.

Captain William B. Evans of the Boston Police Department, however, testified that his officers had made "no more than five or so arrests" at the Planned Parenthood clinic in Boston and that what few prosecutions had been brought were unsuccessful. Witnesses attributed the dearth of enforcement to the difficulty of policing the six-foot no-approach zones. Captain Evans testified that the 18-foot zones were so crowded with protestors that they resembled "a goalie's crease," making it hard to determine whether a protestor had deliberately approached a patient or, if so, whether the patient had consented. For similar reasons, Attorney General Coakley concluded that the six-foot no-approach zones were "unenforceable." What the police needed, she said, was a fixed buffer zone around clinics that protestors could not enter. Captain Evans agreed, explaining that such a zone would "make our job so much easier."

To address these concerns, the Massachusetts Legislature amended the statute in 2007, replacing the six-foot no-approach zones (within the 18-foot area) with a 35-foot fixed buffer zone from which individuals are categorically excluded. The statute now provides:

"No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway."

Mass. Gen. Laws, ch. 266, §120E½(b) (West 2012).

A "reproductive health care facility," in turn, is defined as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." §120E½(a).

The 35-foot buffer zone applies only "during a facility's business hours," and the area must be "clearly marked and posted." §120E½(c). In practice, facilities typically mark the zones with painted arcs and posted signs on adjacent sidewalks and streets. A first violation of the statute is punishable by a fine of up to \$500, up to three months in prison, or both, while a subsequent offense is punishable by a fine of between \$500 and \$5,000, up to two and a half years in prison, or both. §120E½(d).

The Act exempts four classes of individuals: (1) "persons entering or leaving such facility"; (2) "employees or agents of such facility acting within the scope of their employment"; (3) "law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment"; and (4) "persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility." §120E½(b)(1)-(4). The legislature also retained the separate provision from the 2000 version that proscribes the knowing obstruction of access to a facility. §120E½(e).

## B

Some of the individuals who stand outside Massachusetts abortion clinics are fairly described as protestors, who express their moral or religious opposition to abortion through signs and chants or, in some cases, more aggressive methods such as face-to-face confrontation. Petitioners take a different tack. They attempt to engage women approaching the clinics in what they call "sidewalk counseling," which involves offering information about alternatives to abortion and help pursuing those options. Petitioner Eleanor McCullen, for instance, will typically initiate a conversation this way: "Good morning, may I give you my literature? Is there anything I can do for you? I'm available if you have any questions." If the woman seems receptive, McCullen will provide additional information. McCullen and the other petitioners consider it essential to maintain a caring demeanor, a calm tone of voice, and direct eye contact during these exchanges. Such interactions, petitioners believe, are a much more effective means of dissuading women from having abortions than confrontational methods such as shouting or brandishing signs, which in petitioners' view tend only to antagonize their intended audience. In unrefuted testimony, petitioners say they have collectively persuaded hundreds of women to forgo abortions.

The buffer zones have displaced petitioners from their previous positions outside the clinics. McCullen offers counseling outside a Planned Parenthood clinic in Boston, as do petitioners Jean Zarrella and Eric Cadin. Petitioner Gregory Smith prays the rosary there. The clinic occupies its own building on a street corner. Its main door is recessed into an open foyer, approximately 12 feet back from the public sidewalk. Before the Act was amended to create the buffer zones, petitioners stood near the entryway to the foyer. Now a buffer zone--marked by a painted arc and a sign--surrounds the entrance. This zone extends 23 feet down the sidewalk in one direction, 26 feet in the other, and outward just one foot short of the curb. The clinic's entrance adds another seven feet to the width of the zone. The upshot is that petitioners are effectively excluded from a 56-foot-wide expanse of the public sidewalk in front of the clinic.

Petitioners Mark Bashour and Nancy Clark offer counseling and information outside a Planned Parenthood clinic in Worcester. Unlike the Boston clinic, the Worcester clinic sits well back from the public street and sidewalks. Patients enter the clinic in one of two ways. Those arriving on foot turn off the public sidewalk and walk down a nearly 54-foot-long private walkway to the main entrance. More than 85% of patients, however, arrive by car, turning onto the

clinic's driveway from the street, parking in a private lot, and walking to the main entrance on a private walkway.

Bashour and Clark would like to stand where the private walkway or driveway intersects the sidewalk and offer leaflets to patients as they walk or drive by. But a painted arc extends from the private walkway 35 feet down the sidewalk in either direction and outward nearly to the curb on the opposite side of the street. Another arc surrounds the driveway's entrance, covering more than 93 feet of the sidewalk (including the width of the driveway) and extending across the street and nearly six feet onto the sidewalk on the opposite side. Bashour and Clark must now stand either some distance down the sidewalk from the private walkway and driveway or across the street.

Petitioner Cyril Shea stands outside a Planned Parenthood clinic in Springfield, which, like the Worcester clinic, is set back from the public streets. Approximately 90% of patients arrive by car and park in the private lots surrounding the clinic. Shea used to position himself at an entrance to one of the five driveways leading to the parking lots. Painted arcs now surround the entrances, each spanning approximately 100 feet of the sidewalk parallel to the street (again, including the width of the driveways) and extending outward well into the street. Like petitioners at the Worcester clinic, Shea now stands far down the sidewalk from the driveway entrances.

Petitioners at all three clinics claim that the buffer zones have considerably hampered their counseling efforts. Although they have managed to conduct some counseling and to distribute some literature outside the buffer zones--particularly at the Boston clinic--they say they have had many fewer conversations and distributed many fewer leaflets since the zones went into effect.

The second statutory exemption allows clinic employees and agents acting within the scope of their employment to enter the buffer zones. Relying on this exemption, the Boston clinic uses "escorts" to greet women as they approach the clinic, accompanying them through the zones to the clinic entrance. Petitioners claim that the escorts sometimes thwart petitioners' attempts to communicate with patients by blocking petitioners from handing literature to patients, telling patients not to "pay any attention" or "listen to" petitioners, and disparaging petitioners as "crazy."

## C

In January 2008, petitioners sued Attorney General Coakley and other Commonwealth officials. They sought to enjoin enforcement of the Act, alleging that it violates the First and Fourteenth Amendments, both on its face and as applied to them. The District Court denied petitioners' facial challenge after a bench trial based on a stipulated record.

The Court of Appeals for the First Circuit affirmed.

Relying extensively on its previous decisions upholding the 2000 version of the Act, the court upheld the 2007 version as a reasonable "time, place, and manner" regulation under the test set forth in *Ward v. Rock Against Racism* (1989). It also rejected petitioners' arguments that the Act was substantially overbroad, void for vagueness, and an impermissible prior restraint.

The case then returned to the District Court, which held that the First Circuit's decision foreclosed all but one of petitioners' as-applied challenges. After another bench trial, it denied the remaining as-applied challenge, finding that the Act left petitioners ample alternative channels of communication. The Court of Appeals once again affirmed.

We granted certiorari.

## II

By its very terms, the Massachusetts Act regulates access to "public way[s]" and "sidewalk[s]." Mass. Gen. Laws, ch. 266, §120E½(b) (Supp. 2007). Such areas occupy a "special position in terms of First Amendment protection" because of their historic role as sites for discussion and debate. These places--which we have labeled "traditional public fora"--"have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' "

It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment's purpose "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail," this aspect of traditional public fora is a virtue, not a vice.

In short, traditional public fora are areas that have historically been open to the public for speech activities. Thus, even though the Act says nothing about speech on its face, there is no doubt--and respondents do not dispute--that it restricts access to traditional public fora and is therefore subject to First Amendment scrutiny. See Brief for Respondents 26 (although "[b]y its terms, the Act regulates only conduct," it "incidentally regulates the place and time of protected speech").

Consistent with the traditionally open character of public streets and sidewalks, we have held that the government's ability to restrict speech in such locations is "very limited." In particular, the guiding First Amendment principle that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content" applies with full force in a traditional public forum. As a general rule, in such a forum the government may not "selectively . . . shield the public from some kinds of speech on the ground that they are more offensive than others."

We have, however, afforded the government somewhat wider leeway to regulate features of speech unrelated to its content. "[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a

significant governmental interest, and that they leave open ample alternative channels for communication of the information.' " *Ward*.

While the parties agree that this test supplies the proper framework for assessing the constitutionality of the Massachusetts Act, they disagree about whether the Act satisfies the test's three requirements.

### III

Petitioners contend that the Act is not content neutral for two independent reasons: First, they argue that it discriminates against abortion-related speech because it establishes buffer zones only at clinics that perform abortions. Second, petitioners contend that the Act, by exempting clinic employees and agents, favors one viewpoint about abortion over the other. If either of these arguments is correct, then the Act must satisfy strict scrutiny--that is, it must be the least restrictive means of achieving a compelling state interest. Respondents do not argue that the Act can survive this exacting standard.

*Justice Scalia* [concurring] objects to our decision to consider whether the statute is content based and thus subject to strict scrutiny, given that we ultimately conclude that it is not narrowly tailored. But we think it unexceptional to perform the first part of a multipart constitutional analysis first. The content-neutrality prong of the *Ward* test is logically antecedent to the narrow-tailoring prong, because it determines the appropriate level of scrutiny. It is not unusual for the Court to proceed sequentially in applying a constitutional test, even when the preliminary steps turn out not to be dispositive. See, e.g., *Holder v. Humanitarian Law Project* (2010) (concluding that a law was content based even though it ultimately survived strict scrutiny).

The Court does sometimes assume, without deciding, that a law is subject to a less stringent level of scrutiny, as we did earlier this Term in *McCutcheon v. Federal Election Commission* (2014) (plurality opinion). But the distinction between that case and this one seems clear: Applying any standard of review other than intermediate scrutiny in *McCutcheon*--the standard that was assumed to apply--would have required overruling a precedent. There is no similar reason to forgo the ordinary order of operations in this case.

At the same time, there is good reason to address content neutrality. In discussing whether the Act is narrowly tailored, we identify a number of less-restrictive alternative measures that the Massachusetts Legislature might have adopted. Some apply only at abortion clinics, which raises the question whether those provisions are content neutral. While we need not (and do not) endorse any of those measures, it would be odd to consider them as possible alternatives if they were presumptively unconstitutional because they were content based and thus subject to strict scrutiny.

### A

The Act applies only at a "reproductive health care facility," defined as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." Mass. Gen. Laws, ch. 266, §120E½(a). Given this definition, petitioners argue, "virtually all speech affected by the Act is speech concerning abortion," thus rendering the Act content based.

We disagree. To begin, the Act does not draw content-based distinctions on its face. Contrast *Boos v. Barry* (1988) (ordinance prohibiting the display within 500 feet of a foreign embassy of any sign that tends to bring the foreign government into " 'public odium' " or " 'public disrepute' "); *Carey v. Brown* (1980) (statute prohibiting all residential picketing except "peaceful labor picketing"). The Act would be content based if it required "enforcement authorities" to "examine the content of the message that is conveyed to determine whether" a violation has occurred. But it does not. Whether petitioners violate the Act "depends" not "on what they say," *Humanitarian Law Project*, but simply on where they say it. Indeed, petitioners can violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word.

It is true, of course, that by limiting the buffer zones to abortion clinics, the Act has the "inevitable effect" of restricting abortion-related speech more than speech on other subjects. But a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics. On the contrary, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*. The question in such a case is whether the law is " 'justified without reference to the content of the regulated speech.' "

The Massachusetts Act is. Its stated purpose is to "increase forthwith public safety at reproductive health care facilities." Respondents have articulated similar purposes before this Court--namely, "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways." It is not the case [as Justice Scalia argues] that "[e]very objective indication shows that the provision's primary purpose is to restrict speech that opposes abortion".

We have previously deemed the foregoing concerns to be content neutral. Obstructed access and congested sidewalks are problems no matter what caused them. A group of individuals can obstruct clinic access and clog sidewalks just as much when they loiter as when they protest abortion or counsel patients.

To be clear, the Act would not be content neutral if it were concerned with undesirable effects that arise from "the direct impact of speech on its audience" or "[l]isteners' reactions to speech." If, for example, the speech outside Massachusetts abortion clinics caused offense or made listeners uncomfortable, such offense or discomfort would not give the Commonwealth a content-neutral justification to restrict the speech. All of the problems identified by the Commonwealth here, however, arise irrespective of any listener's reactions. Whether or not a single person reacts to abortion protestors' chants or petitioners' counseling, large crowds outside abortion clinics can still compromise public safety, impede access, and obstruct sidewalks.

Petitioners do not really dispute that the Commonwealth's interests in ensuring safety and preventing obstruction are, as a general matter, content neutral. But petitioners note that these interests "apply outside every building in the State that hosts any activity that might occasion protest or comment," not just abortion clinics. By choosing to pursue these interests only at abortion clinics,

petitioners argue, the Massachusetts Legislature evinced a purpose to "single[ ] out for regulation speech about one particular topic: abortion."

We cannot infer such a purpose from the Act's limited scope. The broad reach of a statute can help confirm that it was not enacted to burden a narrower category of disfavored speech. See Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 451-452 (1996). At the same time, however, "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist." The Massachusetts Legislature amended the Act in 2007 in response to a problem that was, in its experience, limited to abortion clinics. There was a record of crowding, obstruction, and even violence outside such clinics. There were apparently no similar recurring problems associated with other kinds of healthcare facilities, let alone with "every building in the State that hosts any activity that might occasion protest or comment." In light of the limited nature of the problem, it was reasonable for the Massachusetts Legislature to enact a limited solution. When selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more.

*Justice Scalia* objects that the statute does restrict more speech than necessary, because "only one [Massachusetts abortion clinic] is known to have been beset by the problems that the statute supposedly addresses." But there are no grounds for inferring content-based discrimination here simply because the legislature acted with respect to abortion facilities generally rather than proceeding on a facility-by-facility basis. On these facts, the poor fit noted by *Justice Scalia* goes to the question of narrow tailoring, which we consider below.

## B

Petitioners also argue that the Act is content based because it exempts four classes of individuals, Mass. Gen. Laws, ch. 266, §§120E½(b)(1)-(4), one of which comprises "employees or agents of [a reproductive healthcare] facility acting within the scope of their employment." §120E½(b)(2). This exemption, petitioners say, favors one side in the abortion debate and thus constitutes viewpoint discrimination--an "egregious form of content discrimination," *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995). In particular, petitioners argue that the exemption allows clinic employees and agents--including the volunteers who "escort" patients arriving at the Boston clinic--to speak inside the buffer zones.

It is of course true that "an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" *City of Ladue v. Gilleo* (1994). At least on the record before us, however, the statutory exemption for clinic employees and agents acting within the scope of their employment does not appear to be such an attempt.

There is nothing inherently suspect about providing some kind of exemption to allow individuals who work at the clinics to enter or remain within the buffer zones. In particular, the exemption cannot be regarded as simply a carve-out for the clinic escorts; it also covers employees such as the maintenance worker shoveling a snowy sidewalk or the security guard patrolling a clinic entrance.

Given the need for an exemption for clinic employees, the "scope of their employment" qualification simply ensures that the exemption is limited to its purpose of allowing the employees to do their jobs. It performs the same function as the identical "scope of their employment" restriction on the exemption for "law enforcement, ambulance, fire-fighting, construction, utilities, public works and other municipal agents." §120E½(b)(3). Contrary to the suggestion of *Justice Scalia*, there is little reason to suppose that the Massachusetts Legislature intended to incorporate a common law doctrine developed for determining vicarious liability in tort when it used the phrase "scope of their employment" for the wholly different purpose of defining the scope of an exemption to a criminal statute. The limitation instead makes clear--with respect to both clinic employees and municipal agents--that exempted individuals are allowed inside the zones only to perform those acts authorized by their employers. There is no suggestion in the record that any of the clinics authorize their employees to speak about abortion in the buffer zones. The "scope of their employment" limitation thus seems designed to protect against exactly the sort of conduct that petitioners and *Justice Scalia* fear.

Petitioners did testify in this litigation about instances in which escorts at the Boston clinic had expressed views about abortion to the women they were accompanying, thwarted petitioners' attempts to speak and hand literature to the women, and disparaged petitioners in various ways. It is unclear from petitioners' testimony whether these alleged incidents occurred within the buffer zones. There is no viewpoint discrimination problem if the incidents occurred outside the zones because petitioners are equally free to say whatever they would like in that area.

Even assuming the incidents occurred inside the zones, the record does not suggest that they involved speech within the scope of the escorts' employment. If the speech was beyond the scope of their employment, then each of the alleged incidents would violate the Act's express terms. Petitioners' complaint would then be that the police were failing to *enforce* the Act equally against clinic escorts. While such allegations might state a claim of official viewpoint discrimination, that would not go to the validity of the Act. In any event, petitioners nowhere allege selective enforcement.

It would be a very different question if it turned out that a clinic authorized escorts to speak about abortion inside the buffer zones. In that case, the escorts would not seem to be violating the Act because the speech would be within the scope of their employment. The Act's exemption for clinic employees would then facilitate speech on only one side of the abortion debate--a clear form of viewpoint discrimination that would support an as-applied challenge to the buffer zone at that clinic. But the record before us contains insufficient evidence to show that the exemption operates in this way at any of the clinics, perhaps because the clinics do not want to doom the Act by allowing their employees to speak about abortion within the buffer zones.<sup>4</sup>

We thus conclude that the Act is neither content nor viewpoint based and therefore need not be analyzed under strict scrutiny.

#### IV

Even though the Act is content neutral, it still must be "narrowly tailored to serve a significant governmental interest." *Ward*. The tailoring requirement does not simply guard against an impermissible desire to censor. The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily "sacrific[ing] speech for efficiency."

For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*. Such a regulation, unlike a content-based restriction of speech, "need not be the least restrictive or least intrusive means of" serving the government's interests. But the government still "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."

#### A

As noted, respondents claim that the Act promotes "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways." Petitioners do not dispute the significance of these interests. We have, moreover, previously recognized the legitimacy of the government's interests in "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services." The buffer zones clearly serve these interests.

At the same time, the buffer zones impose serious burdens on petitioners' speech. At each of the three Planned Parenthood clinics where petitioners attempt to counsel patients, the zones carve out a significant portion of the adjacent public sidewalks, pushing petitioners well back from the clinics' entrances and driveways. The zones thereby compromise petitioners' ability to initiate the close, personal conversations that they view as essential to "sidewalk counseling."

For example, in uncontradicted testimony, McCullen explained that she often cannot distinguish patients from passersby outside the Boston clinic in time to initiate a conversation before they enter the buffer zone. And even when she does manage to begin a discussion outside the zone, she must stop abruptly at its painted border, which she believes causes her to appear "untrustworthy" or "suspicious." Given these limitations, McCullen is often reduced to raising her voice at patients from outside the zone--a mode of communication sharply at odds with the compassionate message she wishes to convey. Clark gave similar testimony about her experience at the Worcester clinic.

These burdens on petitioners' speech have clearly taken their toll. Although McCullen claims that she has persuaded about 80 women not to terminate their pregnancies since the 2007 amendment, she also says that she reaches "far fewer people" than she did before the amendment. Zarrella reports an even

more precipitous decline in her success rate: She estimated having about 100 successful interactions over the years before the 2007 amendment, but not a single one since. And as for the Worcester clinic, Clark testified that "only one woman out of 100 will make the effort to walk across [the street] to speak with [her]."

The buffer zones have also made it substantially more difficult for petitioners to distribute literature to arriving patients. As explained, because petitioners in Boston cannot readily identify patients before they enter the zone, they often cannot approach them in time to place literature near their hands--the most effective means of getting the patients to accept it. In Worcester and Springfield, the zones have pushed petitioners so far back from the clinics' driveways that they can no longer even attempt to offer literature as drivers turn into the parking lots. In short, the Act operates to deprive petitioners of their two primary methods of communicating with patients.

The Court of Appeals and respondents are wrong to downplay these burdens on petitioners' speech. As the Court of Appeals saw it, the Constitution does not accord "special protection" to close conversations or "handbilling." But while the First Amendment does not guarantee a speaker the right to any particular form of expression, some forms--such as normal conversation and leafletting on a public sidewalk--have historically been more closely associated with the transmission of ideas than others.

In the context of petition campaigns, we have observed that "one-on-one communication" is "the most effective, fundamental, and perhaps economical avenue of political discourse." And "handing out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression"; "[n]o form of speech is entitled to greater constitutional protection." When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden.

Respondents also emphasize that the Act does not prevent petitioners from engaging in various forms of "protest"--such as chanting slogans and displaying signs--outside the buffer zones. That misses the point. Petitioners are not protestors. They seek not merely to express their opposition to abortion, but to inform women of various alternatives and to provide help in pursuing them. Petitioners believe that they can accomplish this objective only through personal, caring, consensual conversations. And for good reason: It is easier to ignore a strained voice or a waving hand than a direct greeting or an outstretched arm. While the record indicates that petitioners have been able to have a number of quiet conversations outside the buffer zones, respondents have not refuted petitioners' testimony that the conversations have been far less frequent and far less successful since the buffer zones were instituted. It is thus no answer to say that petitioners can still be "seen and heard" by women within the buffer zones. If all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners' message.

Finally, respondents suggest that, at the Worcester and Springfield clinics, petitioners are prevented from communicating with patients not by the buffer zones but by the fact that most patients arrive by car and park in the clinics'

private lots. It is true that the layout of the two clinics would prevent petitioners from approaching the clinics' *doorways*, even without the buffer zones. But petitioners do not claim a right to trespass on the clinics' property. They instead claim a right to stand on the public sidewalks by the driveway as cars turn into the parking lot. Before the buffer zones, they could do so. Now they must stand a substantial distance away. The Act alone is responsible for that restriction on their ability to convey their message.

B

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The buffer zones burden substantially more speech than necessary to achieve the Commonwealth's asserted interests. At the outset, we note that the Act is truly exceptional: Respondents and their *amici* identify no other State with a law that creates fixed buffer zones around abortion clinics. That of course does not mean that the law is invalid. It does, however, raise concern that the Commonwealth has too readily forgone options that could serve its interests just as well, without substantially burdening the kind of speech in which petitioners wish to engage.

That is the case here. The Commonwealth's interests include ensuring public safety outside abortion clinics, preventing harassment and intimidation of patients and clinic staff, and combating deliberate obstruction of clinic entrances. The Act itself contains a separate provision, subsection (e)--unchallenged by petitioners--that prohibits much of this conduct. That provision subjects to criminal punishment "[a]ny person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility." Mass. Gen. Laws, ch. 266, §120E½(e). If Massachusetts determines that broader prohibitions along the same lines are necessary, it could enact legislation similar to the federal Freedom of Access to Clinic Entrances Act of 1994 (FACE Act), 18 U. S. C. §248(a)(1), which subjects to both criminal and civil penalties anyone who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services." Some dozen other States have done so. If the Commonwealth is particularly concerned about harassment, it could also consider an ordinance such as the one adopted in New York City that not only prohibits obstructing access to a clinic, but also makes it a crime "to follow and harass another person within 15 feet of the premises of a reproductive health care facility." N. Y. C. Admin. Code §8-803(a)(3) (2014).

The Commonwealth points to a substantial public safety risk created when protestors obstruct driveways leading to the clinics. That is, however, an example of its failure to look to less intrusive means of addressing its concerns. Any such obstruction can readily be addressed through existing local ordinances. See, *e.g.*, Worcester, Mass., Revised Ordinances of 2008, ch. 12, §25(b) ("No person shall stand, or place any obstruction of any kind, upon any street, sidewalk or crosswalk in such a manner as to obstruct a free passage for travelers thereon"); Boston, Mass., Municipal Code, ch. 16-41.2(d) (2013) ("No

person shall solicit while walking on, standing on or going into any street or highway used for motor vehicle travel, or any area appurtenant thereto (including medians, shoulder areas, bicycle lanes, ramps and exit ramps)").

All of the foregoing measures are, of course, in addition to available generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like.

In addition, subsection (e) of the Act, the FACE Act, and the New York City anti-harassment ordinance are all enforceable not only through criminal prosecutions but also through public and private civil actions for injunctions and other equitable relief. See Mass. Gen. Laws §120E½(f); 18 U. S. C. §248(c)(1); N. Y. C. Admin. Code §§8-804, 8-805. We have previously noted the First Amendment virtues of targeted injunctions as alternatives to broad, prophylactic measures. Such an injunction "regulates the activities, and perhaps the speech, of a group," but only "because of the group's past *actions* in the context of a specific dispute between real parties." Moreover, given the equitable nature of injunctive relief, courts can tailor a remedy to ensure that it restricts no more speech than necessary. In short, injunctive relief focuses on the precise individuals and the precise conduct causing a particular problem. The Act, by contrast, categorically excludes non-exempt individuals from the buffer zones, unnecessarily sweeping in innocent individuals and their speech.

The Commonwealth also asserts an interest in preventing congestion in front of abortion clinics. According to respondents, even when individuals do not deliberately obstruct access to clinics, they can inadvertently do so simply by gathering in large numbers. But the Commonwealth could address that problem through more targeted means. Some localities, for example, have ordinances that require crowds blocking a clinic entrance to disperse when ordered to do so by the police, and that forbid the individuals to reassemble within a certain distance of the clinic for a certain period. We upheld a similar law forbidding three or more people "to congregate within 500 feet of [a foreign embassy], and refuse to disperse after having been ordered so to do by the police."

And to the extent the Commonwealth argues that even these types of laws are ineffective, it has another problem. The portions of the record that respondents cite to support the anticongestion interest pertain mainly to one place at one time: the Boston Planned Parenthood clinic on Saturday mornings. Respondents point us to no evidence that individuals regularly gather at other clinics, or at other times in Boston, in sufficiently large groups to obstruct access. For a problem shown to arise only once a week in one city at one clinic, creating 35-foot buffer zones at every clinic across the Commonwealth is hardly a narrowly tailored solution.

The point is not that Massachusetts must enact all or even any of the proposed measures discussed above. The point is instead that the Commonwealth has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate.

Respondents have but one reply: "We have tried other approaches, but they do not work." Respondents emphasize the history in Massachusetts of obstruction at abortion clinics, and the Commonwealth's allegedly failed attempts to combat such obstruction with injunctions and individual prosecutions. They also point to the Commonwealth's experience under the 2000 version of the Act, during which the police found it difficult to enforce the six-foot no-approach zones given the "frenetic" activity in front of clinic entrances. According to respondents, this history shows that Massachusetts has tried less restrictive alternatives to the buffer zones, to no avail.

We cannot accept that contention. Although respondents claim that Massachusetts "tried other laws already on the books," they identify not a single prosecution brought under those laws within at least the last 17 years. And while they also claim that the Commonwealth "tried injunctions," the last injunctions they cite date to the 1990s. In short, the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor has it shown that it considered different methods that other jurisdictions have found effective.

Respondents contend that the alternatives we have discussed suffer from two defects: First, given the "widespread" nature of the problem, it is simply not "practicable" to rely on individual prosecutions and injunctions. But far from being "widespread," the problem appears from the record to be limited principally to the Boston clinic on Saturday mornings. Moreover, by their own account, the police appear perfectly capable of singling out lawbreakers. The legislative testimony preceding the 2007 Act revealed substantial police and video monitoring at the clinics, especially when large gatherings were anticipated. Captain Evans testified that his officers are so familiar with the scene outside the Boston clinic that they "know all the players down there." And Attorney General Coakley relied on video surveillance to show legislators conduct she thought was "clearly against the law." If Commonwealth officials can compile an extensive record of obstruction and harassment to support their preferred legislation, we do not see why they cannot do the same to support injunctions and prosecutions against those who might deliberately flout the law.

The second supposed defect in the alternatives we have identified is that laws like subsection (e) of the Act and the federal FACE Act require a showing of intentional or deliberate obstruction, intimidation, or harassment, which is often difficult to prove. As Captain Evans predicted in his legislative testimony, fixed buffer zones would "make our job so much easier."

Of course they would. But that is not enough to satisfy the First Amendment. To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier. A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency. In any case, we do not think that showing intentional obstruction is nearly so difficult in this context as respondents suggest. To determine whether a protestor intends to block access to a clinic, a police officer need only order him to move. If he refuses, then there is no question that his continued conduct is knowing or intentional.

For similar reasons, respondents' reliance on our decision in *Burson v. Freeman* (1992) is misplaced. There, we upheld a state statute that established 100-foot buffer zones outside polling places on election day within which no one could display or distribute campaign materials or solicit votes. We approved the buffer zones as a valid prophylactic measure, noting that existing "[i]ntimidation and interference laws fall short of serving a State's compelling interests because they 'deal with only the most blatant and specific attempts' to impede elections." Such laws were insufficient because "[v]oter intimidation and election fraud are . . . difficult to detect." *Burson*. Obstruction of abortion clinics and harassment of patients, by contrast, are anything but subtle.

We also noted in *Burson* that under state law, "law enforcement officers generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process," with the result that "many acts of interference would go undetected." Not so here. Again, the police maintain a significant presence outside Massachusetts abortion clinics. The buffer zones in *Burson* were justified because less restrictive measures were inadequate. Respondents have not shown that to be the case here.

Given the vital First Amendment interests at stake, it is not enough for Massachusetts simply to say that other approaches have not worked.

Petitioners wish to converse with their fellow citizens about an important subject on the public streets and sidewalks--sites that have hosted discussions about the issues of the day throughout history. Respondents assert undeniably significant interests in maintaining public safety on those same streets and sidewalks, as well as in preserving access to adjacent healthcare facilities. But here the Commonwealth has pursued those interests by the extreme step of closing a substantial portion of a traditional public forum to all speakers. It has done so without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes. The Commonwealth may not do that consistent with the First Amendment.

The judgment of the Court of Appeals for the First Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE SCALIA, WITH WHOM JUSTICE KENNEDY AND JUSTICE THOMAS JOIN, CONCURRING IN THE JUDGMENT.

Today's opinion carries forward this Court's practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents. There is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion. See, *e.g.*, *Hill v. Colorado* (2000); *Madsen v. Women's Health Center, Inc.* (1994).

The second half of the Court's analysis today, invalidating the law at issue because of inadequate "tailoring," is certainly attractive to those of us who oppose an abortion-speech edition of the First Amendment. But think again. This is an opinion that has Something for Everyone, and the more significant

portion continues the onward march of abortion-speech-only jurisprudence. That is the first half of the Court's analysis, which concludes that a statute of this sort is not content based and hence not subject to so-called strict scrutiny. The Court reaches out to decide that question unnecessarily--or at least unnecessarily insofar as legal analysis is concerned.

I disagree with the Court's dicta (Part III) and hence see no reason to opine on its holding (Part IV).

#### I. The Court's Content-Neutrality Discussion Is Unnecessary

The gratuitous portion of today's opinion is Part III, which concludes--in seven pages of the purest dicta--that subsection (b) of the Massachusetts Reproductive Health Care Facilities Act is not specifically directed at speech opposing (or even concerning) abortion and hence need not meet the strict-scrutiny standard applicable to content-based speech regulations. Inasmuch as Part IV holds that the Act is unconstitutional because it does not survive the lesser level of scrutiny associated with content-neutral "time, place, and manner" regulations, there is no principled reason for the majority to decide whether the statute is subject to strict scrutiny. \*\*\*

#### II. The Statute Is Content Based and Fails Strict Scrutiny

Having eagerly volunteered to take on the level-of-scrutiny question, the Court provides the wrong answer. Petitioners argue for two reasons that subsection (b) articulates a content-based speech restriction--and that we must therefore evaluate it through the lens of strict scrutiny.

##### A. Application to Abortion Clinics Only

\*\*\* It blinks reality to say, as the majority does, that a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur--and where that speech can most effectively be communicated--is not content based. Would the Court exempt from strict scrutiny a law banning access to the streets and sidewalks surrounding the site of the Republican National Convention? Or those used annually to commemorate the 1965 Selma-to-Montgomery civil rights marches? Or those outside the Internal Revenue Service? Surely not.

\*\*\* Every objective indication shows that the provision's primary purpose is to restrict speech that opposes abortion.

I begin, as suggested above, with the fact that the Act burdens only the public spaces outside abortion clinics. One might have expected the majority to defend the statute's peculiar targeting by arguing that those locations regularly face the safety and access problems that it says the Act was designed to solve. But the majority does not make that argument because it would be untrue. As the Court belatedly discovers in Part IV of its opinion, although the statute applies to all abortion clinics in Massachusetts, only one is known to have been beset by the problems that the statute supposedly addresses. The Court uses this striking fact (a smoking gun, so to speak) as a basis for concluding that the law is insufficiently "tailored" to safety and access concerns (Part IV) rather than as a basis for concluding that it is not *directed* to those concerns at all, but to the

suppression of antiabortion speech. That is rather like invoking the eight missed human targets of a shooter who has killed one victim to prove, not that he is guilty of attempted mass murder, but that *he has bad aim*.

\*\*\* The structure of the Act also indicates that it rests on content-based concerns. The goals of "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways," are already achieved by an earlier-enacted subsection of the statute, which provides criminal penalties for "[a]ny person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility." §120E½(e). As the majority recognizes, that provision is easy to enforce. Thus, the speech-free zones carved out by subsection (b) add nothing to safety and access; what they achieve, and what they were obviously designed to achieve, is the suppression of speech opposing abortion.

Further contradicting the Court's fanciful defense of the Act is the fact that subsection (b) was enacted as a more easily enforceable substitute for a prior provision. That provision did not exclude people entirely from the restricted areas around abortion clinics; rather, it forbade people in those areas to approach within six feet of another person *without that person's consent* "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person." §120E½(b) (West 2000). As the majority acknowledges, that provision was "modeled on a . . . Colorado law that this Court had upheld in *Hill*." And in that case, the Court recognized that the statute in question was directed at the suppression of unwelcome speech, vindicating what *Hill* called "[t]he unwilling listener's interest in avoiding unwanted communication." The Court held that interest to be content neutral.

The provision at issue here was indisputably meant to serve the same interest in protecting citizens' supposed right to avoid speech that they would rather not hear. For that reason, we granted a second question for review in this case (though one would not know that from the Court's opinion, which fails to mention it): whether *Hill* should be cut back or cast aside. See Pet. for Cert. i. (stating second question presented as "If *Hill* . . . permits enforcement of this law, whether *Hill* should be limited or overruled"); 570 U. S. \_\_\_ (2013) (granting certiorari without reservation). The majority avoids that question by declaring the Act content neutral on other (entirely unpersuasive) grounds. In concluding that the statute is content based and therefore subject to strict scrutiny, I necessarily conclude that *Hill* should be overruled. Reasons for doing so are set forth in the dissents in that case, (*Scalia, J.*); (*Kennedy, J.*), and in the abundance of scathing academic commentary describing how *Hill* stands in contradiction to our First Amendment jurisprudence. Protecting people from speech they do not want to hear is not a function that the First Amendment allows the government to undertake in the public streets and sidewalks.

One final thought regarding *Hill*: It can be argued, and it should be argued in the next case, that by stating that "the Act would not be content neutral if it were concerned with undesirable effects that arise from . . . '[l]isteners' reactions to speech,' " and then holding the Act unconstitutional for being insufficiently tailored to safety and access concerns, the Court itself has *sub silentio* (and perhaps inadvertently) overruled *Hill*. The unavoidable implication

of that holding is that protection against unwelcome speech cannot justify restrictions on the use of public streets and sidewalks.

#### B. Exemption for Abortion-Clinic Employees or Agents

Petitioners contend that the Act targets speech opposing abortion (and thus constitutes a presumptively invalid viewpoint-discriminatory restriction) for another reason as well: It exempts "employees or agents" of an abortion clinic "acting within the scope of their employment," §120E½(b)(2).

It goes without saying that "[g]ranting waivers to favored speakers (or . . . denying them to disfavored speakers) would of course be unconstitutional." *Thomas v. Chicago Park Dist.* (2002). The majority opinion sets forth a two-part inquiry for assessing whether a regulation is content based, but when it comes to assessing the exemption for abortion-clinic employees or agents, the Court forgets its own teaching. Its opinion jumps right over the prong that asks whether the provision "draw[s] . . . distinctions on its face," and instead proceeds directly to the purpose-related prong, see , asking whether the exemption "represent[s] a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people." I disagree with the majority's negative answer to that question, but that is beside the point if the text of the statute--whatever its purposes might have been--"license[s] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R. A. V. v. St. Paul* (1992) [Chapter 3].

Is there any serious doubt that *abortion-clinic employees or agents* "acting within the scope of their employment" near clinic entrances may--indeed, often will--speak in favor of abortion ("You are doing the right thing")? Or speak in opposition to the message of abortion opponents--saying, for example, that "this is a safe facility" to rebut the statement that it is not? The Court's contrary assumption is simply incredible. And the majority makes no attempt to establish the further necessary proposition that abortion-clinic employees and agents do not engage in nonspeech activities directed to the suppression of antiabortion speech by hampering the efforts of counselors to speak to prospective clients. Are we to believe that a clinic employee sent out to "escort" prospective clients into the building would not seek to prevent a counselor like Eleanor McCullen from communicating with them? He could pull a woman away from an approaching counselor, cover her ears, or make loud noises to drown out the counselor's pleas.

The Court points out that the exemption may allow into the speech-free zones clinic employees other than escorts, such as "the maintenance worker shoveling a snowy sidewalk or the security guard patrolling a clinic entrance." I doubt that Massachusetts legislators had those people in mind, but whether they did is in any event irrelevant. Whatever other activity is permitted, so long as the statute permits speech favorable to abortion rights while excluding antiabortion speech, it discriminates on the basis of viewpoint.

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### C. Conclusion

In sum, the Act should be reviewed under the strict-scrutiny standard applicable to content-based legislation. That standard requires that a regulation represent "the least restrictive means" of furthering "a compelling Government interest." Respondents do not even attempt to argue that subsection (b) survives this test. \*\*\*

### III. Narrow Tailoring

Having determined that the Act is content based and does not withstand strict scrutiny, I need not pursue the inquiry conducted in Part IV of the Court's opinion--whether the statute is " 'narrowly tailored to serve a significant governmental interest.' " I suppose I *could* do so, taking as a given the Court's erroneous content-neutrality conclusion in Part III; and if I did, I suspect I would agree with the majority that the legislation is not narrowly tailored to advance the interests asserted by respondents. But I prefer not to take part in the assembling of an apparent but specious unanimity. I leave both the plainly unnecessary and erroneous half and the arguably correct half of the Court's analysis to the majority.

The obvious purpose of the challenged portion of the Massachusetts Reproductive Health Care Facilities Act is to "protect" prospective clients of abortion clinics from having to hear abortion-opposing speech on public streets and sidewalks. The provision is thus unconstitutional root and branch and cannot be saved, as the majority suggests, by limiting its application to the single facility that has experienced the safety and access problems to which it is quite obviously not addressed. I concur only in the judgment that the statute is unconstitutional under the First Amendment.

JUSTICE ALITO, CONCURRING IN THE JUDGMENT.

I agree that the Massachusetts statute at issue in this case, Mass. Gen. Laws, ch. 266, §120E½(b) (West 2012), violates the First Amendment. As the Court recognizes, if the Massachusetts law discriminates on the basis of viewpoint, it is unconstitutional, and I believe the law clearly discriminates on this ground.

\*\*\* In this case, I do not think that it is possible to reach a judgment about the intent of the Massachusetts Legislature without taking into account the fact that the law that the legislature enacted blatantly discriminates based on viewpoint. In light of this feature, as well as the overbreadth that the Court identifies, it cannot be said, based on the present record, that the law would be content neutral even if the exemption for clinic employees and agents were excised. However, if the law were truly content neutral, I would agree with the Court that the law would still be unconstitutional on the ground that it burdens more speech than is necessary to serve the Commonwealth's asserted interests.

## Notes

1. Is the similarity of the “time, place, or manner” standard of review to the expressive conduct standard of *United States v. O’Brien* sensible? Would you suggest a higher standard for one or the other?
2. The government practice of establishing “designated protest areas” or “free speech zones” is generally analyzed as a time, place, or manner restriction. Do such practices undermine the notion of “public forum”?
3. An ordinance bans all registered sex offenders from entering a municipal library. How would you analyze the ban using time, place, or manner and fora doctrines? What result? See *Doe v. City of Albuquerque*, 667 F.3d 1111 (10th Cir. 2012).
4. *McCullen v. Coakley* is an unanimous but highly contentious decision in large part because of the disagreement over whether the Massachusetts statute should be analyzed as a content (or even viewpoint) regulation or a “time, place, or manner” regulation. How do you think the concurring Justices would view the statutes directed at funeral protests as described in the next note.

### Note: Funeral Protests

In *Snyder v. Phelps*, 562 U.S. 443 (2011), the Court considered a jury verdict against Fred Phelps, certain members of his family, and his organization, the Westboro Baptist Church, for intentional infliction of emotional distress on behalf of Albert Snyder, the father of Marine Lance Corporal Matthew Snyder. The Westboro Baptist Church has become well known for its picketing of various funerals, including those of soldiers. On the day of the memorial service for Snyder, the Westboro congregation members picketed on public land adjacent to public streets near the Maryland State House, the United States Naval Academy, and Matthew Snyder's funeral. The Westboro picketers carried signs that were largely the same at all three locations. They stated, for instance: “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don't Pray for the USA,” “Thank God for IEDs,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “God Hates Fags,” “You're Going to Hell,” and “God Hates You.”

In an opinion by Chief Justice Roberts, the Court found that the picketing was protected by the First Amendment and a damages awarded precluded. The Court stated

Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a “special position in terms of First Amendment protection.” “[W]e have repeatedly referred to public streets as the archetype of a traditional public forum,” noting that

“ [t]ime out of mind’ public streets and sidewalks have been used for public assembly and debate.”

However, the Court noted:

Westboro's choice of where and when to conduct its picketing is not beyond the Government's regulatory reach—it is “subject to reasonable time, place, or manner restrictions” that are consistent with the standards announced in this Court's precedents. Maryland now has a law imposing restrictions on funeral picketing, Md.Crim. Law Code Ann. § 10–205 (Lexis Supp.2010), as do 43 other States and the Federal Government. See Brief for American Legion as *Amicus Curiae* 18–19, n. 2 (listing statutes). To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case. Maryland's law, however, was not in effect at the time of the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional.

But are such statutes “content neutral”? Consider this typical ordinance, from Manchester, Missouri.

Manchester Code § 210.264 provides:

Funeral Protests Prohibited, When—Citation of Law—Definition

A. Every citizen may freely speak, write and publish the person's sentiments on all subjects, being responsible for the abuse of the right, but no person shall picket or engage in other protest activities, nor shall any association or corporation cause picketing or other protest activities to occur within three hundred (300) feet of any residence, cemetery, funeral home, church, synagogue, or other establishment during or within one (1) hour before or one (1) hour after the conducting of any actual funeral or burial service at that place.

B. As used in this Section, “other protest activities ” means any action that is disruptive or undertaken to disrupt or disturb a funeral or burial service.

C. As used in this Section, “funeral ” and “burial service ” mean the ceremonies and memorial services held in conjunction with the burial or cremation of the dead, but this Section does not apply to processions while they are in transit beyond any three hundred (300) foot zone that is established under Subsection (A) above.

The Eighth Circuit in *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678, 695 (8th Cir. 2012), relying in large part on *Hill v. Colorado* (discussed in *McCullen v. Coakley*), upheld the Manchester ordinance, finding that:

Manchester's ordinance is content neutral. A person may be regulated under the ordinance for disrupting or attempting to disrupt a funeral or burial service with speech concerning any topic or viewpoint. The ordinance makes “no reference to the content of the speech” and is only a “regulation of the places where some speech may occur.” [citing *Hill v. Colorado*]. It simply limits when and where picketing and other protest activities may occur in relation to a funeral or burial service without regard for the speaker's viewpoint.

Applying the standard of review for time, place, or manner restrictions, the court concluded

that the Phelps–Ropers have not shown in their facial challenge to Manchester's amended ordinance that the city has imposed unconstitutional limits on the

time, place, and manner of their picketing. Manchester only limits picketing and other protest activities within 300 feet of a funeral or burial service while it is occurring and for one hour before and after, and it survives First Amendment scrutiny because it serves a significant government interest, it is narrowly tailored, and it leaves open ample alternative channels for communication.

## IV. The Distinct Problems Posed by Signage Regulations

### *City Council v. Taxpayers for Vincent*

466 U.S. 789 (1984)

STEVENS, J., DELIVERED THE OPINION OF THE COURT, IN WHICH BURGER, C. J., AND WHITE, POWELL, REHNQUIST, AND O'CONNOR, JJ., JOINED. BRENNAN, J., FILED A DISSENTING OPINION, IN WHICH MARSHALL AND BLACKMUN, JJ., JOINED.

JUSTICE STEVENS DELIVERED THE OPINION OF THE COURT.

Section 28.04 of the Los Angeles Municipal Code prohibits the posting of signs on public property. The question presented is whether that prohibition abridges appellees' freedom of speech within the meaning of the First Amendment.

In March 1979, Roland Vincent was a candidate for election to the Los Angeles City Council. A group of his supporters known as Taxpayers for Vincent (Taxpayers) entered into a contract with a political sign service company known as Candidates' Outdoor Graphics Service (COGS) to fabricate and post signs with Vincent's name on them. COGS produced 15- by 44-inch cardboard signs and attached them to utility poles at various locations by draping them over crosswires which support the poles and stapling the cardboard together at the bottom. The signs' message was: "Roland Vincent - City Council."

Acting under the authority of 28.04 of the Municipal Code, employees of the city's Bureau of Street Maintenance routinely removed all posters attached to utility poles and similar objects covered by the ordinance, including the COGS signs. The weekly sign removal report covering the period March 1-March 7, 1979, indicated that among the 1,207 signs removed from public property during that week, 48 were identified as "Roland Vincent" signs. Most of the other signs identified in that report were apparently commercial in character.

On March 12, 1979, Taxpayers and COGS filed this action in the United States District Court for the Central District of California, naming the city, the Director of the Bureau of Street Maintenance, and members of the City Council as defendants. They sought an injunction against enforcement of the ordinance as well as compensatory and punitive damages. After engaging in discovery, the parties filed cross-motions for summary judgment on the issue of liability. The District Court entered findings of fact, concluded that the ordinance was constitutional, and granted the City's motion.

The District Court's findings do not purport to resolve any disputed issue of fact; instead, they summarize material in the record that appears to be uncontroverted. The findings recite that the principal responsibility for locating and removing signs and handbills posted in violation of 28.04 is assigned to the Street Use Inspection Division of the city's Bureau of Street Maintenance. The court found that both political and nonpolitical signs are illegally posted and that they are removed "without regard to their content."

After explaining the purposes for which the City's zoning code had been enacted, and noting that the prohibition in 28.04 furthered those purposes, the District Court found that the large number of illegally posted signs "constitute a clutter and visual blight." With specific reference to the posting of the COGS signs on utility pole crosswires, the District Court found that such posting "would add somewhat to the blight and inevitably would encourage greatly increased posting in other unauthorized and unsightly places . . . ."

In addition, the District Court found that placing signs on utility poles creates a potential safety hazard, and that other violations of 28.04 "block views and otherwise cause traffic hazards." Finally, the District Court concluded that the sign prohibition does not prevent taxpayers or COGS "from exercising their free speech rights on the public streets and in other public places; they remain free to picket and parade, to distribute handbills, to carry signs and to post their signs and handbills on their automobiles and on private property with the permission of the owners thereof."

In its conclusions of law the District Court characterized the esthetic and economic interests in improving the beauty of the City "by eliminating clutter and visual blight" as "legitimate and compelling." Those interests, together with the interest in protecting the safety of workmen who must scale utility poles and the interest in eliminating traffic hazards, adequately supported the sign prohibition as a reasonable regulation affecting the time, place, and manner of expression.

The Court of Appeals did not question any of the District Court's findings of fact, but it rejected some of its conclusions of law. The Court of Appeals reasoned that the ordinance was presumptively unconstitutional because significant First Amendment interests were involved. It noted that the City had advanced three separate justifications for the ordinance, but concluded that none of them was sufficient. The Court of Appeals held that the City had failed to make a sufficient showing that its asserted interests in esthetics and preventing visual clutter were substantial because it had not offered to demonstrate that the City was engaged in a comprehensive effort to remove other contributions to an unattractive environment in commercial and industrial areas. The City's interest in minimizing traffic hazards was rejected because it was readily apparent that no substantial traffic problems would result from permitting the posting of certain kinds of signs on many of the publicly owned objects covered by the ordinance. Finally, while acknowledging that a flat prohibition against signs on certain objects such as fire hydrants and traffic signals would be a permissible method of preventing interference with the intended use of public property, and that regulation of the size, design, and construction of posters, or of the method of removing them, might be reasonable, the Court of Appeals concluded that the City had not justified its total ban.

In its appeal to this Court the City challenges the Court of Appeals' holding that 28.04 is unconstitutional on its face. Taxpayers and COGS defend that holding and also contend that the ordinance is unconstitutional as applied to their posting of political campaign signs on the crosswires of utility poles. There are two quite different ways in which a statute or ordinance may be considered invalid "on its face" - either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally "overbroad." We shall analyze the "facial" challenges to the ordinance, and then address its specific application to appellees.

## I

[The Court rejected a facial overbreadth argument]. In light of these arguments, appellees' attack on the ordinance is basically a challenge to the ordinance as applied to their activities. We therefore limit our analysis of the constitutionality of the ordinance to the concrete case before us, and now turn to the arguments that it is invalid as applied to the expressive activity of Taxpayers and COGS.

## II

The ordinance prohibits appellees from communicating with the public in a certain manner, and presumably diminishes the total quantity of their communication in the City. The application of the ordinance to appellees' expressive activities surely raises the question whether the ordinance abridges their "freedom of speech" within the meaning of the First Amendment, and appellees certainly have standing to challenge the application of the ordinance to their own expressive activities. "But to say the ordinance presents a First Amendment issue is not necessarily to say that it constitutes a First Amendment violation." *Metromedia, Inc. v. San Diego* (1981) (Burger, C. J., dissenting). It has been clear since this Court's earliest decisions concerning the freedom of speech that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest. *Schenck v. United States* (1919)[Chapter 2].

\*\*\* [T]here are some purported interests - such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas - that are so plainly illegitimate that they would immediately invalidate the rule. The general principle that has emerged from this line of cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.

That general rule has no application to this case. For there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance. There is no claim that the ordinance was designed to suppress certain ideas that the City finds distasteful or that it has been applied to appellees because of the views that they express. The text of the ordinance is neutral - indeed it is silent - concerning any speaker's point of view, and the District Court's findings indicate that it has been applied to appellees and others in an evenhanded manner.

In *United States v. O'Brien* (1968), the Court set forth the appropriate framework for reviewing a viewpoint-neutral regulation of this kind: "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

It is well settled that the state may legitimately exercise its police powers to advance esthetic values. \*\*\*

In this case, taxpayers and COGS do not dispute that it is within the constitutional power of the City to attempt to improve its appearance, or that this interest is basically unrelated to the suppression of ideas. Therefore the critical inquiries are whether that interest is sufficiently substantial to justify the effect of the ordinance on appellees' expression, and whether that effect is no greater than necessary to accomplish the City's purpose.

### III

\*\*\* We reaffirm the conclusion of the majority in *Metromedia [v. San Diego]* (1981)]. The problem addressed by this ordinance - the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property - constitutes a significant substantive evil within the City's power to prohibit. "[T]he city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect." *Young v. American Mini Theatres, Inc.* (1976) (plurality opinion).

### IV

We turn to the question whether the scope of the restriction on appellees' expressive activity is substantially broader than necessary to protect the City's interest in eliminating visual clutter. The incidental restriction on expression which results from the City's attempt to accomplish such a purpose is considered justified as a reasonable regulation of the time, place, or manner of expression if it is narrowly tailored to serve that interest. The District Court found that the signs prohibited by the ordinance do constitute visual clutter and blight. By banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy. The plurality wrote in *Metromedia*: "It is not speculative to recognize that bill-boards by their very nature, wherever located and however constructed, can be perceived as an `esthetic harm.'" The same is true of posted signs.

It is true that the esthetic interest in preventing the kind of litter that may result from the distribution of leaflets on the public streets and sidewalks cannot support a prophylactic prohibition against the citizen's exercise of that method of expressing his views. In *Schneider v. State* (1939), the Court held that ordinances that absolutely prohibited handbilling on the streets were invalid. The Court explained that cities could adequately protect the esthetic interest in avoiding litter without abridging protected expression merely by penalizing those who actually litter. Taxpayers contend that their interest in supporting Vincent's political campaign, which affords them a constitutional right to

distribute brochures and leaflets on the public streets of Los Angeles, provides equal support for their asserted right to post temporary signs on objects adjacent to the streets and sidewalks. They argue that the mere fact that their temporary signs "add somewhat" to the city's visual clutter is entitled to no more weight than the temporary unsightliness of discarded handbills and the additional street-cleaning burden that were insufficient to justify the ordinances reviewed in *Schneider*.

The rationale of *Schneider* is inapposite in the context of the instant case. There, individual citizens were actively exercising their right to communicate directly with potential recipients of their message. The conduct continued only while the speakers or distributors remained on the scene. In this case, appellees posted dozens of temporary signs throughout an area where they would remain unattended until removed. As the Court expressly noted in *Schneider*, the First Amendment does not "deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion." In short, there is no constitutional impediment to "the punishment of those who actually throw papers on the streets." A distributor of leaflets has no right simply to scatter his pamphlets in the air - or to toss large quantities of paper from the window of a tall building or a low flying airplane. Characterizing such an activity as a separate means of communication does not diminish the State's power to condemn it as a public nuisance. The right recognized in *Schneider* is to tender the written material to the passerby who may reject it or accept it, and who thereafter may keep it, dispose of it properly, or incur the risk of punishment if he lets it fall to the ground. One who is rightfully on a street open to the public "carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word."

With respect to signs posted by appellees, however, it is the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape. In *Schneider*, an antilittering statute could have addressed the substantive evil without prohibiting expressive activity, whereas application of the prophylactic rule actually employed gratuitously infringed upon the right of an individual to communicate directly with a willing listener. Here, the substantive evil - visual blight - is not merely a possible byproduct of the activity, but is created by the medium of expression itself. In contrast to *Schneider*, therefore, the application of the ordinance in this case responds precisely to the substantive problem which legitimately concerns the City. The ordinance curtails no more speech than is necessary to accomplish its purpose.

## V

The Court of Appeals accepted the argument that a prohibition against the use of unattractive signs cannot be justified on esthetic grounds if it fails to apply to all equally unattractive signs wherever they might be located. A comparable argument was categorically rejected in *Metromedia*. In that case it was argued that the city could not simultaneously permit billboards to be used for onsite advertising and also justify the prohibition against offsite advertising on

esthetic grounds, since both types of advertising were equally unattractive. The Court held, however, that the city could reasonably conclude that the esthetic interest was outweighed by the countervailing interest in one kind of advertising even though it was not outweighed by the other. So here, the validity of the esthetic interest in the elimination of signs on public property is not compromised by failing to extend the ban to private property. The private citizen's interest in controlling the use of his own property justifies the disparate treatment. Moreover, by not extending the ban to all locations, a significant opportunity to communicate by means of temporary signs is preserved, and private property owners' esthetic concerns will keep the posting of signs on their property within reasonable bounds. Even if some visual blight remains, a partial, content-neutral ban may nevertheless enhance the City's appearance.

Furthermore, there is no finding that in any area where appellees seek to place signs, there are already so many signs posted on adjacent private property that the elimination of appellees' signs would have an inconsequential effect on the esthetic values with which the City is concerned. There is simply no predicate in the findings of the District Court for the conclusion that the prohibition against the posting of appellees' signs fails to advance the City's esthetic interest.

## VI

While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate. The Los Angeles ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited. To the extent that the posting of signs on public property has advantages over these forms of expression, there is no reason to believe that these same advantages cannot be obtained through other means. To the contrary, the findings of the District Court indicate that there are ample alternative modes of communication in Los Angeles. Notwithstanding appellees' general assertions in their brief concerning the utility of political posters, nothing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication, or that appellees' ability to communicate effectively is threatened by ever-increasing restrictions on expression.

## VII

Appellees suggest that the public property covered by the ordinance either is itself a "public forum" for First Amendment purposes, or at least should be treated in the same respect as the "public forum" in which the property is located. "Traditional public forum property occupies a special position in terms of First Amendment protection," and appellees maintain that their sign-posting activities are entitled to this protection.

In *Hague v. CIO* (1939) (opinion of Roberts, J.), it was recognized: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of

assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

Appellees' reliance on the public forum doctrine is misplaced. They fail to demonstrate the existence of a traditional right of access respecting such items as utility poles for purposes of their communication comparable to that recognized for public streets and parks, and it is clear that "the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government." Rather, the "existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Education Assn. v. Perry Local Educators' Assn.* (1983).

Lampposts can of course be used as signposts, but the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted. Public property which is not by tradition or designation a forum for public communication may be reserved by the State "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Education Assn. v. Perry Local Educators' Assn.* Given our analysis of the legitimate interest served by the ordinance, its viewpoint neutrality, and the availability of alternative channels of communication, the ordinance is certainly constitutional as applied to appellees under this standard.

## VIII

Finally, Taxpayers and COGS argue that Los Angeles could have written an ordinance that would have had a less severe effect on expressive activity such as theirs, by permitting the posting of any kind of sign at any time on some types of public property, or by making a variety of other more specific exceptions to the ordinance: for signs carrying certain types of messages (such as political campaign signs), for signs posted during specific time periods (perhaps during political campaigns), for particular locations (perhaps for areas already cluttered by an excessive number of signs on adjacent private property), or for signs meeting design specifications (such as size or color). Plausible public policy arguments might well be made in support of any such exception, but it by no means follows that it is therefore constitutionally mandated, nor is it clear that some of the suggested exceptions would even be constitutionally permissible. For example, even though political speech is entitled to the fullest possible measure of constitutional protection, there are a host of other communications that command the same respect. An assertion that "Jesus Saves," that "Abortion is Murder," that every woman has the "Right to Choose," or that "Alcohol Kills," may have a claim to a constitutional exemption from the ordinance that is just as strong as "Roland Vincent - City Council." To create an exception for appellees' political speech and not these other types of speech

might create a risk of engaging in constitutionally forbidden content discrimination. Moreover, the volume of permissible postings under such a mandated exemption might so limit the ordinance's effect as to defeat its aim of combating visual blight.

Any constitutionally mandated exception to the City's total prohibition against temporary signs on public property would necessarily rest on a judicial determination that the City's traffic control and safety interests had little or no applicability within the excepted category, and that the City's interests in esthetics are not sufficiently important to justify the prohibition in that category. But the findings of the District Court provide no basis for questioning the substantiality of the esthetic interest at stake, or for believing that a uniquely important form of communication has been abridged for the categories of expression engaged in by Taxpayers and COGS. Therefore, we accept the City's position that it may decide that the esthetic interest in avoiding "visual clutter" justifies a removal of signs creating or increasing that clutter. The findings of the District Court that COGS signs add to the problems addressed by the ordinance and, if permitted to remain, would encourage others to post additional signs, are sufficient to justify application of the ordinance to these appellees.

As recognized in *Metromedia*, if the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, "then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them." As is true of billboards, the esthetic interests that are implicated by temporary signs are presumptively at work in all parts of the city, including those where appellees posted their signs, and there is no basis in the record in this case upon which to rebut that presumption. These interests are both psychological and economic. The character of the environment affects the quality of life and the value of property in both residential and commercial areas. We hold that on this record these interests are sufficiently substantial to justify this content-neutral, impartially administered prohibition against the posting of appellees' temporary signs on public property and that such an application of the ordinance does not create an unacceptable threat to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, (1964).

The judgment of the Court of Appeals is reversed, and the case is remanded to that Court.

*It is so ordered.*

JUSTICE BRENNAN, WITH WHOM JUSTICE MARSHALL AND JUSTICE BLACKMUN JOIN,  
DISSENTING. [OMITTED]

## *Reed v. Town of Gilbert*

576 U. S. \_\_\_\_ (2015)

THOMAS, J., DELIVERED THE OPINION OF THE COURT, IN WHICH ROBERTS, C. J., AND SCALIA, KENNEDY, ALITO, AND SOTOMAYOR, JJ., JOINED. ALITO, J., FILED A CONCURRING OPINION, IN WHICH KENNEDY AND SOTOMAYOR, JJ., JOINED. BREYER, J., FILED AN OPINION CONCURRING IN THE JUDGMENT. KAGAN, J., FILED AN OPINION CONCURRING IN THE JUDGMENT, IN WHICH GINSBURG AND BREYER, JJ., JOINED

JUSTICE THOMAS DELIVERED THE OPINION OF THE COURT.

The town of Gilbert, Arizona (or Town), has adopted a comprehensive code governing the manner in which people may display outdoor signs. Gilbert, Ariz., Land Development Code (Sign Code or Code), ch. 1, §4.402 (2005).<sup>1</sup> The Sign Code identifies various categories of signs based on the type of information they convey, then subjects each category to different restrictions. One of the categories is "Temporary Directional Signs Relating to a Qualifying Event," loosely defined as signs directing the public to a meeting of a nonprofit group. §4.402(P). The Code imposes more stringent restrictions on these signs than it does on signs conveying other messages. We hold that these provisions are content-based regulations of speech that cannot survive strict scrutiny.

I

A

The Sign Code prohibits the display of outdoor signs anywhere within the Town without a permit, but it then exempts 23 categories of signs from that requirement. These exemptions include everything from bazaar signs to flying banners. Three categories of exempt signs are particularly relevant here.

The first is "Ideological Sign[s]." This category includes any "sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency." Of the three categories discussed here, the Code treats ideological signs most favorably, allowing them to be up to 20 square feet in area and to be placed in all "zoning districts" without time limits.

The second category is "Political Sign[s]." This includes any "temporary sign designed to influence the outcome of an election called by a public body." The Code treats these signs less favorably than ideological signs. The Code allows the placement of political signs up to 16 square feet on residential property and up to 32 square feet on nonresidential property, undeveloped municipal property, and "rights-of-way." These signs may be displayed up to 60 days before a primary election and up to 15 days following a general election.

The third category is "Temporary Directional Signs Relating to a Qualifying Event." This includes any "Temporary Sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.' " A "qualifying event" is defined as any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." *Ibid.* The Code treats temporary directional

signs even less favorably than political signs. Temporary directional signs may be no larger than six square feet. They may be placed on private property or on a public right-of-way, but no more than four signs may be placed on a single property at any time. And, they may be displayed no more than 12 hours before the "qualifying event" and no more than 1 hour afterward.

## B

Petitioners Good News Community Church (Church) and its pastor, Clyde Reed, wish to advertise the time and location of their Sunday church services. The Church is a small, cash-strapped entity that owns no building, so it holds its services at elementary schools or other locations in or near the Town. In order to inform the public about its services, which are held in a variety of different locations, the Church began placing 15 to 20 temporary signs around the Town, frequently in the public right-of-way abutting the street. The signs typically displayed the Church's name, along with the time and location of the upcoming service. Church members would post the signs early in the day on Saturday and then remove them around midday on Sunday. The display of these signs requires little money and manpower, and thus has proved to be an economical and effective way for the Church to let the community know where its services are being held each week.

This practice caught the attention of the Town's Sign Code compliance manager, who twice cited the Church for violating the Code. The first citation noted that the Church exceeded the time limits for displaying its temporary directional signs. The second citation referred to the same problem, along with the Church's failure to include the date of the event on the signs. Town officials even confiscated one of the Church's signs, which Reed had to retrieve from the municipal offices.

Reed contacted the Sign Code Compliance Department in an attempt to reach an accommodation. His efforts proved unsuccessful. The Town's Code compliance manager informed the Church that there would be "no leniency under the Code" and promised to punish any future violations.

Shortly thereafter, petitioners filed a complaint in the United States District Court for the District of Arizona, arguing that the Sign Code abridged their freedom of speech in violation of the First and Fourteenth Amendments. The District Court denied the petitioners' motion for a preliminary injunction. The Court of Appeals for the Ninth Circuit affirmed, holding that the Sign Code's provision regulating temporary directional signs did not regulate speech on the basis of content. It reasoned that, even though an enforcement officer would have to read the sign to determine what provisions of the Sign Code applied to it, the " 'kind of cursory examination' " that would be necessary for an officer to classify it as a temporary directional sign was "not akin to an officer synthesizing the expressive content of the sign." It then remanded for the District Court to determine in the first instance whether the Sign Code's distinctions among temporary directional signs, political signs, and ideological signs nevertheless constituted a content-based regulation of speech.

On remand, the District Court granted summary judgment in favor of the Town. The Court of Appeals again affirmed, holding that the Code's sign categories were content neutral. The court concluded that "the distinctions between

Temporary Directional Signs, Ideological Signs, and Political Signs . . . are based on objective factors relevant to Gilbert's creation of the specific exemption from the permit requirement and do not otherwise consider the substance of the sign." Relying on this Court's decision in *Hill v. Colorado* (2000), the Court of Appeals concluded that the Sign Code is content neutral. As the court explained, "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed" and its "interests in regulat[ing] temporary signs are unrelated to the content of the sign." Accordingly, the court believed that the Code was "content-neutral as that term [has been] defined by the Supreme Court." *Id.*, at 1071. In light of that determination, it applied a lower level of scrutiny to the Sign Code and concluded that the law did not violate the First Amendment.

We granted certiorari, and now reverse.

## II

### A

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws "abridging the freedom of speech." U. S. Const., Amdt. 1. Under that Clause, a government, including a municipal government vested with state authority, "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley* (1972). Content-based laws--those that target speech based on its communicative content--are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *R. A. V. v. St. Paul* (1992); *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.* (1991).

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *E.g.*, *Sorrell v. IMS Health, Inc.* (2011); *Carey v. Brown* (1980); *Mosley*. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be " 'justified without reference to the content of the regulated speech,' " or that were adopted by the government "because of disagreement with the message [the speech] conveys," *Ward v. Rock Against Racism* (1989). Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

### B

The Town's Sign Code is content based on its face. It defines "Temporary Directional Signs" on the basis of whether a sign conveys the message of directing the public to church or some other "qualifying event." It defines

"Political Signs" on the basis of whether a sign's message is "designed to influence the outcome of an election." And it defines "Ideological Signs" on the basis of whether a sign "communicat[es] a message or ideas" that do not fit within the Code's other categories. It then subjects each of these categories to different restrictions.

The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke's *Two Treatises of Government*, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government. More to the point, the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

## C

In reaching the contrary conclusion, the Court of Appeals offered several theories to explain why the Town's Sign Code should be deemed content neutral. None is persuasive.

## 1

The Court of Appeals first determined that the Sign Code was content neutral because the Town "did not adopt its regulation of speech [based on] disagree[ment] with the message conveyed," and its justifications for regulating temporary directional signs were "unrelated to the content of the sign." In its brief to this Court, the United States similarly contends that a sign regulation is content neutral--even if it expressly draws distinctions based on the sign's communicative content--if those distinctions can be " 'justified without reference to the content of the regulated speech.' "

But this analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati v. Discovery Network, Inc.* (1993). We have thus made clear that " '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment,' " and a party opposing the government "need adduce 'no evidence of an improper censorial motive.' " *Simon & Schuster*. Although "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary." *Turner Broadcasting System, Inc. v. FCC* (1994). In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

That is why we have repeatedly considered whether a law is content neutral on its face *before* turning to the law's justification or purpose. See, e.g., *Sorrell* (statute was content based "on its face," and there was also evidence of an

impermissible legislative motive); *Members of City Council of Los Angeles v. Taxpayers for Vincent* (1984) ("The text of the ordinance is neutral," and "there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance"); *Clark v. Community for Creative Non-Violence*, (1984) (requiring that a facially content-neutral ban on camping must be "justified without reference to the content of the regulated speech"); *United States v. O'Brien* (1968) (noting that the statute "on its face deals with conduct having no connection with speech," but examining whether the "the governmental interest is unrelated to the suppression of free expression"). Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.

The Court of Appeals and the United States misunderstand our decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content based on its face. That is incorrect. \*\*\* *Ward's* framework "applies only if a statute is content neutral." *Hill* (KENNEDY, J., dissenting). Its rules thus operate "to protect speech," not "to restrict it." *Id.*

The First Amendment requires no less. Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws--i.e., the "abridg[ement] of speech"--rather than merely the motives of those who enacted them. U. S. Const., Amdt. 1. "The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Hill* (SCALIA, J., dissenting).

\*\*\* [O]ne could easily imagine a Sign Code compliance manager who disliked the Church's substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services. Accordingly, we have repeatedly "rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" *Discovery Network*. We do so again today.

2

The Court of Appeals next reasoned that the Sign Code was content neutral because it "does not mention any idea or viewpoint, let alone single one out for differential treatment." It reasoned that, for the purpose of the Code provisions, "[i]t makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted."

The Town seizes on this reasoning, insisting that "content based" is a term of art that "should be applied flexibly" with the goal of protecting "viewpoints and ideas from government censorship or favoritism." In the Town's view, a sign regulation that "does not censor or favor particular viewpoints or ideas" cannot be content based. The Sign Code allegedly passes this test because its treatment of temporary directional signs does not raise any concerns that the government is "endorsing or suppressing 'ideas or viewpoints,'" and the

provisions for political signs and ideological signs "are neutral as to particular ideas or viewpoints" within those categories.

This analysis conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints--or the regulation of speech based on "the specific motivating ideology or the opinion or perspective of the speaker"--is a "more blatant" and "egregious form of content discrimination." *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995). But it is well established that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. of N. Y. v. Public Serv. Comm'n of N. Y.* (1980).

Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. For example, a law banning the use of sound trucks for political speech--and only political speech--would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed. The Town's Sign Code likewise singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter. Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals. That is a paradigmatic example of content-based discrimination.

3

Finally, the Court of Appeals characterized the Sign Code's distinctions as turning on " 'the content-neutral elements of who is speaking through the sign and whether and when an event is occurring.' " That analysis is mistaken on both factual and legal grounds.

To start, the Sign Code's distinctions are not speaker based. The restrictions for political, ideological, and temporary event signs apply equally no matter who sponsors them. If a local business, for example, sought to put up signs advertising the Church's meetings, those signs would be subject to the same limitations as such signs placed by the Church. And if Reed had decided to display signs in support of a particular candidate, he could have made those signs far larger--and kept them up for far longer--than signs inviting people to attend his church services. If the Code's distinctions were truly speaker based, both types of signs would receive the same treatment.

In any case, the fact that a distinction is speaker based does not, as the Court of Appeals seemed to believe, automatically render the distinction content neutral. Because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content," *Citizens United v. Federal Election Comm'n* (2010), we have insisted that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference," *Turner Broadcasting System, Inc. v. FCC*. Thus, a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based. Likewise, a content-based law that restricted the political speech of all corporations would

not become content neutral just because it singled out corporations as a class of speakers. See *Citizens United*. Characterizing a distinction as speaker based is only the beginning--not the end--of the inquiry.

Nor do the Sign Code's distinctions hinge on "whether and when an event is occurring." The Code does not permit citizens to post signs on any topic whatsoever within a set period leading up to an election, for example. Instead, come election time, it requires Town officials to determine whether a sign is "designed to influence the outcome of an election" (and thus "political") or merely "communicating a message or ideas for noncommercial purposes" (and thus "ideological"). That obvious content-based inquiry does not evade strict scrutiny review simply because an event (*i.e.*, an election) is involved.

And, just as with speaker-based laws, the fact that a distinction is event based does not render it content neutral. The Court of Appeals cited no precedent from this Court supporting its novel theory of an exception from the content-neutrality requirement for event-based laws. As we have explained, a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed. A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea. Here, the Code singles out signs bearing a particular message: the time and location of a specific event. This type of ordinance may seem like a perfectly rational way to regulate signs, but a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem "entirely reasonable" will sometimes be "struck down because of their content-based nature." *City of Ladue v. Gilleo* (1994) (O'Connor, J., concurring).

### III

Because the Town's Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny, " 'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest,' " *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011). Thus, it is the Town's burden to demonstrate that the Code's differentiation between temporary directional signs and other types of signs, such as political signs and ideological signs, furthers a compelling governmental interest and is narrowly tailored to that end.

The Town cannot do so. It has offered only two governmental interests in support of the distinctions the Sign Code draws: preserving the Town's aesthetic appeal and traffic safety. Assuming for the sake of argument that those are compelling governmental interests, the Code's distinctions fail as hopelessly underinclusive.

Starting with the preservation of aesthetics, temporary directional signs are "no greater an eyesore," *Discovery Network*, than ideological or political ones. Yet the Code allows unlimited proliferation of larger ideological signs while strictly limiting the number, size, and duration of smaller directional ones. The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.

The Town similarly has not shown that limiting temporary directional signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not. The Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting.

In light of this underinclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest. Because a " 'law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited,' " *Republican Party of Minn. v. White* (2002), the Sign Code fails strict scrutiny.

#### IV

Our decision today will not prevent governments from enacting effective sign laws. The Town asserts that an " 'absolutist' " content-neutrality rule would render "virtually all distinctions in sign laws . . . subject to strict scrutiny," but that is not the case. Not "all distinctions" are subject to strict scrutiny, only *content-based* ones are. Laws that are *content neutral* are instead subject to lesser scrutiny.

The Town has ample content-neutral options available to resolve problems with safety and aesthetics. For example, its current Code regulates many aspects of signs that have nothing to do with a sign's message: size, building materials, lighting, moving parts, and portability. And on public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner. See *Taxpayers for Vincent* (upholding content-neutral ban against posting signs on public property). Indeed, some lower courts have long held that similar content-based sign laws receive strict scrutiny, but there is no evidence that towns in those jurisdictions have suffered catastrophic effects.

We acknowledge that a city might reasonably view the general regulation of signs as necessary because signs "take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." *City of Ladue*. At the same time, the presence of certain signs may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety. A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers--such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses--well might survive strict scrutiny. The signs at issue in this case, including political and ideological signs and signs for events, are far removed from those purposes. As discussed above, they are facially content based and are neither justified by traditional safety concerns nor narrowly tailored.

We reverse the judgment of the Court of Appeals and remand the case for proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE ALITO, WITH WHOM JUSTICE KENNEDY AND JUSTICE SOTOMAYOR JOIN, CONCURRING.

I join the opinion of the Court but add a few words of further explanation.

As the Court holds, what we have termed "content-based" laws must satisfy strict scrutiny. Content-based laws merit this protection because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint. Limiting speech based on its "topic" or "subject" favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth. See *Consolidated Edison Co. of N. Y. v. Public Serv. Comm'n of N. Y.* (1980).

As the Court shows, the regulations at issue in this case are replete with content-based distinctions, and as a result they must satisfy strict scrutiny. This does not mean, however, that municipalities are powerless to enact and enforce reasonable sign regulations. I will not attempt to provide anything like a comprehensive list, but here are some rules that would not be content based:

Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below.

Rules regulating the locations in which signs may be placed. These rules may distinguish between free-standing signs and those attached to buildings.

Rules distinguishing between lighted and unlighted signs.

Rules distinguishing between signs with fixed messages and electronic signs with messages that change.

Rules that distinguish between the placement of signs on private and public property.

Rules distinguishing between the placement of signs on commercial and residential property.

Rules distinguishing between on-premises and off-premises signs.

Rules restricting the total number of signs allowed per mile of roadway.

Rules imposing time restrictions on signs advertising a one-time event. Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed.\*

In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. See *Pleasant Grove City v. Summum* (2009). They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.

JUSTICE BREYER, CONCURRING IN THE JUDGMENT.

I join Justice Kagan's separate opinion. Like Justice Kagan I believe that categories alone cannot satisfactorily resolve the legal problem before us. The First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories, such as "content discrimination" and "strict scrutiny," would permit. In my view, the category "content discrimination" is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic "strict scrutiny" trigger, leading to almost certain legal condemnation.

To use content discrimination to trigger strict scrutiny sometimes makes perfect sense. There are cases in which the Court has found content discrimination an unconstitutional method for suppressing a viewpoint. *E.g.*, *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995); see also *Boos v. Barry* (1988) (plurality opinion) (applying strict scrutiny where the line between subject matter and viewpoint was not obvious). And there are cases where the Court has found content discrimination to reveal that rules governing a traditional public forum are, in fact, not a neutral way of fairly managing the forum in the interest of all speakers. *Police Dept. of Chicago v. Mosley* (1972) ("Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say"). In these types of cases, strict scrutiny is often appropriate, and content discrimination has thus served a useful purpose.

But content discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not *always* trigger strict scrutiny. To say that it is not an automatic "strict scrutiny" trigger is not to argue against that concept's use. I readily concede, for example, that content discrimination, as a conceptual tool, can sometimes reveal weaknesses in the government's rationale for a rule that limits speech. If, for example, a city looks to litter prevention as the rationale for a prohibition against placing newsracks dispensing free advertisements on public property, why does it exempt other newsracks causing similar litter? Cf. *Cincinnati v. Discovery Network, Inc.* (1993). I also concede that, whenever government disfavors one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas and with an individual's ability to express thoughts and ideas that can help that individual determine the kind of society in which he wishes to live, help shape that society, and help define his place within it.

Nonetheless, in these latter instances to use the presence of content discrimination automatically to trigger strict scrutiny and thereby call into play a strong presumption against constitutionality goes too far. That is because virtually all government activities involve speech, many of which involve the regulation of speech. Regulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity.

Consider a few examples of speech regulated by government that inevitably involve content discrimination, but where a strong presumption against

constitutionality has no place. Consider governmental regulation of securities, *e.g.*, 15 U. S. C. §78l (requirements for content that must be included in a registration statement); of energy conservation labeling-practices, *e.g.*, 42 U. S. C. §6294 (requirements for content that must be included on labels of certain consumer electronics); of prescription drugs, *e.g.*, 21 U. S. C. §353(b)(4)(A) (requiring a prescription drug label to bear the symbol "Rx only"); of doctor-patient confidentiality, *e.g.*, 38 U. S. C. §7332 (requiring confidentiality of certain medical records, but allowing a physician to disclose that the patient has HIV to the patient's spouse or sexual partner); of income tax statements, *e.g.*, 26 U. S. C. §6039F (requiring taxpayers to furnish information about foreign gifts received if the aggregate amount exceeds \$10,000); of commercial airplane briefings, *e.g.*, 14 CFR §136.7 (2015) (requiring pilots to ensure that each passenger has been briefed on flight procedures, such as seatbelt fastening); of signs at petting zoos, *e.g.*, N. Y. Gen. Bus. Law Ann. §399-ff(3) (West Cum. Supp. 2015) (requiring petting zoos to post a sign at every exit " 'strongly recommend[ing] that persons wash their hands upon exiting the petting zoo area' "); and so on.

Nor can the majority avoid the application of strict scrutiny to all sorts of justifiable governmental regulations by relying on this Court's many subcategories and exceptions to the rule. The Court has said, for example, that we should apply less strict standards to "commercial speech." *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N. Y.* (1980). But I have great concern that many justifiable instances of "content-based" regulation are noncommercial. And, worse than that, the Court has applied the heightened "strict scrutiny" standard even in cases where the less stringent "commercial speech" standard was appropriate. See *Sorrell v. IMS Health Inc.* (2011) (BREYER, J., dissenting). The Court has also said that "government speech" escapes First Amendment strictures. See *Rust v. Sullivan* (1991). But regulated speech is typically private speech, not government speech. Further, the Court has said that, "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." *R. A. V. v. St. Paul* (1992). But this exception accounts for only a few of the instances in which content discrimination is readily justifiable.

I recognize that the Court could escape the problem by watering down the force of the presumption against constitutionality that "strict scrutiny" normally carries with it. But, in my view, doing so will weaken the First Amendment's protection in instances where "strict scrutiny" should apply in full force.

The better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it a helpful, but not determinative legal tool, in an appropriate case, to determine the strength of a justification. I would use content discrimination as a supplement to a more basic analysis, which, tracking most of our First Amendment cases, asks whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives. Answering this question requires examining the seriousness of the harm to speech, the importance of the

countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so. See, e.g., *United States v. Alvarez* (2012) (Breyer, J., concurring in judgment); *Nixon v. Shrink Missouri Government PAC* (2000) (Breyer, J., concurring). Admittedly, this approach does not have the simplicity of a mechanical use of categories. But it does permit the government to regulate speech in numerous instances where the voters have authorized the government to regulate and where courts should hesitate to substitute judicial judgment for that of administrators.

Here, regulation of signage along the roadside, for purposes of safety and beautification is at issue. There is no traditional public forum nor do I find any general effort to censor a particular viewpoint. Consequently, the specific regulation at issue does not warrant "strict scrutiny." Nonetheless, for the reasons that Justice Kagan sets forth, I believe that the Town of Gilbert's regulatory rules violate the First Amendment. I consequently concur in the Court's judgment only.

JUSTICE KAGAN, WITH WHOM JUSTICE GINSBURG AND JUSTICE BREYER JOIN, CONCURRING IN THE JUDGMENT.

Countless cities and towns across America have adopted ordinances regulating the posting of signs, while exempting certain categories of signs based on their subject matter. For example, some municipalities generally prohibit illuminated signs in residential neighborhoods, but lift that ban for signs that identify the address of a home or the name of its owner or occupant. See, e.g., *City of Truth or Consequences, N. M., Code of Ordinances, ch. 16, Art. XIII, §§11-13-2.3, 11-13-2.9(H)(4)* (2014). In other municipalities, safety signs such as "Blind Pedestrian Crossing" and "Hidden Driveway" can be posted without a permit, even as other permanent signs require one. See, e.g., *Code of Athens-Clarke County, Ga., Pt. III, §7-4-7(1)* (1993). Elsewhere, historic site markers--for example, "George Washington Slept Here"--are also exempt from general regulations. See, e.g., *Dover, Del., Code of Ordinances, Pt. II, App. B, Art. 5, §4.5(F)* (2012). And similarly, the federal Highway Beautification Act limits signs along interstate highways unless, for instance, they direct travelers to "scenic and historical attractions" or advertise free coffee. See 23 U. S. C. §§131(b), (c)(1), (c)(5).

Given the Court's analysis, many sign ordinances of that kind are now in jeopardy. Says the majority: When laws "single[ ] out specific subject matter," they are "facially content based"; and when they are facially content based, they are automatically subject to strict scrutiny. And although the majority holds out hope that some sign laws with subject-matter exemptions "might survive" that stringent review, the likelihood is that most will be struck down. After all, it is the "rare case[ ] in which a speech restriction withstands strict scrutiny." *Williams-Yulee v. Florida Bar* (2015). To clear that high bar, the government must show that a content-based distinction "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc. v. Ragland* (1987). So on the majority's view, courts would have to determine that a town has a compelling interest in informing passersby where George Washington slept. And likewise, courts would have to find that a town

has no other way to prevent hidden-driveway mishaps than by specially treating hidden-driveway signs. (Well-placed speed bumps? Lower speed limits? Or how about just a ban on hidden driveways?) The consequence--unless courts water down strict scrutiny to something unrecognizable--is that our communities will find themselves in an unenviable bind: They will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter.\*

Although the majority insists that applying strict scrutiny to all such ordinances is "essential" to protecting First Amendment freedoms, I find it challenging to understand why that is so. This Court's decisions articulate two important and related reasons for subjecting content-based speech regulations to the most exacting standard of review. The first is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen v. Coakley* (2014). The second is to ensure that the government has not regulated speech "based on hostility--or favoritism--towards the underlying message expressed." *R. A. V. v. St. Paul* (1992). Yet the subject-matter exemptions included in many sign ordinances do not implicate those concerns. Allowing residents, say, to install a light bulb over "name and address" signs but no others does not distort the marketplace of ideas. Nor does that different treatment give rise to an inference of impermissible government motive.

We apply strict scrutiny to facially content-based regulations of speech, in keeping with the rationales just described, when there is any "realistic possibility that official suppression of ideas is afoot." *R. A. V.* That is always the case when the regulation facially differentiates on the basis of viewpoint. See *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995). It is also the case (except in non-public or limited public forums) when a law restricts "discussion of an entire topic" in public debate. *Consolidated Edison Co. of N. Y. v. Public Serv. Comm'n of N. Y.* (1980) (invalidating a limitation on speech about nuclear power). We have stated that "[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating.'" *Id.* And we have recognized that such subject-matter restrictions, even though viewpoint-neutral on their face, may "suggest[ ] an attempt to give one side of a debatable public question an advantage in expressing its views to the people." *First Nat. Bank of Boston v. Bellotti* (1978). Subject-matter regulation, in other words, may have the intent or effect of favoring some ideas over others. When that is realistically possible--when the restriction "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace"--we insist that the law pass the most demanding constitutional test. *R. A. V.*

But when that is not realistically possible, we may do well to relax our guard so that "entirely reasonable" laws imperiled by strict scrutiny can survive. This point is by no means new. Our concern with content-based regulation arises from the fear that the government will skew the public's debate of ideas--so when "that risk is inconsequential, . . . strict scrutiny is unwarranted." To do its intended work, of course, the category of content-based regulation triggering strict scrutiny must sweep more broadly than the actual harm; that category exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints. But that buffer zone need not extend forever. We

can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function.

And indeed we have done just that: Our cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws--including in cases just like this one. In *Members of City Council of Los Angeles v. Taxpayers for Vincent* (1984), the Court declined to apply strict scrutiny to a municipal ordinance that exempted address numbers and markers commemorating "historical, cultural, or artistic event[s]" from a generally applicable limit on sidewalk signs. After all, we explained, the law's enactment and enforcement revealed "not even a hint of bias or censorship." And another decision involving a similar law provides an alternative model. In *City of Ladue v. Gilleo* (1994), the Court assumed *arguendo* that a sign ordinance's exceptions for address signs, safety signs, and for-sale signs in residential areas did not trigger strict scrutiny. We did not need to, and so did not, decide the level-of-scrutiny question because the law's breadth made it unconstitutional under any standard.

The majority could easily have taken *Ladue's* tack here. The Town of Gilbert's defense of its sign ordinance--most notably, the law's distinctions between directional signs and others--does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test. The Town, for example, provides no reason at all for prohibiting more than four directional signs on a property while placing no limits on the number of other types of signs. Similarly, the Town offers no coherent justification for restricting the size of directional signs to 6 square feet while allowing other signs to reach 20 square feet. The best the Town could come up with at oral argument was that directional signs "need to be smaller because they need to guide travelers along a route." Why exactly a smaller sign better helps travelers get to where they are going is left a mystery. The absence of any sensible basis for these and other distinctions dooms the Town's ordinance under even the intermediate scrutiny that the Court typically applies to "time, place, or manner" speech regulations. Accordingly, there is no need to decide in this case whether strict scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption.

I suspect this Court and others will regret the majority's insistence today on answering that question in the affirmative. As the years go by, courts will discover that thousands of towns have such ordinances, many of them "entirely reasonable." And as the challenges to them mount, courts will have to invalidate one after the other. (This Court may soon find itself a veritable Supreme Board of Sign Review.) And courts will strike down those democratically enacted local laws even though no one--certainly not the majority--has ever explained why the vindication of First Amendment values requires that result. Because I see no reason why such an easy case calls for us to cast a constitutional pall on reasonable regulations quite unlike the law before us, I concur only in the judgment.

## Notes

1. Is it possible after *Reed v. Town of Gilbert* for a municipality to require removal of signs after the event to which they refer has ended? What might you suggest to a town if you were a town attorney?
2. What is the likelihood that the Court will soon find itself “a veritable Supreme Board of Sign Review”? The federal courts?

## V. The “Escape Clause” of Government Speech

### *Pleasant Grove City v. Summum*

555 U.S. 460 (2009)

ALITO, J., DELIVERED THE OPINION OF THE COURT, IN WHICH ROBERTS, C. J., AND STEVENS, SCALIA, KENNEDY, THOMAS, GINSBURG, AND BREYER, JJ., JOINED. STEVENS, J., FILED A CONCURRING OPINION, IN WHICH GINSBURG, J., JOINED. SCALIA, J., FILED A CONCURRING OPINION, IN WHICH THOMAS, J., JOINED. BREYER, J., FILED A CONCURRING OPINION. SOUTER, J., FILED AN OPINION CONCURRING IN THE JUDGMENT.

JUSTICE ALITO DELIVERED THE OPINION OF THE COURT.

This case presents the question whether the Free Speech Clause of the First Amendment entitles a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected. The Court of Appeals held that the municipality was required to accept the monument because a public park is a traditional public forum. We conclude, however, that although a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.

I

A

Pioneer Park (or Park) is a 2.5 acre public park located in the Historic District of Pleasant Grove City (or City) in Utah. The Park currently contains 15 permanent displays, at least 11 of which were donated by private groups or individuals. These include an historic granary, a wishing well, the City's first fire station, a September 11 monument, and a Ten Commandments monument donated by the Fraternal Order of Eagles in 1971.

Respondent Summum is a religious organization founded in 1975 and headquartered in Salt Lake City, Utah. On two separate occasions in 2003, Summum's president wrote a letter to the City's mayor requesting permission to

erect a "stone monument," which would contain "the Seven Aphorisms of SUMMUM" and be similar in size and nature to the Ten Commandments monument. The City denied the requests and explained that its practice was to limit monuments in the Park to those that "either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community." The following year, the City passed a resolution putting this policy into writing. The resolution also mentioned other criteria, such as safety and esthetics.

In May 2005, respondent's president again wrote to the mayor asking to erect a monument, but the letter did not describe the monument, its historical significance, or Summum's connection to the community. The city council rejected this request.

## B

In 2005, respondent filed this action against the City and various local officials (petitioners), asserting, among other claims, that petitioners had violated the Free Speech Clause of the First Amendment by accepting the Ten Commandments monument but rejecting the proposed Seven Aphorisms monument. Respondent sought a preliminary injunction directing the City to permit Summum to erect its monument in Pioneer Park. After the District Court denied Summum's preliminary injunction request, respondent appealed, pressing solely its free speech claim.

A panel of the Tenth Circuit reversed. The panel noted that it had previously found the Ten Commandments monument to be private rather than government speech. Noting that public parks have traditionally been regarded as public forums, the panel held that the City could not reject the Seven Aphorisms monument unless it had a compelling justification that could not be served by more narrowly tailored means. The panel then concluded that the exclusion of respondent's monument was unlikely to survive this strict scrutiny, and the panel therefore held that the City was required to erect Summum's monument immediately.

The Tenth Circuit denied the City's petition for rehearing en banc by an equally divided vote. Judge Lucero dissented, arguing that the Park was not a traditional public forum for the purpose of displaying monuments. Judge McConnell also dissented, contending that the monuments in the Park constitute government speech.

We granted certiorari and now reverse.

## II

No prior decision of this Court has addressed the application of the Free Speech Clause to a government entity's acceptance of privately donated, permanent monuments for installation in a public park, and the parties disagree sharply about the line of precedents that governs this situation. Petitioners contend that the pertinent cases are those concerning government speech. Respondent, on the other hand, agrees with the Court of Appeals panel that the applicable cases are those that analyze private speech in a public forum. The parties' fundamental disagreement thus centers on the nature of petitioners' conduct when they permitted privately donated monuments to be erected in Pioneer

Park. Were petitioners engaging in their own expressive conduct? Or were they providing a forum for private speech?

#### A

If petitioners were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. A government entity has the right to "speak for itself." *Board of Regents of Univ. of Wis. System v. Southworth* (2000). "[I]t is entitled to say what it wishes," *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995), and to select the views that it wants to express. See *Rust v. Sullivan* (1991); *National Endowment for Arts v. Finley* (1998) (Scalia, J., concurring in judgment) ("It is the very business of government to favor and disfavor points of view").

Indeed, it is not easy to imagine how government could function if it lacked this freedom. \*\*\*

A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message. \*\*\*

This does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause. The involvement of public officials in advocacy may be limited by law, regulation, or practice. And of course, a government entity is ultimately "accountable to the electorate and the political process for its advocacy." *Southworth*. "If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Id.*

#### B

While government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property. This Court long ago recognized that members of the public retain strong free speech rights when they venture into public streets and parks, "which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry Ed. Assn. v. Perry Local Educators' Assn.* (1983) (quoting *Hague v. Committee for Industrial Organization* (1939) (opinion of Roberts, J.)). In order to preserve this freedom, government entities are strictly limited in their ability to regulate private speech in such "traditional public fora." Reasonable time, place, and manner restrictions are allowed, see *Perry Ed. Assn.*, but any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest, and restrictions based on viewpoint are prohibited.

With the concept of the traditional public forum as a starting point, this Court has recognized that members of the public have free speech rights on other types of government property and in certain other government programs that share essential attributes of a traditional public forum. We have held that a government entity may create "a designated public forum" if government property that has not traditionally been regarded as a public forum is

intentionally opened up for that purpose. Government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum.

The Court has also held that a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects. *Perry Ed. Assn.* In such a forum, a government entity may impose restrictions on speech that are reasonable and viewpoint-neutral.

### III

There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. Permanent monuments displayed on public property typically represent government speech.

Governments have long used monuments to speak to the public. Since ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power. Triumphal arches, columns, and other monuments have been built to commemorate military victories and sacrifices and other events of civic importance. A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure. Neither the Court of Appeals nor respondent disputes the obvious proposition that a monument that is commissioned and financed by a government body for placement on public land constitutes government speech.

Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land. It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. And because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely--and reasonably--interpret them as conveying some message on the property owner's behalf. In this context, there is little chance that observers will fail to appreciate the identity of the speaker. This is true whether the monument is located on private property or on public property, such as national, state, or city park land.

We think it is fair to say that throughout our Nation's history, the general government practice with respect to donated monuments has been one of selective receptivity. A great many of the monuments that adorn the Nation's public parks were financed with private funds or donated by private parties. Sites managed by the National Park Service contain thousands of privately designed or funded commemorative objects, including the Statue of Liberty, the Marine Corps War Memorial (the Iwo Jima monument), and the Vietnam Veterans Memorial. States and cities likewise have received thousands of donated monuments. By accepting monuments that are privately funded or donated, government entities save tax dollars and are able to acquire monuments that they could not have afforded to fund on their own.

But while government entities regularly accept privately funded or donated monuments, they have exercised selectivity. An example discussed by the city of New York as amicus curiae is illustrative. In the wake of the controversy generated in 1876 when the city turned down a donated monument to honor Daniel Webster, the city adopted rules governing the acceptance of artwork for permanent placement in city parks, requiring, among other things, that "any proposed gift of art had to be viewed either in its finished condition or as a model before acceptance." Brief for City of New York as Amicus Curiae 4-5 (hereinafter NYC Brief). Across the country, "municipalities generally exercise editorial control over donated monuments through prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals."

Public parks are often closely identified in the public mind with the government unit that owns the land. City parks--ranging from those in small towns, like Pioneer Park in Pleasant Grove City, to those in major metropolises, like Central Park in New York City--commonly play an important role in defining the identity that a city projects to its own residents and to the outside world. Accordingly, cities and other jurisdictions take some care in accepting donated monuments. Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.

#### IV

##### A

In this case, it is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech. Although many of the monuments were not designed or built by the City and were donated in completed form by private entities, the City decided to accept those donations and to display them in the Park. Respondent does not claim that the City ever opened up the Park for the placement of whatever permanent monuments might be offered by private donors. Rather, the City has "effectively controlled" the messages sent by the monuments in the Park by exercising "final approval authority" over their selection. The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park; it has taken ownership of most of the monuments in the Park, including the Ten Commandments monument that is the focus of respondent's concern; and the City has now expressly set forth the criteria it will use in making future selections.

##### B

Respondent voices the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint. Respondent's suggested solution is to require a government entity accepting a privately donated monument to go through a formal process of adopting a resolution publicly embracing "the message" that the monument conveys.

We see no reason for imposing a requirement of this sort. The parks of this country contain thousands of donated monuments that government entities have used for their own expressive purposes, usually without producing the sort of formal documentation that respondent now says is required to escape Free Speech Clause restrictions. Requiring all of these jurisdictions to go back and proclaim formally that they adopt all of these monuments as their own expressive vehicles would be a pointless exercise that the Constitution does not mandate.

In this case, for example, although respondent argues that Pleasant Grove City has not adequately "controll[ed] the message" of the Ten Commandments monument, the City took ownership of that monument and put it on permanent display in a park that it owns and manages and that is linked to the City's identity. All rights previously possessed by the monument's donor have been relinquished. The City's actions provided a more dramatic form of adoption than the sort of formal endorsement that respondent would demand, unmistakably signifying to all Park visitors that the City intends the monument to speak on its behalf. And the City has made no effort to abridge the traditional free speech rights--the right to speak, distribute leaflets, etc.--that may be exercised by respondent and others in Pioneer Park.

What respondent demands, however, is that the City "adopt" or "embrace" "the message" that it associates with the monument. Respondent seems to think that a monument can convey only one "message"--which is, presumably, the message intended by the donor--and that, if a government entity that accepts a monument for placement on its property does not formally embrace that message, then the government has not engaged in expressive conduct.

This argument fundamentally misunderstands the way monuments convey meaning. \*\*\* Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways. Monuments called to our attention by the briefing in this case illustrate this phenomenon.

What, for example, is "the message" of the Greco-Roman mosaic of the word "Imagine" that was donated to New York City's Central Park in memory of John Lennon? See NYC Brief 18. Some observers may "imagine" the musical contributions that John Lennon would have made if he had not been killed. Others may think of the lyrics of the Lennon song that obviously inspired the mosaic and may "imagine" a world without religion, countries, possessions, greed, or hunger. [FN 2 contains the lyrics to "Imagine"].

Or, to take another example, what is "the message" of the "large bronze statue displaying the word 'peace' in many world languages" that is displayed in Fayetteville, Arkansas?

These text-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable. Consider, for example, the statue of Pancho Villa that was given to the city of Tucson, Arizona, in 1981 by the Government of Mexico with, according to a Tucson publication, "a wry sense of irony." Does this statue commemorate a "revolutionary leader who advocated for agrarian reform and the poor" or "a violent bandit"?

Contrary to respondent's apparent belief, it frequently is not possible to identify a single "message" that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor. By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator. Indeed, when a privately donated memorial is funded by many small donations, the donors themselves may differ in their interpretation of the monument's significance. By accepting such a monument, a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument.

The message that a government entity conveys by allowing a monument to remain on its property may also be altered by the subsequent addition of other monuments in the same vicinity. For example, following controversy over the original design of the Vietnam Veterans Memorial, a compromise was reached that called for the nearby addition of a flagstaff and bronze Three Soldiers statue, which many believed changed the overall effect of the memorial. See, e.g., J. MAYO, *WAR MEMORIALS AS POLITICAL LANDSCAPE: THE AMERICAN EXPERIENCE AND BEYOND* 202-203, 205 (1988); K. HASS, *CARRIED TO THE WALL: AMERICAN MEMORY AND THE VIETNAM VETERANS MEMORIAL* 15-18 (1998).

The "message" conveyed by a monument may change over time. A study of war memorials found that "people reinterpret" the meaning of these memorials as "historical interpretations" and "the society around them changes."

A striking example of how the interpretation of a monument can evolve is provided by one of the most famous and beloved public monuments in the United States, the Statue of Liberty. The statue was given to this country by the Third French Republic to express republican solidarity and friendship between the two countries. See J. Res. 6, 44th Cong., 2d Sess. (1877), 19 Stat. 410 (accepting the statue as an "expressive and felicitous memorial of the sympathy of the citizens of our sister Republic"). At the inaugural ceremony, President Cleveland saw the statue as an emblem of international friendship and the widespread influence of American ideals. See *Inauguration of the Statue of Liberty Enlightening the World* 30 (1887). Only later did the statue come to be viewed as a beacon welcoming immigrants to a land of freedom. See *Public Papers of the Presidents, Ronald Reagan, Vol. 2, July 3, 1986*, pp. 918-919 (1989), *Remarks at the Opening Ceremonies of the Statue of Liberty Centennial Celebration in New York, New York*; J. Higham, *The Transformation of the Statue of Liberty*, in *Send These To Me* 74-80 (rev. ed. 1984).

## C

Respondent and the Court of Appeals analogize the installation of permanent monuments in a public park to the delivery of speeches and the holding of marches and demonstrations, and they thus invoke the rule that a public park is a traditional public forum for these activities. But "public forum principles . . . are out of place in the context of this case." *United States v. American Library Assn., Inc.* (2003). The forum doctrine has been applied in situations in which government-owned property or a government program was capable of

accommodating a large number of public speakers without defeating the essential function of the land or the program. For example, a park can accommodate many speakers and, over time, many parades and demonstrations. The Combined Federal Campaign permits hundreds of groups to solicit donations from federal employees. A public university's student activity fund can provide money for many campus activities. A public university's buildings may offer meeting space for hundreds of student groups. A school system's internal mail facilities can support the transmission of many messages to and from teachers and school administrators.

By contrast, public parks can accommodate only a limited number of permanent monuments. Public parks have been used, " 'time out of mind, . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions,' " *Perry Ed. Assn.* (quoting *Hague*), but "one would be hard pressed to find a 'long tradition' of allowing people to permanently occupy public space with any manner of monuments." (Lucero, J., dissenting from denial of rehearing en banc) [in Tenth Circuit].

Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however, endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space. A public park, over the years, can provide a soapbox for a very large number of orators--often, for all who want to speak--but it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression.

Respondent contends that this issue "can be dealt with through content-neutral time, place and manner restrictions, including the option of a ban on all unattended displays." On this view, when France presented the Statue of Liberty to the United States in 1884, this country had the option of either (a) declining France's offer or (b) accepting the gift, but providing a comparable location in the harbor of New York for other statues of a similar size and nature (e.g., a Statue of Autocracy, if one had been offered by, say, the German Empire or Imperial Russia).

While respondent and some of its amici deride the fears expressed about the consequences of the Court of Appeals holding in this case, those concerns are well founded. If government entities must maintain viewpoint neutrality in their selection of donated monuments, they must either "brace themselves for an influx of clutter" or face the pressure to remove longstanding and cherished monuments. (McConnell, J., dissenting from denial of rehearing en banc)[in Tenth Circuit]. Every jurisdiction that has accepted a donated war memorial may be asked to provide equal treatment for a donated monument questioning the cause for which the veterans fought. New York City, having accepted a donated statue of one heroic dog (Balto, the sled dog who brought medicine to Nome, Alaska, during a diphtheria epidemic) may be pressed to accept monuments for other dogs who are claimed to be equally worthy of commemoration. The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. And where the application of forum analysis would lead almost

inexorably to closing of the forum, it is obvious that forum analysis is out of place.

\*\*\* To be sure, there are limited circumstances in which the forum doctrine might properly be applied to a permanent monument--for example, if a town created a monument on which all of its residents (or all those meeting some other criterion) could place the name of a person to be honored or some other private message. But as a general matter, forum analysis simply does not apply to the installation of permanent monuments on public property.

## V

In sum, we hold that the City's decision to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech. As a result, the City's decision is not subject to the Free Speech Clause, and the Court of Appeals erred in holding otherwise. We therefore reverse.

*It is so ordered.*

JUSTICE STEVENS, WITH WHOM JUSTICE GINSBURG JOINS, CONCURRING.

This case involves a property owner's rejection of an offer to place a permanent display on its land. While I join the Court's persuasive opinion, I think the reasons justifying the city's refusal would have been equally valid if its acceptance of the monument, instead of being characterized as "government speech," had merely been deemed an implicit endorsement of the donor's message.

To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit. See, e.g., *Garcetti v. Ceballos* (2006); *Johanns v. Livestock Marketing Assn.*, (2005); *Rust v. Sullivan* (1991). The Court's opinion in this case signals no expansion of that doctrine. And by joining the Court's opinion, I do not mean to indicate agreement with our earlier decisions. Unlike other decisions relying on the government speech doctrine, our decision in this case excuses no retaliation for, or coercion of, private speech. Cf. *Garcetti* (Souter, J., dissenting); *Rust* (Blackmun, J., dissenting). Nor is it likely, given the near certainty that observers will associate permanent displays with the governmental property owner, that the government will be able to avoid political accountability for the views that it endorses or expresses through this means. Cf. *Johanns* (Souter, J., dissenting). Finally, recognizing permanent displays on public property as government speech will not give the government free license to communicate offensive or partisan messages. For even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses. Together with the checks imposed by our democratic processes, these constitutional safeguards ensure that the effect of today's decision will be limited.

JUSTICE SCALIA, WITH WHOM JUSTICE THOMAS JOINS, CONCURRING.

As framed and argued by the parties, this case presents a question under the Free Speech Clause of the First Amendment. I agree with the Court's analysis of that question and join its opinion in full. But it is also obvious that from the start, the case has been litigated in the shadow of the First Amendment's Establishment Clause: the city wary of associating itself too closely with the Ten Commandments monument displayed in the park, lest that be deemed a breach in the so-called "wall of separation between church and State," *Reynolds v. United States* (1879).\*\*\*

JUSTICE BREYER, CONCURRING.

I agree with the Court and join its opinion. I do so, however, on the understanding that the "government speech" doctrine is a rule of thumb, not a rigid category. Were the City to discriminate in the selection of permanent monuments on grounds unrelated to the display's theme, say solely on political grounds, its action might well violate the First Amendment.

In my view, courts must apply categories such as "government speech," "public forums," "limited public forums," and "nonpublic forums" with an eye towards their purposes--lest we turn "free speech" doctrine into a jurisprudence of labels. Consequently, we must sometimes look beyond an initial categorization. And, in doing so, it helps to ask whether a government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective.

Were we to do so here, we would find--for reasons that the Court sets forth--that the City's action, while preventing Summum from erecting its monument, does not disproportionately restrict Summum's freedom of expression. The City has not closed off its parks to speech; no one claims that the City prevents Summum's members from engaging in speech in a form more transient than a permanent monument. Rather, the City has simply reserved some space in the park for projects designed to further other than free-speech goals. And that is perfectly proper. After all, parks do not serve speech-related interests alone. To the contrary, cities use park space to further a variety of recreational, historical, educational, aesthetic, and other civic interests. To reserve to the City the power to pick and choose among proposed monuments according to criteria reasonably related to one or more of these legitimate ends restricts Summum's expression, but, given the impracticality of alternatives and viewed in light of the City's legitimate needs, the restriction is not disproportionate. Analyzed either way, as "government speech" or as a proportionate restriction on Summum's expression, the City's action here is lawful.

JUSTICE SOUTER, CONCURRING IN THE JUDGMENT.

I agree with the Court that the Ten Commandments monument is government speech, that is, an expression of a government's position on the moral and religious issues raised by the subject of the monument. And although the government should lose when the character of the speech is at issue and its governmental nature has not been made clear, I also agree with the Court that the city need not satisfy the particular formality urged by Summum as a

condition of recognizing that the expression here falls within the public category. I have qualms, however, about accepting the position that public monuments are government speech categorically.

Because the government speech doctrine, as Justice Stevens notes (concurring opinion), is "recently minted," it would do well for us to go slow in setting its bounds, which will affect existing doctrine in ways not yet explored. Even though, for example, Establishment Clause issues have been neither raised nor briefed before us, there is no doubt that this case and its government speech claim has been litigated by the parties with one eye on the Establishment Clause, see (Scalia, J., concurring). The interaction between the "government speech doctrine" and Establishment Clause principles has not, however, begun to be worked out.

The case shows that it may not be easy to work out. \*\*\*

## *Walker v. Texas Division, Sons of Confederate Veterans*

576 U. S. \_\_\_\_ (2015)

BREYER, J., DELIVERED THE OPINION OF THE COURT, IN WHICH THOMAS, GINSBURG, SOTOMAYOR, AND KAGAN, JJ., JOINED. ALITO, J., FILED A DISSENTING OPINION, IN WHICH ROBERTS, C. J., AND SCALIA AND KENNEDY, JJ., JOINED.

JUSTICE BREYER DELIVERED THE OPINION OF THE COURT.

Texas offers automobile owners a choice between ordinary and specialty license plates. Those who want the State to issue a particular specialty plate may propose a plate design, comprising a slogan, a graphic, or (most commonly) both. If the Texas Department of Motor Vehicles Board approves the design, the State will make it available for display on vehicles registered in Texas.

In this case, the Texas Division of the Sons of Confederate Veterans proposed a specialty license plate design featuring a Confederate battle flag. The Board rejected the proposal. We must decide whether that rejection violated the Constitution's free speech guarantees. We conclude that it did not.

I

A

Texas law requires all motor vehicles operating on the State's roads to display valid license plates. And Texas makes available several kinds of plates. Drivers may choose to display the State's general-issue license plates. Each of these plates contains the word "Texas," a license plate number, a silhouette of the State, a graphic of the Lone Star, and the slogan "The Lone Star State." In the alternative, drivers may choose from an assortment of specialty license plates. Each of these plates contains the word "Texas," a license plate number, and one of a selection of designs prepared by the State. Finally, Texas law provides for personalized plates (also known as vanity plates). Pursuant to the personalization program, a vehicle owner may request a particular alphanumeric pattern for use as a plate number, such as "BOB" or "TEXPL8."

Here we are concerned only with the second category of plates, namely specialty license plates, not with the personalization program. Texas offers vehicle owners a variety of specialty plates, generally for an annual fee. And Texas selects the designs for specialty plates through three distinct processes.

First, the state legislature may specifically call for the development of a specialty license plate. The legislature has enacted statutes authorizing, for example, plates that say "Keep Texas Beautiful" and "Mothers Against Drunk Driving," plates that "honor" the Texas citrus industry, and plates that feature an image of the World Trade Center towers and the words "Fight Terrorism."

Second, the Board may approve a specialty plate design proposal that a state-designated private vendor has created at the request of an individual or organization. Among the plates created through the private-vendor process are plates promoting the "Keller Indians" and plates with the slogan "Get it Sold with RE/MAX."

Third, the Board "may create new specialty license plates on its own initiative or on receipt of an application from a" nonprofit entity seeking to sponsor a specialty plate. A nonprofit must include in its application "a draft design of the specialty license plate." And Texas law vests in the Board authority to approve or to disapprove an application. The relevant statute says that the Board "may refuse to create a new specialty license plate" for a number of reasons, for example "if the design might be offensive to any member of the public . . . or for any other reason established by rule." Specialty plates that the Board has sanctioned through this process include plates featuring the words "The Gator Nation," together with the Florida Gators logo, and plates featuring the logo of Rotary International and the words "SERVICE ABOVE SELF."

## B

In 2009, the Sons of Confederate Veterans, Texas Division (a nonprofit entity), applied to sponsor a specialty license plate through this last-mentioned process. SCV's application included a draft plate design. At the bottom of the proposed plate were the words "SONS OF CONFEDERATE VETERANS." At the side was the organization's logo, a square Confederate battle flag framed by the words "Sons of Confederate Veterans 1896." A faint Confederate battle flag appeared in the background on the lower portion of the plate. Additionally, in the middle of the plate was the license plate number, and at the top was the State's name and silhouette. The Board's predecessor denied this application.

In 2010, SCV renewed its application before the Board. The Board invited public comment on its website and at an open meeting. After considering the responses, including a number of letters sent by elected officials who opposed the proposal, the Board voted unanimously against issuing the plate. The Board explained that it had found "it necessary to deny th[e] plate design application, specifically the confederate flag portion of the design, because public comments ha[d] shown that many members of the general public find the design offensive, and because such comments are reasonable." The Board added "that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups."

In 2012, SCV and two of its officers (collectively SCV) brought this lawsuit against the chairman and members of the Board (collectively Board). SCV argued that the Board's decision violated the Free Speech Clause of the First Amendment, and it sought an injunction requiring the Board to approve the proposed plate design. The District Court entered judgment for the Board. A divided panel of the Court of Appeals for the Fifth Circuit reversed. It held that Texas's specialty license plate designs are private speech and that the Board, in refusing to approve SCV's design, engaged in constitutionally forbidden viewpoint discrimination. The dissenting judge argued that Texas's specialty license plate designs are government speech, the content of which the State is free to control.

We granted the Board's petition for certiorari, and we now reverse.

## II

When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. *Pleasant Grove City v. Summum* (2009). That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech. See *Board of Regents of Univ. of Wis. System v. Southworth* (2000). Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas. See *Johanns v. Livestock Marketing Assn.* (2005). Instead, the Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate. See *Stromberg v. California* (1931) (observing that "our constitutional system" seeks to maintain "the opportunity for free political discussion to the end that government may be responsive to the will of the people").

Were the Free Speech Clause interpreted otherwise, government would not work. How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary? How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization? "[I]t is not easy to imagine how government could function if it lacked th[e] freedom" to select the messages it wishes to convey. *Summum*.

We have therefore refused "[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals." *Rust v. Sullivan* (1991). We have pointed out that a contrary holding "would render numerous Government programs constitutionally suspect." *Ibid.* Cf. *Keller v. State Bar of Cal.* (1990) ("If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed"). And we have made clear that "the government can speak for itself." *Southworth*.

That is not to say that a government's ability to express itself is without restriction. Constitutional and statutory provisions outside of the Free Speech Clause may limit government speech. *Summum*. And the Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech. But, as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf.

### III

In our view, specialty license plates issued pursuant to Texas's statutory scheme convey government speech. Our reasoning rests primarily on our analysis in *Summum*, a recent case that presented a similar problem. We conclude here, as we did there, that our precedents regarding government speech (and not our precedents regarding forums for private speech) provide the appropriate framework through which to approach the case.

#### A

In *Summum*, we considered a religious organization's request to erect in a 2.5-acre city park a monument setting forth the organization's religious tenets. \*\*\* We held that the city had not "provid[ed] a forum for private speech" with respect to monuments. Rather, the city, even when "accepting a privately donated monument and placing it on city property," had "engage[d] in expressive conduct." The speech at issue, this Court decided, was "best viewed as a form of government speech" and "therefore [was] not subject to scrutiny under the Free Speech Clause."

We based our conclusion on several factors. First, history shows that "[g]overnments have long used monuments to speak to the public." Thus, we observed that "[w]hen a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure."

Second, we noted that it "is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated." As a result, "persons who observe donated monuments routinely--and reasonably--interpret them as conveying some message on the property owner's behalf." And "observers" of such monuments, as a consequence, ordinarily "appreciate the identity of the speaker."

Third, we found relevant the fact that the city maintained control over the selection of monuments. We thought it "fair to say that throughout our Nation's history, the general government practice with respect to donated monuments has been one of selective receptivity." And we observed that the city government in *Summum* "effectively controlled" the messages sent by the monuments in the [p]ark by exercising "final approval authority" over their selection."

In light of these and a few other relevant considerations, the Court concluded that the expression at issue was government speech. And, in reaching that conclusion, the Court rejected the premise that the involvement of private

parties in designing the monuments was sufficient to prevent the government from controlling which monuments it placed in its own public park.

## B

Our analysis in *Summum* leads us to the conclusion that here, too, government speech is at issue. First, the history of license plates shows that, insofar as license plates have conveyed more than state names and vehicle identification numbers, they long have communicated messages from the States. In 1917, Arizona became the first State to display a graphic on its plates. J. FOX, LICENSE PLATES OF THE UNITED STATES (1997); J. MINARD & T. STENTIFORD, A MOVING HISTORY (2004). The State presented a depiction of the head of a Hereford steer. In the years since, New Hampshire plates have featured the profile of the "Old Man of the Mountain," Massachusetts plates have included a representation of the Commonwealth's famous codfish, and Wyoming plates have displayed a rider atop a bucking bronco.

In 1928, Idaho became the first State to include a slogan on its plates. The 1928 Idaho plate proclaimed "Idaho Potatoes" and featured an illustration of a brown potato, onto which the license plate number was superimposed in green. The brown potato did not catch on, but slogans on license plates did. Over the years, state plates have included the phrases "North to the Future" (Alaska), "Keep Florida Green" (Florida), "Hoosier Hospitality" (Indiana), "The Iodine Products State" (South Carolina), "Green Mountains" (Vermont), and "America's Dairyland" (Wisconsin). States have used license plate slogans to urge action, to promote tourism, and to tout local industries.

Texas, too, has selected various messages to communicate through its license plate designs. By 1919, Texas had begun to display the Lone Star emblem on its plates. In 1936, the State's general-issue plates featured the first slogan on Texas license plates: the word "Centennial." In 1968, Texas plates promoted a San Antonio event by including the phrase "Hemisfair 68." In 1977, Texas replaced the Lone Star with a small silhouette of the State. And in 1995, Texas plates celebrated "150 Years of Statehood." Additionally, the Texas Legislature has specifically authorized specialty plate designs stating, among other things, "Read to Succeed," "Houston Livestock Show and Rodeo," "Texans Conquer Cancer," and "Girl Scouts." This kind of state speech has appeared on Texas plates for decades.

Second, Texas license plate designs "are often closely identified in the public mind with the [State]." Each Texas license plate is a government article serving the governmental purposes of vehicle registration and identification. The governmental nature of the plates is clear from their faces: The State places the name "TEXAS" in large letters at the top of every plate. Moreover, the State requires Texas vehicle owners to display license plates, and every Texas license plate is issued by the State. Texas also owns the designs on its license plates, including the designs that Texas adopts on the basis of proposals made by private individuals and organizations. And Texas dictates the manner in which drivers may dispose of unused plates.

Texas license plates are, essentially, government IDs. And issuers of ID "typically do not permit" the placement on their IDs of "message[s] with which they do not wish to be associated." *Summum*. Consequently, "persons who

observe" designs on IDs "routinely--and reasonably--interpret them as conveying some message on the [issuer's] behalf."

Indeed, a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message. If not, the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate. But the individual prefers a license plate design to the purely private speech expressed through bumper stickers. That may well be because Texas's license plate designs convey government agreement with the message displayed.

Third, Texas maintains direct control over the messages conveyed on its specialty plates. Texas law provides that the State "has sole control over the design, typeface, color, and alphanumeric pattern for all license plates." The Board must approve every specialty plate design proposal before the design can appear on a Texas plate. And the Board and its predecessor have actively exercised this authority. Texas asserts, and SCV concedes, that the State has rejected at least a dozen proposed designs. Accordingly, like the city government in *Summum*, Texas "has 'effectively controlled' the messages [conveyed] by exercising 'final approval authority' over their selection." (quoting *Johanns*).

This final approval authority allows Texas to choose how to present itself and its constituency. Thus, Texas offers plates celebrating the many educational institutions attended by its citizens. But it need not issue plates deriding schooling. Texas offers plates that pay tribute to the Texas citrus industry. But it need not issue plates praising Florida's oranges as far better. And Texas offers plates that say "Fight Terrorism." But it need not issue plates promoting al Qaeda.

These considerations, taken together, convince us that the specialty plates here in question are similar enough to the monuments in *Summum* to call for the same result. That is not to say that every element of our discussion in *Summum* is relevant here. For instance, in *Summum* we emphasized that monuments were "permanent" and we observed that "public parks can accommodate only a limited number of permanent monuments." We believed that the speech at issue was government speech rather than private speech in part because we found it "hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression." Here, a State could theoretically offer a much larger number of license plate designs, and those designs need not be available for time immemorial.

But those characteristics of the speech at issue in *Summum* were particularly important because the government speech at issue occurred in public parks, which are traditional public forums for "the delivery of speeches and the holding of marches and demonstrations" by private citizens. By contrast, license plates are not traditional public forums for private speech.

And other features of the designs on Texas's specialty license plates indicate that the message conveyed by those designs is conveyed on behalf of the government. Texas, through its Board, selects each design featured on the State's specialty license plates. Texas presents these designs on government-mandated, government-controlled, and government-issued IDs that have

traditionally been used as a medium for government speech. And it places the designs directly below the large letters identifying "TEXAS" as the issuer of the IDs. "The [designs] that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech."

### C

SCV believes that Texas's specialty license plate designs are not government speech, at least with respect to the designs (comprising slogans and graphics) that were initially proposed by private parties. According to SCV, the State does not engage in expressive activity through such slogans and graphics, but rather provides a forum for private speech by making license plates available to display the private parties' designs. We cannot agree.

We have previously used what we have called "forum analysis" to evaluate government restrictions on purely private speech that occurs on government property. *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.* (1985). But forum analysis is misplaced here. Because the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply.

The parties agree that Texas's specialty license plates are not a "traditional public forum," such as a street or a park, "which ha[s] immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Ed. Assn. v. Perry Local Educators' Assn.* (1983). \*\*\*

It is equally clear that Texas's specialty plates are neither a "'designated public forum,' " which exists where "government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose," nor a "limited public forum," which exists where a government has "reserv[ed] a forum] for certain groups or for the discussion of certain topics." A government "does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." And in order "to ascertain whether [a government] intended to designate a place not traditionally open to assembly and debate as a public forum," this Court "has looked to the policy and practice of the government" and to "the nature of the property and its compatibility with expressive activity."

Texas's policies and the nature of its license plates indicate that the State did not intend its specialty license plates to serve as either a designated public forum or a limited public forum. First, the State exercises final authority over each specialty license plate design. This authority militates against a determination that Texas has created a public forum. Second, Texas takes ownership of each specialty plate design, making it particularly untenable that the State intended specialty plates to serve as a forum for public discourse. Finally, Texas license plates have traditionally been used for government speech, are primarily used as a form of government ID, and bear the State's name. These features of Texas license plates indicate that Texas explicitly associates itself with the speech on its plates.

For similar reasons, we conclude that Texas's specialty license plates are not a "nonpublic for[um]," which exists "[w]here the government is acting as a proprietor, managing its internal operations." With respect to specialty license plate designs, Texas is not simply managing government property, but instead is engaging in expressive conduct. As we have described, we reach this conclusion based on the historical context, observers' reasonable interpretation of the messages conveyed by Texas specialty plates, and the effective control that the State exerts over the design selection process. Texas's specialty license plate designs "are meant to convey and have the effect of conveying a government message." *Summum*. They "constitute government speech." *Ibid*.

The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum-provider. In *Summum*, private entities "financed and donated monuments that the government accept[ed] and display[ed] to the public." Here, similarly, private parties propose designs that Texas may accept and display on its license plates. In this case, as in *Summum*, the "government entity may exercise [its] freedom to express its views" even "when it receives assistance from private sources for the purpose of delivering a government-controlled message." And in this case, as in *Summum*, forum analysis is inapposite.

Of course, Texas allows many more license plate designs than the city in *Summum* allowed monuments. But our holding in *Summum* was not dependent on the precise number of monuments found within the park. Indeed, we indicated that the permanent displays in New York City's Central Park also constitute government speech. And an *amicus* brief had informed us that there were, at the time, 52 such displays. Further, there may well be many more messages that Texas wishes to convey through its license plates than there were messages that the city in *Summum* wished to convey through its monuments. Texas's desire to communicate numerous messages does not mean that the messages conveyed are not Texas's own.

Additionally, the fact that Texas vehicle owners pay annual fees in order to display specialty license plates does not imply that the plate designs are merely a forum for private speech. While some nonpublic forums provide governments the opportunity to profit from speech, the existence of government profit alone is insufficient to trigger forum analysis. Thus, if the city in *Summum* had established a rule that organizations wishing to donate monuments must also pay fees to assist in park maintenance, we do not believe that the result in that case would have been any different. Here, too, we think it sufficiently clear that Texas is speaking through its specialty license plate designs, such that the existence of annual fees does not convince us that the specialty plates are a nonpublic forum.

Finally, we note that this case does not resemble other cases in which we have identified a nonpublic forum. This case is not like *Perry Ed. Assn.*, where we found a school district's internal mail system to be a nonpublic forum for private speech. There, it was undisputed that a number of private organizations, including a teachers' union, had access to the mail system. It was therefore clear that private parties, and not only the government, used the

system to communicate. Here, by contrast, each specialty license plate design is formally approved by and stamped with the imprimatur of Texas.

Nor is this case like *Lehman [ v. Shaker Heights (1974) (plurality)]*, where we found the advertising space on city buses to be a nonpublic forum. There, the messages were located in a context (advertising space) that is traditionally available for private speech. And the advertising space, in contrast to license plates, bore no indicia that the speech was owned or conveyed by the government.

Nor is this case like *Cornelius [v. NAACP Legal Defense & Ed. Fund, Inc. (1985)]* where we determined that a charitable fundraising program directed at federal employees constituted a nonpublic forum. That forum lacked the kind of history present here. The fundraising drive had never been a medium for government speech. Instead, it was established "to bring order to [a] solicitation process" which had previously consisted of ad hoc solicitation by individual charitable organizations. The drive "was designed to minimize . . . disruption to the [federal] workplace," not to communicate messages from the government. Further, the charitable solicitations did not appear on a government ID under the government's name. In contrast to the instant case, there was no reason for employees to "interpret [the solicitation] as conveying some message on the [government's] behalf." *Summum*.

#### IV

Our determination that Texas's specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons. We have acknowledged that drivers who display a State's selected license plate designs convey the messages communicated through those designs. See *Wooley v. Maynard (1977)* (observing that a vehicle "is readily associated with its operator" and that drivers displaying license plates "use their private property as a 'mobile billboard' for the State's ideological message"). And we have recognized that the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees. *Wooley; Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc. (1995); West Virginia Bd. of Ed. v. Barnette (1943)*. But here, compelled private speech is not at issue. And just as Texas cannot require SCV to convey "the State's ideological message," *Wooley*, SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.

\* \* \*

For the reasons stated, we hold that Texas's specialty license plate designs constitute government speech and that Texas was consequently entitled to refuse to issue plates featuring SCV's proposed design. Accordingly, the judgment of the United States Court of Appeals for the Fifth Circuit is

*Reversed.*

JUSTICE ALITO, WITH WHOM THE CHIEF JUSTICE, JUSTICE SCALIA, AND JUSTICE KENNEDY JOIN, DISSENTING.

The Court's decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing. Under our First Amendment cases, the distinction between government speech and private speech is critical. The First Amendment "does not regulate government speech," and therefore when government speaks, it is free "to select the views that it wants to express." *Pleasant Grove City v. Summum* (2009). By contrast, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995).

Unfortunately, the Court's decision categorizes private speech as government speech and thus strips it of all First Amendment protection. The Court holds that all the privately created messages on the many specialty plates issued by the State of Texas convey a government message rather than the message of the motorist displaying the plate. Can this possibly be correct?

Here is a test. Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. You would see, in addition to the standard Texas plates, an impressive array of specialty plates. (There are now more than 350 varieties.) You would likely observe plates that honor numerous colleges and universities. You might see plates bearing the name of a high school, a fraternity or sorority, the Masons, the Knights of Columbus, the Daughters of the American Revolution, a realty company, a favorite soft drink, a favorite burger restaurant, and a favorite NASCAR driver.

As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars? If a car with a plate that says "Rather Be Golfing" passed by at 8:30 am on a Monday morning, would you think: "This is the official policy of the State--better to golf than to work?" If you did your viewing at the start of the college football season and you saw Texas plates with the names of the University of Texas's out-of-state competitors in upcoming games--Notre Dame, Oklahoma State, the University of Oklahoma, Kansas State, Iowa State--would you assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns' opponents? And when a car zipped by with a plate that reads "NASCAR - 24 Jeff Gordon," would you think that Gordon (born in California, raised in Indiana, resides in North Carolina) is the official favorite of the State government?

The Court says that all of these messages are government speech. It is essential that government be able to express its own viewpoint, the Court reminds us, because otherwise, how would it promote its programs, like recycling and vaccinations? So when Texas issues a "Rather Be Golfing" plate, but not a "Rather Be Playing Tennis" or "Rather Be Bowling" plate, it is furthering a state policy to promote golf but not tennis or bowling. And when Texas allows motorists to obtain a Notre Dame license plate but not a University of Southern California plate, it is taking sides in that long-time rivalry.

This capacious understanding of government speech takes a large and painful bite out of the First Amendment. Specialty plates may seem innocuous. They

make motorists happy, and they put money in a State's coffers. But the precedent this case sets is dangerous. While all license plates unquestionably contain *some* government speech (*e.g.*, the name of the State and the numbers and/or letters identifying the vehicle), the State of Texas has converted the remaining space on its specialty plates into little mobile billboards on which motorists can display their own messages. And what Texas did here was to reject one of the messages that members of a private group wanted to post on some of these little billboards because the State thought that many of its citizens would find the message offensive. That is blatant viewpoint discrimination.

If the State can do this with its little mobile billboards, could it do the same with big, stationary billboards? Suppose that a State erected electronic billboards along its highways. Suppose that the State posted some government messages on these billboards and then, to raise money, allowed private entities and individuals to purchase the right to post their own messages. And suppose that the State allowed only those messages that it liked or found not too controversial. Would that be constitutional?

What if a state college or university did the same thing with a similar billboard or a campus bulletin board or dorm list serve? What if it allowed private messages that are consistent with prevailing views on campus but banned those that disturbed some students or faculty? Can there be any doubt that these examples of viewpoint discrimination would violate the First Amendment? I hope not, but the future uses of today's precedent remain to be seen.\*\*\*

I  
A [omitted]  
B

The Texas Division of Sons of Confederate Veterans (SCV) is an organization composed of descendants of Confederate soldiers. The group applied for a Texas specialty license plate in 2009 and again in 2010. Their proposed design featured a controversial symbol, the Confederate battle flag, surrounded by the words "Sons of Confederate Veterans 1896" and a gold border. The Texas Department of Motor Vehicles Board (or Board) invited public comments and considered the plate design at a meeting in April 2011. At that meeting, one board member was absent, and the remaining eight members deadlocked on whether to approve the plate. The Board thus reconsidered the plate at its meeting in November 2011. This time, many opponents of the plate turned out to voice objections. The Board then voted unanimously against approval and issued an order stating:

"The Board has considered the information and finds it necessary to deny this plate design application, specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable. The Board finds that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups."

The Board also saw "a compelling public interest in protecting a conspicuous mechanism for identification, such as a license plate, from degrading into a

possible public safety issue." And it thought that the public interest required rejection of the plate design because the controversy surrounding the plate was so great that "the design could distract or disturb some drivers to the point of being unreasonably dangerous."

At the same meeting, the Board approved a Buffalo Soldiers plate design by a 5-to-3 vote. Proceeds from fees paid by motorists who select that plate benefit the Buffalo Soldier National Museum in Houston, which is "dedicated primarily to preserving the legacy and honor of the African American soldier." Buffalo Soldier National Museum, online at <http://www.buffalosoldiermuseum.com>. "Buffalo Soldiers" is a nickname that was originally given to black soldiers in the Army's 10th Cavalry Regiment, which was formed after the Civil War, and the name was later used to describe other black soldiers. The original Buffalo Soldiers fought with distinction in the Indian Wars, but the "Buffalo Soldiers" plate was opposed by some Native Americans. One leader commented that he felt " 'the same way about the Buffalo Soldiers' " as African-Americans felt about the Confederate flag. "When we see the U. S. Cavalry uniform,' " he explained, " 'we are forced to relive an American holocaust.' "

II [omitted]

III

What Texas has done by selling space on its license plates is to create what we have called a limited public forum. It has allowed state property (*i.e.*, motor vehicle license plates) to be used by private speakers according to rules that the State prescribes. Under the First Amendment, however, those rules cannot discriminate on the basis of viewpoint. See *Rosenberger*. But that is exactly what Texas did here. The Board rejected Texas SCV's design, "specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable." These statements indisputably demonstrate that the Board denied Texas SCV's design because of its viewpoint.

The Confederate battle flag is a controversial symbol. To the Texas Sons of Confederate Veterans, it is said to evoke the memory of their ancestors and other soldiers who fought for the South in the Civil War. To others, it symbolizes slavery, segregation, and hatred. Whatever it means to motorists who display that symbol and to those who see it, the flag expresses a viewpoint. The Board rejected the plate design because it concluded that many Texans would find the flag symbol offensive. That was pure viewpoint discrimination.

If the Board's candid explanation of its reason for rejecting the SCV plate were not alone sufficient to establish this point, the Board's approval of the Buffalo Soldiers plate at the same meeting dispels any doubt. The proponents of both the SCV and Buffalo Soldiers plates saw them as honoring soldiers who served with bravery and honor in the past. To the opponents of both plates, the images on the plates evoked painful memories. The Board rejected one plate and approved the other.

Like these two plates, many other specialty plates have the potential to irritate and perhaps even infuriate those who see them. Texas allows a plate with the words "Choose Life," but the State of New York rejected such a plate because

the message " '[is] so incredibly divisive,' " and the Second Circuit recently sustained that decision. *Children First Foundation, Inc. v. Fiala* (2015). Texas allows a specialty plate honoring the Boy Scouts, but the group's refusal to accept gay leaders angers some. Virginia, another State with a proliferation of specialty plates, issues plates for controversial organizations like the National Rifle Association, controversial commercial enterprises (raising tobacco and mining coal), controversial sports (fox hunting), and a professional sports team with a controversial name (the Washington Redskins). Allowing States to reject specialty plates based on their potential to offend is viewpoint discrimination.

The Board's decision cannot be saved by its suggestion that the plate, if allowed, "could distract or disturb some drivers to the point of being unreasonably dangerous." This rationale cannot withstand strict scrutiny. Other States allow specialty plates with the Confederate Battle Flag, and Texas has not pointed to evidence that these plates have led to incidents of road rage or accidents. Texas does not ban bumper stickers bearing the image of the Confederate battle flag. Nor does it ban any of the many other bumper stickers that convey political messages and other messages that are capable of exciting the ire of those who loathe the ideas they express.

Messages that are proposed by private parties and placed on Texas specialty plates are private speech, not government speech. Texas cannot forbid private speech based on its viewpoint. That is what it did here. Because the Court approves this violation of the First Amendment, I respectfully dissent.

## Notes

1. Note that the consequence of a finding of "government speech" removes the subject from First Amendment analysis.
2. Consider Justice Thomas's position in the majority of the 5-4 decision in *Walker v. Texas Division, Sons of Confederate Veterans*. Recall that Thomas authored the other 2014-15 Term First Amendment decision in this chapter, *Reed v. Town of Gilbert*.
3. How would you explain the difference between a forum opened by the government for "private speech" and a "forum" that is government speech?
4. The Court announced its decision in *Walker* on the morning of June 18, 2015. The previous evening, a white male about 21 years of age entered an historically black church, Emanuel African Methodist Episcopal Church in downtown Charleston, South Carolina, participated in a Bible study session, and then opened fire with a handgun, killing nine people, including a state senator. Images of the alleged perpetrator, Dylann Roof, were later publicized including one in which he posed with a car bearing a Confederate battle flag license plate and another in which he brandished a gun in front of a Confederate flag. On July 9, 2015, the state Governor signed legislation removing the Confederate flag from the state capitol grounds, where it had been displayed since 1962, although relocated in 2000.

# Chapter Eight: THE POLITICAL PROCESS

This chapter considers election and campaign finance cases, including the right to be anonymous, campaign finance, and judicial elections.

## Chapter Outline

### I. Anonymity and Political Life

NAACP. v. Alabama

McIntyre v. Ohio Elections Comm'n

Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton

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Notes

### II. Campaign Finance

Note: Timeline of First Amendment Campaign Finance Cases

Note: Buckley v. Valeo

Citizens United v. Federal Election Commission

McCutcheon v. Federal Election Commission

Note: "Dark Money" Anonymity, Disclosure, and Campaign Finance

### III. Judicial Elections

Republican Party of Minnesota v. White

Williams-Yulee v. the Florida Bar

Notes

## I. Anonymity and Political Life

Is there a First Amendment right to be anonymous? Is it especially pertinent to political contexts?

### *NAACP. v. Alabama*

357 U.S. 449 (1958)

JUSTICE HARLAN DELIVERED THE OPINION OF THE UNANIMOUS COURT.

We review from the standpoint of its validity under the Federal Constitution a judgment of civil contempt entered against petitioner, the National Association for the Advancement of Colored People [NAACP] in the courts of Alabama. The question presented is whether Alabama, consistently with the Due Process Clause of the Fourteenth Amendment, can compel petitioner to reveal to the State's Attorney General the names and addresses of all its Alabama members and agents, without regard to their positions or functions in the Association. The judgment of contempt was based upon petitioner's refusal to comply fully with a court order requiring in part the production of membership lists. Petitioner's claim is that the order, in the circumstances shown by this record, violated rights assured to petitioner and its members under the Constitution.

Alabama has a statute similar to those of many other States which requires a foreign corporation, except as exempted, to qualify before doing business by filing its corporate charter with the Secretary of State and designating a place of business and an agent to receive service of process. The statute imposes a fine on a corporation transacting intrastate business before qualifying and provides for criminal prosecution of officers of such a corporation. Ala. Code, 1940, Tit. 10, 192-198. The National Association for the Advancement of Colored People is a nonprofit membership corporation organized under the laws of New York. Its purposes, fostered on a nationwide basis, are those indicated by its name,<sup>†</sup> and it operates through chartered affiliates which are independent unincorporated associations, with membership therein equivalent to membership in petitioner. The first Alabama affiliates were chartered in 1918. Since that time the aims of the Association have been advanced through activities of its affiliates, and in 1951 the Association itself opened a regional office in Alabama, at which it employed two supervisory persons and one clerical worker. The Association has never complied with the qualification statute, from which it considered itself exempt.

In 1956 the Attorney General of Alabama brought an equity suit in the State Circuit Court, Montgomery County, to enjoin the Association from conducting further activities within, and to oust it from, the State. Among other things the bill in equity alleged that the Association had opened a regional office and had

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<sup>†</sup> The Certificate of Incorporation of the Association provides that its ". . . principal objects . . . are voluntarily to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to advance the interest of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law."

organized various affiliates in Alabama; had recruited members and solicited contributions within the State; had given financial support and furnished legal assistance to Negro students seeking admission to the state university; and had supported a Negro boycott of the bus lines in Montgomery to compel the seating of passengers without regard to race. The bill recited that the Association, by continuing to do business in Alabama without complying with the qualification statute, was ". . . causing irreparable injury to the property and civil rights of the residents and citizens of the State of Alabama for which criminal prosecution and civil actions at law afford no adequate relief . . . ." On the day the complaint was filed, the Circuit Court issued ex parte an order restraining the Association, pendente lite, from engaging in further activities within the State and forbidding it to take any steps to qualify itself to do business therein.

Petitioner demurred to the allegations of the bill and moved to dissolve the restraining order. It contended that its activities did not subject it to the qualification requirements of the statute and that in any event what the State sought to accomplish by its suit would violate rights to freedom of speech and assembly guaranteed under the Fourteenth Amendment to the Constitution of the United States. Before the date set for a hearing on this motion, the State moved for the production of a large number of the Association's records and papers, including bank statements, leases, deeds, and records containing the names and addresses of all Alabama "members" and "agents" of the Association. It alleged that all such documents were necessary for adequate preparation for the hearing, in view of petitioner's denial of the conduct of intrastate business within the meaning of the qualification statute. Over petitioner's objections, the court ordered the production of a substantial part of the requested records, including the membership lists, and postponed the hearing on the restraining order to a date later than the time ordered for production.

Thereafter petitioner filed its answer to the bill in equity. It admitted its Alabama activities substantially as alleged in the complaint and that it had not qualified to do business in the State. Although still disclaiming the statute's application to it, petitioner offered to qualify if the bar from qualification made part of the restraining order were lifted, and it submitted with the answer an executed set of the forms required by the statute. However petitioner did not comply with the production order, and for this failure was adjudged in civil contempt and fined \$10,000. The contempt judgment provided that the fine would be subject to reduction or remission if compliance were forthcoming within five days but otherwise would be increased to \$100,000.

At the end of the five-day period petitioner produced substantially all the data called for by the production order except its membership lists, as to which it contended that Alabama could not constitutionally compel disclosure, and moved to modify or vacate the contempt judgment, or stay its execution pending appellate review. This motion was denied. While a similar stay application, which was later denied, was pending before the Supreme Court of Alabama, the Circuit Court made a further order adjudging petitioner in continuing contempt and increasing the fine already imposed to \$100,000. Under Alabama law the effect of the contempt adjudication was to foreclose petitioner from obtaining a hearing on the merits of the underlying ouster action, or from taking any steps

to dissolve the temporary restraining order which had been issued ex parte, until it purged itself of contempt.

The State Supreme Court thereafter twice dismissed petitions for certiorari to review this final contempt judgment, the first time for insufficiency of the petition's allegations and the second time on procedural grounds. We granted certiorari because of the importance of the constitutional questions presented.

#### I.

We address ourselves first to respondent's contention that we lack jurisdiction because the denial of certiorari by the Supreme Court of Alabama rests on an independent nonfederal ground, namely, that petitioner in applying for certiorari had pursued the wrong appellate remedy under state law. \*\*\*

We hold that this Court has jurisdiction to entertain petitioner's federal claims.

#### II.

The Association both urges that it is constitutionally entitled to resist official inquiry into its membership lists, and that it may assert, on behalf of its members, a right personal to them to be protected from compelled disclosure by the State of their affiliation with the Association as revealed by the membership lists. We think that petitioner argues more appropriately the rights of its members, and that its nexus with them is sufficient to permit that it act as their representative before this Court. In so concluding, we reject respondent's argument that the Association lacks standing to assert here constitutional rights pertaining to the members, who are not of course parties to the litigation. \*\*\*

#### III.

We thus reach petitioner's claim that the production order in the state litigation trespasses upon fundamental freedoms protected by the Due Process Clause of the Fourteenth Amendment. Petitioner argues that in view of the facts and circumstances shown in the record, the effect of compelled disclosure of the membership lists will be to abridge the rights of its rank-and-file members to engage in lawful association in support of their common beliefs. It contends that governmental action which, although not directly suppressing association, nevertheless carries this consequence, can be justified only upon some overriding valid interest of the State.

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. See *Gitlow v. New York* (1925); *Palko v. Connecticut* (1937); *Cantwell v. Connecticut* (1940); *Staub v. City of Baxley* (1958). Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

The fact that Alabama, so far as is relevant to the validity of the contempt judgment presently under review, has taken no direct action to restrict the right

of petitioner's members to associate freely, does not end inquiry into the effect of the production order. In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action. \*\*\* The governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment. *Grosjean v. American Press Co.* (1936); *Murdock v. Pennsylvania* (1943).

It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in *American Communications Assn. v. Douds* (1950), "A requirement that adherents of particular religious faiths or political parties wear identifying armbands, for example, is obviously of this nature." Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

We think that the production order, in the respects here drawn in question, must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association. Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.

It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from state action but from private community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold.

We turn to the final question whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association. Such a ". . . subordinating interest of the State must be

compelling," It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize.

It is important to bear in mind that petitioner asserts no right to absolute immunity from state investigation, and no right to disregard Alabama's laws. As shown by its substantial compliance with the production order, petitioner does not deny Alabama's right to obtain from it such information as the State desires concerning the purposes of the Association and its activities within the State. Petitioner has not objected to divulging the identity of its members who are employed by or hold official positions with it. It has urged the rights solely of its ordinary rank-and-file members. This is therefore not analogous to a case involving the interest of a State in protecting its citizens in their dealings with paid solicitors or agents of foreign corporations by requiring identification.

Whether there was "justification" in this instance turns solely on the substantiality of Alabama's interest in obtaining the membership lists. During the course of a hearing before the Alabama Circuit Court on a motion of petitioner to set aside the production order, the State Attorney General presented at length, under examination by petitioner, the State's reason for requesting the membership lists. The exclusive purpose was to determine whether petitioner was conducting intrastate business in violation of the Alabama foreign corporation registration statute, and the membership lists were expected to help resolve this question. The issues in the litigation commenced by Alabama by its bill in equity were whether the character of petitioner and its activities in Alabama had been such as to make petitioner subject to the registration statute, and whether the extent of petitioner's activities without qualifying suggested its permanent ouster from the State. Without intimating the slightest view upon the merits of these issues, we are unable to perceive that the disclosure of the names of petitioner's rank-and-file members has a substantial bearing on either of them. As matters stand in the state court, petitioner (1) has admitted its presence and conduct of activities in Alabama since 1918; (2) has offered to comply in all respects with the state qualification statute, although preserving its contention that the statute does not apply to it; and (3) has apparently complied satisfactorily with the production order, except for the membership lists, by furnishing the Attorney General with varied business records, its charter and statement of purposes, the names of all of its directors and officers, and with the total number of its Alabama members and the amount of their dues. These last items would not on this record appear subject to constitutional challenge and have been furnished, but whatever interest the State may have in obtaining names of ordinary members has not been shown to be sufficient to overcome petitioner's constitutional objections to the production order.

From what has already been said, we think it apparent that *Bryant v. Zimmerman* (1928) cannot be relied on in support of the State's position, for that case involved markedly different considerations in terms of the interest of the State in obtaining disclosure. There, this Court upheld, as applied to a member of a local chapter of the Ku Klux Klan, a New York statute requiring any unincorporated association which demanded an oath as a condition to membership to file with state officials copies of its ". . . constitution, by-laws,

rules, regulations and oath of membership, together with a roster of its membership and a list of its officers for the current year." N. Y. Laws 1923, c. 664, 53, 56. In its opinion, the Court took care to emphasize the nature of the organization which New York sought to regulate. The decision was based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence, which the Court assumed was before the state legislature when it enacted the statute, and of which the Court itself took judicial notice. Furthermore, the situation before us is significantly different from that in *Bryant*, because the organization there had made no effort to comply with any of the requirements of New York's statute but rather had refused to furnish the State with any information as to its local activities.

We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment. And we conclude that Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have. Accordingly, the judgment of civil contempt and the \$100,000 fine which resulted from petitioner's refusal to comply with the production order in this respect must fall.

#### IV.

Petitioner joins with its attack upon the production order a challenge to the constitutionality of the State's ex parte temporary restraining order preventing it from soliciting support in Alabama, and it asserts that the Fourteenth Amendment precludes such state action. But as noted above, petitioner has never received a hearing on the merits of the ouster suit, and we do not consider these questions properly here. \*\*\*Only from the disposition of such an appeal can review be sought here.

For the reasons stated, the judgment of the Supreme Court of Alabama must be reversed and the case remanded for proceedings not inconsistent with this opinion.

*Reversed.*

## ***McIntyre v. Ohio Elections Comm'n***

514 U.S. 334 (1995)

STEVENS, J., DELIVERED THE OPINION OF THE COURT, IN WHICH O'CONNOR, KENNEDY, SOUTER, GINSBURG, AND BREYER, JJ., JOINED. GINSBURG, J., FILED A CONCURRING OPINION. THOMAS, J., FILED AN OPINION CONCURRING IN THE JUDGMENT. SCALIA, J., FILED A DISSENTING OPINION, IN WHICH REHNQUIST, C. J., JOINED.

JUSTICE STEVENS DELIVERED THE OPINION OF THE COURT.

The question presented is whether an Ohio statute that prohibits the distribution of anonymous campaign literature is a "law . . . abridging the

freedom of speech" within the meaning of the First Amendment.

I

On April 27, 1988, Margaret McIntyre distributed leaflets to persons attending a public meeting at the Blendon Middle School in Westerville, Ohio. At this meeting, the superintendent of schools planned to discuss an imminent referendum on a proposed school tax levy. The leaflets expressed Mrs. McIntyre's opposition to the levy.† There is no suggestion that the text of her message was false, misleading, or libelous. She had composed and printed it on her home computer and had paid a professional printer to make additional copies. Some of the handbills identified her as the author; others merely purported to express the views of "CONCERNED PARENTS AND TAX PAYERS." Except for the help provided by her son and a friend, who placed some of the leaflets on car windshields in the school parking lot, Mrs. McIntyre acted independently.

While Mrs. McIntyre distributed her handbills, an official of the school district, who supported the tax proposal, advised her that the unsigned leaflets did not conform to the Ohio election laws. Undeterred, Mrs. McIntyre appeared at another meeting on the next evening and handed out more of the handbills.

The proposed school levy was defeated at the next two elections, but it finally passed on its third try in November 1988. Five months later, the same school official filed a complaint with the Ohio Elections Commission charging that Mrs. McIntyre's distribution of unsigned leaflets violated 3599.09(A) of the Ohio Code [prohibiting participation in publications "designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications" "unless there appears on such

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† [Footnote 2] The following is one of Mrs. McIntyre's leaflets, in its original typeface:

• **VOTE NO**  
• **ISSUE 19 SCHOOL TAX LEVY**

Last election Westerville Schools, asked us to vote yes for new buildings and expansions programs. We gave them what they asked. We knew there was crowded conditions and new growth in the district.

Now we find out there is a 4 million dollar deficit - WHY?

We are told the 3 middle schools must be split because of over-crowding, and yet we are told 3 schools are being closed - WHY?

A magnet school is not a full operating school, but a specials school.

Residents were asked to work on a 20 member commission to help formulate the new boundaries For 4 weeks they worked long and hard and came up with a very workable plan. Their plan was totally disregarded - WHY?

WASTE of tax payers dollars must be stopped. Our children's education and welfare must come first. WASTE CAN NO LONGER BE TOLERATED.

PLEASE VOTE NO  
ISSUE 19  
THANK YOU,  
CONCERNED PARENTS  
AND  
TAX PAYERS

form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor." ] The Commission agreed and imposed a fine of \$100.

The Franklin County Court of Common Pleas reversed. Finding that Mrs. McIntyre did not "mislead the public nor act in a surreptitious manner," the court concluded that the statute was unconstitutional as applied to her conduct. The Ohio Court of Appeals, by a divided vote, reinstated the fine. Notwithstanding doubts about the continuing validity of a 1922 decision of the Ohio Supreme Court upholding the statutory predecessor of §3599.09(A), the majority considered itself bound by that precedent. The dissenting judge thought that our intervening decision in *Talley v. California* (1960), in which we invalidated a city ordinance prohibiting all anonymous leafletting, compelled the Ohio court to adopt a narrowing construction of the statute to save its constitutionality.

The Ohio Supreme Court affirmed by a divided vote. The majority distinguished Mrs. McIntyre's case from *Talley* on the ground that §3599.09(A) "has as its purpose the identification of persons who distribute materials containing false statements." The Ohio court believed that such a law should be upheld if the burdens imposed on the First Amendment rights of voters are "reasonable" and "nondiscriminatory." Under that standard, the majority concluded that the statute was plainly valid.\*\*\*

Mrs. McIntyre passed away during the pendency of this litigation. Even though the amount in controversy is only \$100, petitioner, as the executor of her estate, has pursued her claim in this Court. Our grant of certiorari reflects our agreement with his appraisal of the importance of the question presented.

## II

Ohio maintains that the statute under review is a reasonable regulation of the electoral process. The State does not suggest that all anonymous publications are pernicious or that a statute totally excluding them from the marketplace of ideas would be valid. This is a wise (albeit implicit) concession, for the anonymity of an author is not ordinarily a sufficient reason to exclude her work product from the protections of the First Amendment.

"Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley v. California* (1960). Great works of literature have frequently been produced by authors writing under assumed names. § Despite readers' curiosity and the public's interest in

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§ [Footnote 4 ] American names such as Mark Twain (Samuel Langhorne Clemens) and O. Henry (William Sydney Porter) come readily to mind. Benjamin Franklin employed numerous different pseudonyms. See 2 W. C. Bruce, *Benjamin Franklin Self-Revealed: A Biographical and Critical Study Based Mainly on His Own Writings*, ch. 5 (2d ed. 1923). Distinguished French authors such as Voltaire (Francois Marie Arouet) and George Sand (Amandine Aurore Lucie Dupin), and British authors such as George Eliot (Mary Ann Evans), Charles Lamb (sometimes wrote as "Elia"), and Charles Dickens (sometimes wrote as "Boz"), also published under assumed names. Indeed, some believe the works of Shakespeare were actually written by the Earl of Oxford rather than by William Shaksper of Stratford-on-Avon. See C. Ogburn, *The Mysterious William Shakespeare: The Myth & the Reality* (2d ed. 1992); but see S. Schoenbaum, *Shakespeare's Lives* (2d ed.

identifying the creator of a work of art, an author generally is free to decide whether or not to disclose her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

The freedom to publish anonymously extends beyond the literary realm. In *Talley*, the Court held that the First Amendment protects the distribution of unsigned handbills urging readers to boycott certain Los Angeles merchants who were allegedly engaging in discriminatory employment practices. Writing for the Court, Justice Black noted that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." Justice Black recalled England's abusive press licensing laws and seditious libel prosecutions, and he reminded us that even the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were published under fictitious names. On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudice her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade," *City of Ladue v. Gilleo* (1994) the most effective advocates have sometimes opted for anonymity. The specific holding in *Talley* related to advocacy of an economic boycott, but the Court's reasoning embraced a respected tradition of anonymity in the advocacy of political causes. \*\* This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation.

### III

California had defended the Los Angeles ordinance at issue in *Talley* as a law

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1991) (adhering to the traditional view that Shaksper was in fact the author). See also Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. Pa. L. Rev. 1373 (1992) (commenting on the competing theories).

\*\* [Footnote 6] That tradition is most famously embodied in the Federalist Papers, authored by James Madison, Alexander Hamilton, and John Jay, but signed "Publius." Publius's opponents, the Anti-Federalists, also tended to publish under pseudonyms: prominent among them were "Cato," believed to be New York Governor George Clinton; "Centinel," probably Samuel Bryan or his father, Pennsylvania judge and legislator George Bryan; "The Federal Farmer," who may have been Richard Henry Lee, a Virginia member of the Continental Congress and a signer of the Declaration of Independence; and "Brutus," who may have been Robert Yates, a New York Supreme Court justice who walked out on the Constitutional Convention. 2 H. Storing, ed., *The Complete Anti-Federalist* (1981). A forerunner of all of these writers was the pre-Revolutionary War English pamphleteer "Junius," whose true identity remains a mystery. See J. M. Faragher, ed., *The Encyclopedia of Colonial and Revolutionary America* 220 (1990) (positing that "Junius" may have been Sir Phillip Francis). The "Letters of Junius" were "widely reprinted in colonial newspapers and lent considerable support to the revolutionary cause." *Powell v. McCormack*, 395 U.S. 486, 531, n. 60 (1969).

"aimed at providing a way to identify those responsible for fraud, false advertising and libel." We rejected that argument because nothing in the text or legislative history of the ordinance limited its application to those evils. We then made clear that we did "not pass on the validity of an ordinance limited to prevent these or any other supposed evils." The Ohio statute likewise contains no language limiting its application to fraudulent, false, or libelous statements; to the extent, therefore, that Ohio seeks to justify §3599.09(A) as a means to prevent the dissemination of untruths, its defense must fail for the same reason given in *Talley*. As the facts of this case demonstrate, the ordinance plainly applies even when there is no hint of falsity or libel.

Ohio's statute does, however, contain a different limitation: It applies only to unsigned documents designed to influence voters in an election. In contrast, the Los Angeles ordinance prohibited all anonymous handbilling "in any place under any circumstances." For that reason, Ohio correctly argues that *Talley* does not necessarily control the disposition of this case. We must, therefore, decide whether and to what extent the First Amendment's protection of anonymity encompasses documents intended to influence the electoral process.

Ohio places its principal reliance on cases such as *Anderson v. Celebrezze* (1983) [filing deadlines]; *Storer v. Brown* (1974) [ballot access]; and *Burdick v. Takushi* (1992) [write-in voting], in which we reviewed election code provisions governing the voting process itself. In those cases we refused to adopt "any 'litmus-paper test' that will separate valid from invalid restrictions." Instead, we pursued an analytical process comparable to that used by courts "in ordinary litigation": we considered the relative interests of the State and the injured voters, and we evaluated the extent to which the State's interests necessitated the contested restrictions. Applying similar reasoning in this case, the Ohio Supreme Court upheld §3599.09(A) as a "reasonable" and "nondiscriminatory" burden on the rights of voters.

The "ordinary litigation" test does not apply here. Unlike the statutory provisions challenged in *Storer* and *Anderson*, §3599.09(A) of the Ohio Code does not control the mechanics of the electoral process. It is a regulation of pure speech. Moreover, even though this provision applies evenhandedly to advocates of differing viewpoints, it is a direct regulation of the content of speech. Every written document covered by the statute must contain "the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor." Ohio Rev. Code Ann. §3599.09(A) (1988). Furthermore, the category of covered documents is defined by their content - only those publications containing speech designed to influence the voters in an election need bear the required markings. Consequently, we are not faced with an ordinary election restriction; this case "involves a limitation on political expression subject to exacting scrutiny." *Meyer v. Grant* (1988).

Indeed, as we have explained on many prior occasions, the category of speech regulated by the Ohio statute occupies the core of the protection afforded by the First Amendment. \*\*\*[extensive quotation from *Buckley v. Valeo* (1976)].

Of course, core political speech need not center on a candidate for office. The principles enunciated in *Buckley v. Valeo* extend equally to issue-based

elections such as the school-tax referendum that Mrs. McIntyre sought to influence through her handbills. Indeed, the speech in which Mrs. McIntyre engaged - handing out leaflets in the advocacy of a politically controversial viewpoint - is the essence of First Amendment expression. That this advocacy occurred in the heat of a controversial referendum vote only strengthens the protection afforded to Ms. McIntyre's expression: urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed. No form of speech is entitled to greater constitutional protection than Mrs. McIntyre's.

When a law burdens core political speech, we apply "exacting scrutiny," and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest. Our precedents thus make abundantly clear that the Ohio Supreme Court applied a significantly more lenient standard than is appropriate in a case of this kind.

#### IV

Nevertheless, the State argues that even under the strictest standard of review, the disclosure requirement in 3599.09(A) is justified by two important and legitimate state interests. Ohio judges its interest in preventing fraudulent and libelous statements and its interest in providing the electorate with relevant information to be sufficiently compelling to justify the anonymous speech ban. These two interests necessarily overlap to some extent, but it is useful to discuss them separately.

Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude. We have already held that the State may not compel a newspaper that prints editorials critical of a particular candidate to provide space for a reply by the candidate. *Miami Herald Publishing Co. v. Tornillo* (1974). The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit. Moreover, in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author adds little, if anything, to the reader's ability to evaluate the document's message. Thus, Ohio's informational interest is plainly insufficient to support the constitutionality of its disclosure requirement.

The state interest in preventing fraud and libel stands on a different footing. We agree with Ohio's submission that this interest carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large. Ohio does not, however, rely solely on 3599.09(A) to protect that interest. Its Election Code includes detailed and specific prohibitions against making or disseminating false statements during political campaigns. Ohio Rev. Code Ann. 3599.09.1(B), 3599.09.2(B) (1988). These regulations apply both to candidate elections and to issue-driven ballot measures. Thus, Ohio's prohibition of anonymous leaflets plainly is not its principal weapon against fraud. Rather, it serves as an aid to enforcement of the specific prohibitions and as a deterrent to the making of false statements by unscrupulous prevaricators. Although these ancillary benefits are assuredly

legitimate, we are not persuaded that they justify 3599.09(A)'s extremely broad prohibition.

As this case demonstrates, the prohibition encompasses documents that are not even arguably false or misleading. It applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources. It applies not only to elections of officers, but also to ballot issues that present neither a substantial risk of libel nor any potential appearance of corrupt advantage. It applies not only to leaflets distributed on the eve of an election, when the opportunity for reply is limited, but also to those distributed months in advance. It applies no matter what the character or strength of the author's interest in anonymity. Moreover, as this case also demonstrates, the absence of the author's name on a document does not necessarily protect either that person or a distributor of a forbidden document from being held responsible for compliance with the election code. Nor has the State explained why it can more easily enforce the direct bans on disseminating false documents against anonymous authors and distributors than against wrongdoers who might use false names and addresses in an attempt to avoid detection. We recognize that a State's enforcement interest might justify a more limited identification requirement, but Ohio has shown scant cause for inhibiting the leafletting at issue here.

## V

Finally, Ohio vigorously argues that our opinions in *First Nat. Bank of Boston v. Bellotti* (1978) and *Buckley v. Valeo* (1976) amply support the constitutionality of its disclosure requirement. Neither case is controlling: the former concerned the scope of First Amendment protection afforded to corporations; the relevant portion of the latter concerned mandatory disclosure of campaign-related expenditures. Neither case involved a prohibition of anonymous campaign literature. \*\*\*

## VI

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. See generally J. S. MILL, ON LIBERTY, in ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 1, 3-4 (R. McCallum ed. 1947). It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation - and their ideas from suppression - at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse. See *Abrams v. United States* (1919) (Holmes, J., dissenting). Ohio has not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all uses of that speech. The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented. One would be hard pressed

to think of a better example of the pitfalls of Ohio's blunderbuss approach than the facts of the case before us.

The judgment of the Ohio Supreme Court is reversed.

*It is so ordered.*

JUSTICE GINSBURG, CONCURRING.

The dissent is stirring in its appreciation of democratic values. But I do not see the Court's opinion as unguided by "bedrock principle," tradition, or our case law. Margaret McIntyre's case, it seems to me, bears a marked resemblance to Margaret Gilileo's case [*City of Ladue v. Gilileo* (1994)] and Mary Grace's [*United States v. Grace* (1983)]. All three decisions, I believe, are sound, and hardly sensational, applications of our First Amendment jurisprudence.

In for a calf is not always in for a cow. The Court's decision finds unnecessary, overintrusive, and inconsistent with American ideals the State's imposition of a fine on an individual leafleteer who, within her local community, spoke her mind, but sometimes not her name. We do not thereby hold that the State may not in other, larger circumstances, require the speaker to disclose its interest by disclosing its identity. Appropriately leaving open matters not presented by McIntyre's handbills, the Court recognizes that a State's interest in protecting an election process "might justify a more limited identification requirement." But the Court has convincingly explained why Ohio lacks "cause for inhibiting the leafletting at issue here."

JUSTICE THOMAS, CONCURRING IN THE JUDGMENT.

I agree with the majority's conclusion that Ohio's election law, Ohio Rev. Code Ann. 3599.09(A), is inconsistent with the First Amendment. I would apply, however, a different methodology to this case. Instead of asking whether "an honorable tradition" of anonymous speech has existed throughout American history, or what the "value" of anonymous speech might be, we should determine whether the phrase "freedom of speech, or of the press," as originally understood, protected anonymous political leafletting. I believe that it did.

\*\*\* [Extensive discussion of history omitted].

I cannot join the majority's analysis because it deviates from our settled approach to interpreting the Constitution and because it superimposes its modern theories concerning expression upon the constitutional text. Whether "great works of literature" - by Voltaire or George Eliot have been published anonymously should be irrelevant to our analysis, because it sheds no light on what the phrases "free speech" or "free press" meant to the people who drafted and ratified the First Amendment. Similarly, whether certain types of expression have "value" today has little significance; what is important is whether the Framers in 1791 believed anonymous speech sufficiently valuable to deserve the protection of the Bill of Rights. And although the majority faithfully follows our approach to "content-based" speech regulations, we need not undertake this analysis when the original understanding provides the answer. \*\*\*

JUSTICE SCALIA, WITH WHOM THE CHIEF JUSTICE JOINS, DISSENTING.

At a time when both political branches of Government and both political parties reflect a popular desire to leave more decisionmaking authority to the States, today's decision moves in the opposite direction, adding to the legacy of inflexible central mandates (irrevocable even by Congress) imposed by this Court's constitutional jurisprudence. In an opinion which reads as though it is addressing some peculiar law like the Los Angeles municipal ordinance at issue in *Talley v. California* (1960), the Court invalidates a species of protection for the election process that exists, in a variety of forms, in every State except California, and that has a pedigree dating back to the end of the 19th century. Preferring the views of the English utilitarian philosopher John Stuart Mill to the considered judgment of the American people's elected representatives from coast to coast, the Court discovers a hitherto unknown right-to-be-unknown while engaging in electoral politics. I dissent from this imposition of free-speech imperatives that are demonstrably not those of the American people today, and that there is inadequate reason to believe were those of the society that begat the First Amendment or the Fourteenth.

The question posed by the present case is not the easiest sort to answer for those who adhere to the Court's (and the society's) traditional view that the Constitution bears its original meaning and is unchanging. \*\*\*

But to prove that anonymous electioneering was used frequently is not to establish that it is a constitutional right. Quite obviously, not every restriction upon expression that did not exist in 1791 or in 1868 is ipso facto unconstitutional, or else modern election laws \*\*\*would be prohibited, as would (to mention only a few other categories) modern antinoise regulation \*\*\* and modern parade-permitting regulation \*\*\*.

Evidence that anonymous electioneering was regarded as a constitutional right is sparse, and as far as I am aware evidence that it was generally regarded as such is nonexistent. \*\*\*

\*\*\* I do not know where the Court derives its perception that "anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." I can imagine no reason why an anonymous leaflet is any more honorable, as a general matter, than an anonymous phone call or an anonymous letter. It facilitates wrong by eliminating accountability, which is ordinarily the very purpose of the anonymity. There are of course exceptions, and where anonymity is needed to avoid "threats, harassment, or reprisals" the First Amendment will require an exemption from the Ohio law. But to strike down the Ohio law in its general application - and similar laws of 48 other States and the Federal Government - on the ground that all anonymous communication is in our society traditionally sacrosanct, seems to me a distortion of the past that will lead to a coarsening of the future.

I respectfully dissent.

***Watchtower Bible & Tract Society of New York, Inc. v.  
Village of Stratton***  
536 U.S. 150 (2002)

STEVENS, J., DELIVERED THE OPINION OF THE COURT, IN WHICH O' CONNOR, KENNEDY, SOUTER, GINSBURG, AND BREYER, JJ., JOINED. BREYER, J., FILED A CONCURRING OPINION, IN WHICH SOUTER AND GINSBURG, JJ., JOINED. SCALIA, J., FILED AN OPINION CONCURRING IN THE JUDGMENT, IN WHICH THOMAS, J., JOINED. REHNQUIST, C. J., FILED A DISSENTING OPINION.

JUSTICE STEVENS DELIVERED THE OPINION OF THE COURT.

Petitioners contend that a village ordinance making it a misdemeanor to engage in door-to-door advocacy with- out first registering with the mayor and receiving a permit violates the First Amendment. Through this facial challenge, we consider the door-to-door canvassing regulation not only as it applies to religious proselytizing, but also to anonymous political speech and the distribution of handbills.

I

Petitioner Watchtower Bible and Tract Society of New York, Inc., coordinates the preaching activities of Jehovah's Witnesses throughout the United States and publishes Bibles and religious periodicals that are widely distributed. Petitioner Wellsville, Ohio, Congregation of Jehovah's Witnesses, Inc., supervises the activities of approximately 59 members in a part of Ohio that includes the Village of Stratton (Village). Petitioners offer religious literature without cost to anyone interested in reading it. They allege that they do not solicit contributions or orders for the sale of merchandise or services, but they do accept donations.

Petitioners brought this action against the Village and its mayor in the United States District Court for the Southern District of Ohio, seeking an injunction against the enforcement of several sections of Ordinance No. 1998-5 regulating uninvited peddling and solicitation on private property in the Village. Petitioners' complaint alleged that the ordinance violated several constitutional rights, including the free exercise of religion, free speech, and the freedom of the press. The District Court conducted a bench trial at which evidence of the administration of the ordinance and its effect on petitioners was introduced.

Section 116.01 prohibits "canvassers" and others from "going in and upon" private residential property for the purpose of promoting any "cause" without first having obtained a permit pursuant to §116.03.1 That section provides that any canvasser who intends to go on private property to promote a cause, must obtain a "Solicitation Permit" from the office of the mayor; there is no charge for the permit, and apparently one is issued routinely after an applicant fills out a fairly detailed "Solicitor's Registration Form." The canvasser is then authorized to go upon premises that he listed on the registration form, but he must carry the permit upon his person and exhibit it whenever requested to do so by a police officer or by a resident. The ordinance sets forth grounds for the denial or revocation of a permit, but the record before us does not show that any

application has been denied or that any permit has been revoked. Petitioners did not apply for a permit.

A section of the ordinance that petitioners do not challenge establishes a procedure by which a resident may prohibit solicitation even by holders of permits. If the resident files a "No Solicitation Registration Form" with the mayor, and also posts a "No Solicitation" sign on his property, no uninvited canvassers may enter his property, unless they are specifically authorized to do so in the "No Solicitation Registration Form" itself. Only 32 of the Village's 278 residents filed such forms. Each of the forms in the record contains a list of 19 suggested exceptions; on one form, a resident checked 17 exceptions, thereby excluding only "Jehovah's Witnesses" and "Political Candidates" from the list of invited canvassers. Although Jehovah's Witnesses do not consider themselves to be "solicitors" because they make no charge for their literature or their teaching, leaders of the church testified at trial that they would honor "no solicitation" signs in the Village. They also explained at trial that they did not apply for a permit because they derive their authority to preach from Scripture. "For us to seek a permit from a municipality to preach we feel would almost be an insult to God."

Petitioners introduced some evidence that the ordinance was the product of the mayor's hostility to their ministry, but the District Court credited the mayor's testimony that it had been designed to protect the privacy rights of the Village residents, specifically to protect them "from 'flim flam' con artists who prey on small town populations." Nevertheless, the court concluded that the terms of the ordinance applied to the activities of petitioners as well as to "business or political canvassers."

The District Court upheld most provisions of the ordinance as valid, content-neutral regulations that did not infringe on petitioners' First Amendment rights. The court did, however, require the Village to accept narrowing constructions of three provisions. First, the court viewed the requirement in §116.03(b)(5) that the applicant must list the specific address of each residence to be visited as potentially invalid, but cured by the Village's agreement to attach to the form a list of willing residents. Second, it held that petitioners could comply with §116.03(b)(6) by merely stating their purpose as "the Jehovah's Witness ministry." And third, it held that §116.05, which limited canvassing to the hours before 5 p.m., was invalid on its face and should be replaced with a provision referring to "reasonable hours of the day." As so modified, the court held the ordinance constitutionally valid as applied to petitioners and dismissed the case.

The Court of Appeals for the Sixth Circuit affirmed. It held that the ordinance was "content neutral and of general applicability and therefore subject to intermediate scrutiny." It rejected petitioners' reliance on the discussion of laws affecting both the free exercise of religion and free speech in *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990) [Chapter 14] because that "language was dicta and therefore not binding." It also rejected petitioners' argument that the ordinance is overbroad because it impairs the right to distribute pamphlets anonymously that we recognized in *McIntyre v. Ohio Elections Comm'n* (1995), reasoning that "the very act of going door-to-door requires the canvassers to reveal a portion of their identities." The Court of

Appeals concluded that the interests promoted by the Village--"protecting its residents from fraud and undue annoyance"--as well as the harm that it seeks to prevent--"criminals posing as canvassers in order to defraud its residents"--though "by no means overwhelming," were sufficient to justify the regulation. The court distinguished earlier cases protecting the Jehovah's Witnesses ministry because those cases either involved a flat prohibition on the dissemination of ideas or an ordinance that left the issuance of a permit to the discretion of a municipal officer.

In dissent, Judge Gilman expressed the opinion that by subjecting noncommercial solicitation to the permit requirements, the ordinance significantly restricted a substantial quantity of speech unrelated to the Village's interest in eliminating fraud and unwanted annoyance. In his view, the Village "failed to demonstrate either the reality of the harm or the efficacy of the restriction."

We granted certiorari to decide the following question: "Does a municipal ordinance that requires one to obtain a permit prior to engaging in the door-to-door advocacy of a political cause and to display upon demand the permit, which contains one's name, violate the First Amendment protection accorded to anonymous pamphleteering or discourse?"

## II

For over 50 years, the Court has invalidated restrictions on door-to-door canvassing and pamphleteering. It is more than historical accident that most of these cases involved First Amendment challenges brought by Jehovah's Witnesses, because door-to-door canvassing is mandated by their religion. As we noted in *Murdock v. Pennsylvania* (1943), the Jehovah's Witnesses "claim to follow the example of Paul, teaching 'publicly, and from house to house.' Acts 20:20. They take literally the mandate of the Scriptures, 'Go ye into all the world, and preach the gospel to every creature.' Mark 16:15. In doing so they believe that they are obeying a commandment of God." Moreover, because they lack significant financial resources, the ability of the Witnesses to proselytize is seriously diminished by regulations that burden their efforts to canvass door-to-door.

Although our past cases involving Jehovah's Witnesses, most of which were decided shortly before and during World War II, do not directly control the question we confront today, they provide both a historical and analytical backdrop for consideration of petitioners' First Amendment claim that the breadth of the Village's ordinance offends the First Amendment. Those cases involved petty offenses that raised constitutional questions of the most serious magnitude--questions that implicated the free exercise of religion, the freedom of speech, and the freedom of the press. From these decisions, several themes emerge that guide our consideration of the ordinance at issue here.

First, the cases emphasize the value of the speech involved. For example, in *Murdock v. Pennsylvania*, the Court noted that "hand distribution of religious tracts is an age-old form of missionary evangelism--as old as the history of printing presses. It has been a potent force in various religious movements down through the years... . This form of religious activity occupies the same

high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press."

In addition, the cases discuss extensively the historical importance of door-to-door canvassing and pamphleteering as vehicles for the dissemination of ideas. In *Schneider v. State (Town of Irvington)* (1939), the petitioner was a Jehovah's Witness who had been convicted of canvassing without a permit based on evidence that she had gone from house to house offering to leave books or booklets. Writing for the Court, Justice Roberts stated that "pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people. On this method of communication the ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution. To require a censorship through license which makes impossible the *free and unhampered* distribution of pamphlets strikes at the very heart of the constitutional guarantees." (emphasis added).

Despite the emphasis on the important role that door-to-door canvassing and pamphleteering has played in our constitutional tradition of free and open discussion, these early cases also recognized the interests a town may have in some form of regulation, particularly when the solicitation of money is involved. In *Cantwell v. Connecticut* (1940), the Court held that an ordinance requiring Jehovah's Witnesses to obtain a license before soliciting door to door was invalid because the issuance of the license depended on the exercise of discretion by a city official. Our opinion recognized that "a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." Similarly, in *Martin v. City of Struthers*, the Court recognized crime prevention as a legitimate interest served by these ordinances and noted that "burglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later." Despite recognition of these interests as legitimate, our precedent is clear that there must be a balance between these interests and the effect of the regulations on First Amendment rights. We "must `be astute to examine the effect of the challenged legislation' and must `weigh the circumstances and ... appraise the substantiality of the reasons advanced in support of the regulation.' "

Finally, the cases demonstrate that efforts of the Jehovah's Witnesses to resist speech regulation have not been a struggle for their rights alone. In *Martin*, after cataloging the many groups that rely extensively upon this method of communication, the Court summarized that "[d]oor to door distribution of circulars is essential to the poorly financed causes of little people."

That the Jehovah's Witnesses are not the only "little people" who face the risk of silencing by regulations like the Village's is exemplified by our cases involving nonreligious speech. In *Thomas [v. Collins]* (1945), the issue was whether a

labor leader could be required to obtain a permit before delivering a speech to prospective union members. After reviewing the Jehovah's Witnesses cases discussed above, the Court observed:

"As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly... .

.....

"If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction. If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment."

Although these World War II-era cases provide guidance for our consideration of the question presented, they do not answer one preliminary issue that the parties adamantly dispute. That is, what standard of review ought we use in assessing the constitutionality of this ordinance. We find it unnecessary, however, to resolve that dispute because the breadth of speech affected by the ordinance and the nature of the regulation make it clear that the Court of Appeals erred in upholding it.

### III

The Village argues that three interests are served by its ordinance: the prevention of fraud, the prevention of crime, and the protection of residents' privacy. We have no difficulty concluding, in light of our precedent, that these are important interests that the Village may seek to safeguard through some form of regulation of solicitation activity. We must also look, however, to the amount of speech covered by the ordinance and whether there is an appropriate balance between the affected speech and the governmental interests that the ordinance purports to serve.

The text of the Village's ordinance prohibits "canvassers" from going on private property for the purpose of explaining or promoting any "cause," unless they receive a permit and the residents visited have not opted for a "no solicitation" sign. Had this provision been construed to apply only to commercial activities and the solicitation of funds, arguably the ordinance would have been tailored to the Village's interest in protecting the privacy of its residents and preventing fraud. Yet, even though the Village has explained that the ordinance was adopted to serve those interests, it has never contended that it should be so narrowly interpreted. To the contrary, the Village's administration of its ordinance unquestionably demonstrates that the provisions apply to a significant number of noncommercial "canvassers" promoting a wide variety of "causes." Indeed, on the "No Solicitation Forms" provided to the residents, the canvassers include "Camp Fire Girls," "Jehovah's Witnesses," "Political Candidates," "Trick or Treaters during Halloween Season," and "Persons

Affiliated with Stratton Church." The ordinance unquestionably applies, not only to religious causes, but to political activity as well. It would seem to extend to "residents casually soliciting the votes of neighbors," or ringing doorbells to enlist support for employing a more efficient garbage collector.

The mere fact that the ordinance covers so much speech raises constitutional concerns. It is offensive--not only to the values protected by the First Amendment, but to the very notion of a free society--that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. Even if the issuance of permits by the mayor's office is a ministerial task that is performed promptly and at no cost to the applicant, a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition. Three obvious examples illustrate the pernicious effect of such a permit requirement.

First, as our cases involving distribution of unsigned handbills demonstrate, there are a significant number of persons who support causes anonymously. "The decision to favor anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre v. Ohio Elections Comm'n*. The requirement that a canvasser must be identified in a permit application filed in the mayor's office and available for public inspection necessarily results in a surrender of that anonymity. Although it is true, as the Court of Appeals suggested, that persons who are known to the resident reveal their allegiance to a group or cause when they present themselves at the front door to advocate an issue or to deliver a handbill, the Court of Appeals erred in concluding that the ordinance does not implicate anonymity interests. The Sixth Circuit's reasoning is undermined by our decision in *Buckley v. American Constitutional Law Foundation, Inc.* (1999). The badge requirement that we invalidated in *Buckley* applied to petition circulators seeking signatures in face-to-face interactions. The fact that circulators revealed their physical identities did not foreclose our consideration of the circulators' interest in maintaining their anonymity. In the Village, strangers to the resident certainly maintain their anonymity, and the ordinance may preclude such persons from canvassing for unpopular causes. Such preclusion may well be justified in some situations--for example, by the special state interest in protecting the integrity of a ballot-initiative process, see *ibid.*, or by the interest in preventing fraudulent commercial transactions. The Village ordinance, however, sweeps more broadly, covering unpopular causes unrelated to commercial transactions or to any special interest in protecting the electoral process.

Second, requiring a permit as a prior condition on the exercise of the right to speak imposes an objective burden on some speech of citizens holding religious or patriotic views. As our World War II-era cases dramatically demonstrate, there are a significant number of persons whose religious scruples will prevent them from applying for such a license. There are no doubt other patriotic citizens, who have such firm convictions about their constitutional right to engage in uninhibited debate in the context of door-to-door advocacy, that they would prefer silence to speech licensed by a petty official.

Third, there is a significant amount of spontaneous speech that is effectively

banned by the ordinance. A person who made a decision on a holiday or a weekend to take an active part in a political campaign could not begin to pass out handbills until after he or she obtained the required permit. Even a spontaneous decision to go across the street and urge a neighbor to vote against the mayor could not lawfully be implemented without first obtaining the mayor's permission. In this respect, the regulation is analogous to the circulation licensing tax the Court invalidated in *Grosjean v. American Press Co.* (1936). In *Grosjean*, while discussing the history of the Free Press Clause of the First Amendment, the Court stated that "[t]he evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.' "

The breadth and unprecedented nature of this regulation does not alone render the ordinance invalid. Also central to our conclusion that the ordinance does not pass First Amendment scrutiny is that it is not tailored to the Village's stated interests. Even if the interest in preventing fraud could adequately support the ordinance insofar as it applies to commercial transactions and the solicitation of funds, that interest provides no support for its application to petitioners, to political campaigns, or to enlisting support for unpopular causes. The Village, however, argues that the ordinance is nonetheless valid because it serves the two additional interests of protecting the privacy of the resident and the prevention of crime.

With respect to the former, it seems clear that §107 of the ordinance, which provides for the posting of "No Solicitation" signs and which is not challenged in this case, coupled with the resident's unquestioned right to refuse to engage in conversation with unwelcome visitors, provides ample protection for the unwilling listener. The annoyance caused by an uninvited knock on the front door is the same whether or not the visitor is armed with a permit.

With respect to the latter, it seems unlikely that the absence of a permit would preclude criminals from knocking on doors and engaging in conversations not covered by the ordinance. They might, for example, ask for directions or permission to use the telephone, or pose as surveyors or census takers. Or they might register under a false name with impunity because the ordinance contains no provision for verifying an applicant's identity or organizational credentials. Moreover, the Village did not assert an interest in crime prevention below, and there is an absence of any evidence of a special crime problem related to door-to-door solicitation in the record before us.

The rhetoric used in the World War II-era opinions that repeatedly saved petitioners' coreligionists from petty prosecutions reflected the Court's evaluation of the First Amendment freedoms that are implicated in this case. The value judgment that then motivated a united democratic people fighting to defend those very freedoms from totalitarian attack is unchanged. It motivates our decision today.

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.

CONCURRING OPINIONS [OMITTED].

CHIEF JUSTICE REHNQUIST, DISSENTING.

Stratton is a village of 278 people located along the Ohio River where the borders of Ohio, West Virginia, and Pennsylvania converge. It is strung out along a multilane highway connecting it with the cities of East Liverpool to the north and Steubenville and Weirton, West Virginia, to the south. One may doubt how much legal help a village of this size has available in drafting an ordinance such as the present one, but even if it had availed itself of a battery of constitutional lawyers, they would have been of little use in the town's effort. For the Court today ignores the cases on which those lawyers would have relied, and comes up with newly fashioned doctrine. This doctrine contravenes well-established precedent, renders local governments largely impotent to address the very real safety threat that canvassers pose, and may actually result in less of the door-to-door communication that it seeks to protect.

\*\*\* A recent double murder in Hanover, New Hampshire, a town of approximately 7,500 that would appear tranquil to most Americans but would probably seem like a bustling town of Dartmouth College students to Stratton residents, illustrates these dangers. Two teenagers murdered a married couple of Dartmouth College professors, Half and Susanne Zantop, in the Zantop's home. Investigators have concluded, based on the confession of one of the teenagers, that the teenagers went door-to-door intent on stealing access numbers to bank debit cards and then killing their owners. See *Dartmouth Professors Called Random Targets*, WASHINGTON POST, Feb. 20, 2002, p. A2. Their modus operandi was to tell residents that they were conducting an environmental survey for school. They canvassed a few homes where no one answered. At another, the resident did not allow them in to conduct the "survey." They were allowed into the Zantop home. After conducting the phony environmental survey, they stabbed the Zantops to death.

In order to reduce these very grave risks associated with canvassing, the 278 "little people," of Stratton, who, unlike petitioners, do not have a team of attorneys at their ready disposal, see *Jehovah's Witnesses May Make High Court History Again*, LEGAL TIMES, Feb. 25, 2002, p. 1 (noting that petitioners have a team of 12 lawyers in their New York headquarters), enacted the ordinance at issue here. The residents did not prohibit door-to-door communication, they simply required that canvassers obtain a permit before going door-to-door. And the village does not have the discretion to reject an applicant who completes the application.

The town had little reason to suspect that the negligible burden of having to obtain a permit runs afoul of the First Amendment. For over 60 years, we have categorically stated that a permit requirement for door-to-door canvassers, which gives no discretion to the issuing authority, is constitutional. The District Court and Court of Appeals, relying on our cases, upheld the ordinance. The Court today, however, abruptly changes course and invalidates the ordinance.

\*\*\* It is telling that Justices Douglas and Black, perhaps the two Justices in this Court's history most identified with an expansive view of the First

Amendment, authored, respectively, *Murdock* and *Martin*. Their belief in the constitutionality of the permit requirement that the Court strikes down today demonstrates just how far the Court's present jurisprudence has strayed from the core concerns of the First Amendment.

\*\*\* The ordinance prevents and detects serious crime by making it a crime not to register. Take the Hanover double murder discussed earlier. The murderers did not achieve their objective until they visited their fifth home over a period of seven months. If Hanover had a permit requirement, the teens may have been stopped before they achieved their objective. One of the residents they visited may have informed the police that there were two canvassers who lacked a permit. Such neighborly vigilance, though perhaps foreign to those residing in modern day cities, is not uncommon in small towns. Or the police on their own may have discovered that two canvassers were violating the ordinance. Apprehension for violating the permit requirement may well have frustrated the teenagers' objectives; it certainly would have assisted in solving the murders had the teenagers gone ahead with their plan.<sup>††</sup>

Of course, the Stratton ordinance does not guarantee that no canvasser will ever commit a burglary or violent crime. The Court seems to think this dooms the ordinance, erecting an insurmountable hurdle that a law must provide a fool-proof method of preventing crime. In order to survive intermediate scrutiny, however, a law need not solve the crime problem, it need only further the interest in preventing crime. Some deterrence of serious criminal activity is more than enough to survive intermediate scrutiny.

The final requirement of intermediate scrutiny is that a regulation leave open ample alternatives for expression. Undoubtedly, ample alternatives exist here. Most obviously, canvassers are free to go door-to-door after filling out the permit application. And those without permits may communicate on public sidewalks, on street corners, through the mail, or through the telephone.

\*\*\* Today, the Court elevates its concern with what is, at most, a negligible burden on door-to-door communication above this established proposition. Ironically, however, today's decision may result in less of the door-to-door communication that the Court extols. As the Court recognizes, any homeowner may place a "No Solicitation" sign on his or her property, and it is a crime to violate that sign. In light of today's decision depriving Stratton residents of the degree of accountability and safety that the permit requirement provides, more and more residents may decide to place these signs in their yards and cut off door-to-door communication altogether.

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<sup>††</sup> Indeed, an increased focus on apprehending criminals for "petty" offenses, such as not paying subway fares, is credited with the dramatic reduction in violent crimes in New York City during the last decade. See, e.g., M. GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000). If this works in New York City, surely it can work in a small village like Stratton.

## *Doe v. Reed*

561 US 186 (2010)

ROBERTS, C.J., DELIVERED THE OPINION OF THE COURT, IN WHICH KENNEDY, GINSBURG, BREYER, ALITO, AND SOTOMAYOR, JJ., JOINED. BREYER, J., AND ALITO, J., FILED CONCURRING OPINIONS. SOTOMAYOR, J., FILED A CONCURRING OPINION, IN WHICH STEVENS AND GINSBURG, JJ., JOINED. STEVENS, J., FILED AN OPINION CONCURRING IN PART AND CONCURRING IN THE JUDGMENT, IN WHICH BREYER, J., JOINED. SCALIA, J., FILED AN OPINION CONCURRING IN THE JUDGMENT. THOMAS, J., FILED A DISSENTING OPINION.

CHIEF JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

The State of Washington allows its citizens to challenge state laws by referendum. Roughly four percent of Washington voters must sign a petition to place such a referendum on the ballot. That petition, which by law must include the names and addresses of the signers, is then submitted to the government for verification and canvassing, to ensure that only lawful signatures are counted. The Washington Public Records Act (PRA) authorizes private parties to obtain copies of government documents, and the State construes the PRA to cover submitted referendum petitions.

This case arises out of a state law extending certain benefits to same-sex couples, and a corresponding referendum petition to put that law to a popular vote. Respondent intervenors invoked the PRA to obtain copies of the petition, with the names and addresses of the signers. Certain petition signers and the petition sponsor objected, arguing that such public disclosure would violate their rights under the First Amendment.

The course of this litigation, however, has framed the legal question before us more broadly. The issue at this stage of the case is not whether disclosure of this particular petition would violate the First Amendment, but whether disclosure of referendum petitions in general would do so. We conclude that such disclosure does not as a general matter violate the First Amendment, and we therefore affirm the judgment of the Court of Appeals. We leave it to the lower courts to consider in the first instance the signers' more focused claim concerning disclosure of the information on this particular petition, which is pending before the District Court.

### I

The Washington Constitution reserves to the people the power to reject any bill, with a few limited exceptions not relevant here, through the referendum process. Wash. Const., Art. II, §1(b). To initiate a referendum, proponents must file a petition with the secretary of state that contains valid signatures of registered Washington voters equal to or exceeding four percent of the votes cast for the office of Governor at the last gubernatorial election. §§1(b), (d). A valid submission requires not only a signature, but also the signer's address and the county in which he is registered to vote. Wash. Rev. Code §29A.72.130 (2008).

In May 2009, Washington Governor Christine Gregoire signed into law Senate Bill 5688, which "expand[ed] the rights and responsibilities" of state-registered domestic partners, including same-sex domestic partners. That same month, Protect Marriage Washington, one of the petitioners here, was organized as a

"State Political Committee" for the purpose of collecting the petition signatures necessary to place a referendum on the ballot, which would give the voters themselves an opportunity to vote on SB 5688. If the referendum made it onto the ballot, Protect Marriage Washington planned to encourage voters to reject SB 5688.

On July 25, 2009, Protect Marriage Washington submitted to the secretary of state a petition containing over 137,000 signatures. The secretary of state then began the verification and canvassing process, as required by Washington law, to ensure that only legal signatures were counted. Some 120,000 valid signatures were required to place the referendum on the ballot. Sam Reed, Washington Secretary of State, Certification of Referendum 71 (Sept. 2, 2009). The secretary of state determined that the petition contained a sufficient number of valid signatures, and the referendum (R-71) appeared on the November 2009 ballot. The voters approved SB 5688 by a margin of 53% to 47%.

The PRA, Wash. Rev. Code §42.56.001 et seq., makes all "public records" available for public inspection and copying. §42.56.070(1) (2008). The Act defines "[p]ublic record" as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency." §42.56.010(2). Washington takes the position that referendum petitions are "public records."

By August 20, 2009, the secretary had received requests for copies of the R-71 petition from an individual and four entities, including Washington Coalition for Open Government (WCOG) and Washington Families Standing Together (WFST), two of the respondents here. Two entities, WhoSigned.org and KnowThyNeighbor.org, issued a joint press release stating their intention to post the names of the R-71 petition signers online, in a searchable format.

The referendum petition sponsor and certain signers filed a complaint and a motion for a preliminary injunction in the United States District Court for the Western District of Washington, seeking to enjoin the secretary of state from publicly releasing any documents that would reveal the names and contact information of the R-71 petition signers. Count I of the complaint alleges that "[t]he Public Records Act is unconstitutional as applied to referendum petitions." Count II of the complaint alleges that "[t]he Public Records Act is unconstitutional as applied to the Referendum 71 petition because there is a reasonable probability that the signatories of the Referendum 71 petition will be subjected to threats, harassment, and reprisals." Determining that the PRA burdened core political speech, the District Court held that plaintiffs were likely to succeed on the merits of Count I and granted them a preliminary injunction on that count, enjoining release of the information on the petition.

The United States Court of Appeals for the Ninth Circuit reversed. Reviewing only Count I of the complaint, the Court of Appeals held that plaintiffs were unlikely to succeed on their claim that the PRA is unconstitutional as applied to referendum petitions generally. It therefore reversed the District Court's grant of the preliminary injunction. We granted certiorari.

## II

It is important at the outset to define the scope of the challenge before us. As noted, Count I of the complaint contends that the PRA "violates the First Amendment as applied to referendum petitions." Count II asserts that the PRA "is unconstitutional as applied to the Referendum 71 petition." The District Court decision was based solely on Count I; the Court of Appeals decision reversing the District Court was similarly limited. Neither court addressed Count II.

The parties disagree about whether Count I is properly viewed as a facial or as-applied challenge. It obviously has characteristics of both: The claim is "as applied" in the sense that it does not seek to strike the PRA in all its applications, but only to the extent it covers referendum petitions. The claim is "facial" in that it is not limited to plaintiffs' particular case, but challenges application of the law more broadly to all referendum petitions.

The label is not what matters. The important point is that plaintiffs' claim and the relief that would follow--an injunction barring the secretary of state "from making referendum petitions available to the public--reach beyond the particular circumstances of these plaintiffs. They must therefore satisfy our standards for a facial challenge to the extent of that reach.

### III

#### A

The compelled disclosure of signatory information on referendum petitions is subject to review under the First Amendment. An individual expresses a view on a political matter when he signs a petition under Washington's referendum procedure. In most cases, the individual's signature will express the view that the law subject to the petition should be overturned. Even if the signer is agnostic as to the merits of the underlying law, his signature still expresses the political view that the question should be considered "by the whole electorate." In either case, the expression of a political view implicates a First Amendment right. The State, having "cho[sen] to tap the energy and the legitimizing power of the democratic process, ... must accord the participants in that process the First Amendment rights that attach to their roles." *Republican Party of Minn. v. White* (2002).

Respondents counter that signing a petition is a legally operative legislative act and therefore "does not involve any significant expressive element." It is true that signing a referendum petition may ultimately have the legal consequence of requiring the secretary of state to place the referendum on the ballot. But we do not see how adding such legal effect to an expressive activity somehow deprives that activity of its expressive component, taking it outside the scope of the First Amendment. Respondents themselves implicitly recognize that the signature expresses a particular viewpoint, arguing that one purpose served by disclosure is to allow the public to engage signers in a debate on the merits of the underlying law.

Petition signing remains expressive even when it has legal effect in the electoral process. But that is not to say that the electoral context is irrelevant to the nature of our First Amendment review. We allow States significant flexibility in implementing their own voting systems. To the extent a regulation concerns the legal effect of a particular activity in that process, the government will be

afforded substantial latitude to enforce that regulation. Also pertinent to our analysis is the fact that the PRA is not a prohibition on speech, but instead a disclosure requirement. "[D]isclosure requirements may burden the ability to speak, but they ... do not prevent anyone from speaking." *Citizens United v. Federal Election Comm'n* (2010).

We have a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context. These precedents have reviewed such challenges under what has been termed "exacting scrutiny." See, e.g., *Buckley v. Valeo* (1976); *Citizens United* (2010); *Davis v. Federal Election Comm'n*, (2008); *Buckley v. American Constitutional Law Foundation, Inc. (ACLF)* (1999).

That standard "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*. To withstand this scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights."

## B

Respondents assert two interests to justify the burdens of compelled disclosure under the PRA on First Amendment rights: (1) preserving the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability; and (2) providing information to the electorate about who supports the petition. Because we determine that the State's interest in preserving the integrity of the electoral process suffices to defeat the argument that the PRA is unconstitutional with respect to referendum petitions in general, we need not, and do not, address the State's "informational" interest.

The State's interest in preserving the integrity of the electoral process is undoubtedly important. "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *ACLF*. The State's interest is particularly strong with respect to efforts to root out fraud, which not only may produce fraudulent outcomes, but has a systemic effect as well: It "drives honest citizens out of the democratic process and breeds distrust of our government." The threat of fraud in this context is not merely hypothetical; respondents and their amici cite a number of cases of petition-related fraud across the country to support the point.

But the State's interest in preserving electoral integrity is not limited to combating fraud. That interest extends to efforts to ferret out invalid signatures caused not by fraud but by simple mistake, such as duplicate signatures or signatures of individuals who are not registered to vote in the State. That interest also extends more generally to promoting transparency and accountability in the electoral process, which the State argues is "essential to the proper functioning of a democracy."

Plaintiffs contend that the disclosure requirements of the PRA are not "sufficiently related" to the interest of protecting the integrity of the electoral process. They argue that disclosure is not necessary because the secretary of state is already charged with verifying and canvassing the names on a petition, advocates and opponents of a measure can observe that process, and any

citizen can challenge the secretary's actions in court. They also stress that existing criminal penalties reduce the danger of fraud in the petition process.

But the secretary's verification and canvassing will not catch all invalid signatures: The job is large and difficult (the secretary ordinarily checks "only 3 to 5% of signatures," Brief for Respondent), and the secretary can make mistakes, too. Public disclosure can help cure the inadequacies of the verification and canvassing process.

Disclosure also helps prevent certain types of petition fraud otherwise difficult to detect, such as outright forgery and "bait and switch" fraud, in which an individual signs the petition based on a misrepresentation of the underlying issue. The signer is in the best position to detect these types of fraud, and public disclosure can bring the issue to the signer's attention.

Public disclosure thus helps ensure that the only signatures counted are those that should be, and that the only referenda placed on the ballot are those that garner enough valid signatures. Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot. In light of the foregoing, we reject plaintiffs' argument and conclude that public disclosure of referendum petitions in general is substantially related to the important interest of preserving the integrity of the electoral process.

### C

Plaintiffs' more significant objection is that "the strength of the governmental interest" does not "reflect the seriousness of the actual burden on First Amendment rights." According to plaintiffs, the objective of those seeking disclosure of the R-71 petition is not to prevent fraud, but to publicly identify those who had validly signed and to broadcast the signers' political views on the subject of the petition. Plaintiffs allege, for example, that several groups plan to post the petitions in searchable form on the Internet, and then encourage other citizens to seek out the R-71 signers.

Plaintiffs explain that once on the Internet, the petition signers' names and addresses "can be combined with publicly available phone numbers and maps," in what will effectively become a blueprint for harassment and intimidation. To support their claim that they will be subject to reprisals, plaintiffs cite examples from the history of a similar proposition in California, and from the experience of one of the petition sponsors in this case.

In related contexts, we have explained that those resisting disclosure can prevail under the First Amendment if they can show "a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley*; see also *Citizens United*. The question before us, however, is not whether PRA disclosure violates the First Amendment with respect to those who signed the R-71 petition, or other particularly controversial petitions. The question instead is whether such disclosure in general violates the First Amendment rights of those who sign referendum petitions.

The problem for plaintiffs is that their argument rests almost entirely on the specific harm they say would attend disclosure of the information on the R-71 petition, or on similarly controversial ones. But typical referendum petitions

"concern tax policy, revenue, budget, or other state law issues." Brief for Respondent (listing referenda); see also App. 26 (stating that in recent years the State has received PRA requests for petitions supporting initiatives concerning limiting motor vehicle charges; government regulation of private property; energy resource use by certain electric utilities; long-term care services for the elderly and persons with disabilities; and state, county, and city revenue); *id.*, at 26-27 (stating that in the past 20 years, referendum measures that have qualified for the ballot in the State concerned land-use regulation; unemployment insurance; charter public schools; and insurance coverage and benefits). Voters care about such issues, some quite deeply--but there is no reason to assume that any burdens imposed by disclosure of typical referendum petitions would be remotely like the burdens plaintiffs fear in this case.

Plaintiffs have offered little in response. They have provided us scant evidence or argument beyond the burdens they assert disclosure would impose on R-71 petition signers or the signers of other similarly controversial petitions. Indeed, what little plaintiffs do offer with respect to typical petitions in Washington hurts, not helps: Several other petitions in the State "have been subject to release in recent years," plaintiffs tell us, but apparently that release has come without incident. Cf. *Citizens United* ("Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation").

Faced with the State's un rebutted arguments that only modest burdens attend the disclosure of a typical petition, we must reject plaintiffs' broad challenge to the PRA. In doing so, we note--as we have in other election law disclosure cases--that upholding the law against a broad-based challenge does not foreclose a litigant's success in a narrower one. See *Buckley* ("minor parties" may be exempt from disclosure requirements if they can show "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties"); *Citizens United* (disclosure "would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed" The secretary of state acknowledges that plaintiffs may press the narrower challenge in Count II of their complaint in proceedings pending before the District Court.

We conclude that disclosure under the PRA would not violate the First Amendment with respect to referendum petitions in general and therefore affirm the judgment of the Court of Appeals.

*It is so ordered.*

JUSTICE BREYER, CONCURRING [OMITTED].

JUSTICE ALITO, CONCURRING.

The Court holds that the disclosure under the Washington Public Records Act (PRA), Wash. Rev. Code §42.56.001 et seq. (2008), of the names and addresses of persons who sign referendum petitions does not as a general matter violate

the First Amendment and I agree with that conclusion. Many referendum petitions concern relatively uncontroversial matters and plaintiffs have provided no reason to think that disclosure of signatory information in those contexts would significantly chill the willingness of voters to sign. Plaintiffs' facial challenge therefore must fail.

Nonetheless, facially valid disclosure requirements can impose heavy burdens on First Amendment rights in individual cases. Acknowledging that reality, we have long held that speakers can obtain as-applied exemptions from disclosure requirements if they can show "a reasonable probability that the compelled disclosure of [personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley v. Valeo*. Because compelled disclosure can "burden the ability to speak," *Citizens United* and "seriously infringe on privacy of association and belief guaranteed by the First Amendment," *Buckley*, the as-applied exemption plays a critical role in safeguarding First Amendment rights.

I  
[omitted]

II

\*\*\* In light of those principles, the plaintiffs in this case have a strong argument that the PRA violates the First Amendment as applied to the Referendum 71 petition.

A

Consider first the burdens on plaintiffs' First Amendment rights. The widespread harassment and intimidation suffered by supporters of California's Proposition 8 provides strong support for an as-applied exemption in the present case. Proposition 8 amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California," Cal. Const., Art. I, §7.5, and plaintiffs submitted to the District Court substantial evidence of the harassment suffered by Proposition 8 supporters. Members of this Court have also noted that harassment. See *Hollingsworth v. Perry* (2010) (per curiam) (slip op., at 2-3); *Citizens United* (opinion of Thomas, J.). Indeed, if the evidence relating to Proposition 8 is not sufficient to obtain an as-applied exemption in this case, one may wonder whether that vehicle provides any meaningful protection for the First Amendment rights of persons who circulate and sign referendum and initiative petitions.

What is more, when plaintiffs return to the District Court, they will have the opportunity to develop evidence of intimidation and harassment of Referendum 71 supporters--an opportunity that was pretermitted because of the District Court's decision to grant a preliminary injunction on count 1 of plaintiffs' complaint. For example, plaintiffs allege that the campaign manager for one of the plaintiff groups received threatening e-mails and phone calls, and that the threats were so severe that the manager filed a complaint with the local sheriff and had his children sleep in an interior room of his home.

B

The inadequacy of the State's interests in compelling public disclosure of referendum signatory information further confirms that courts should be

generous in granting as-applied relief in this context. As the Court notes, respondents rely on two interests to justify compelled disclosure in this context: (1) providing information to voters about who supports a referendum petition; and (2) preserving the integrity of the referendum process by detecting fraudulent and mistaken signatures.

1

In my view, respondents' asserted informational interest will not in any case be sufficient to trump the First Amendment rights of signers and circulators who face a threat of harassment. Respondents maintain that publicly disclosing the names and addresses of referendum signatories provides the voting public with "insight into whether support for holding a vote comes predominantly from particular interest groups, political or religious organizations, or other group[s] of citizens," and thus allows voters to draw inferences about whether they should support or oppose the referendum. Additionally, respondents argue that disclosure "allows Washington voters to engage in discussion of referred measures with persons whose acts secured the election and suspension of state law."

The implications of accepting such an argument are breathtaking. Were we to accept respondents' asserted informational interest, the State would be free to require petition signers to disclose all kinds of demographic information, including the signer's race, religion, political affiliation, sexual orientation, ethnic background, and interest-group memberships. Requiring such disclosures, however, runs headfirst into a half century of our case law, which firmly establishes that individuals have a right to privacy of belief and association. See *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, (2006); \*\*\* *NAACP v. Alabama ex rel. Patterson* (1958). Indeed, the State's informational interest paints such a chilling picture of the role of government in our lives that at oral argument the Washington attorney general balked when confronted with the logical implications of accepting such an argument, conceding that the State could not require petition signers to disclose their religion or ethnicity.

Respondents' informational interest is no more legitimate when viewed as a means of providing the public with information needed to locate and contact supporters of a referendum. In the name of pursuing such an interest, the State would be free to require petition signers to disclose any information that would more easily enable members of the voting public to contact them and engage them in discussion, including telephone numbers, e-mail addresses, and Internet aliases. Once again, permitting the government to require speakers to disclose such information runs against the current of our associational privacy cases. But more important, when speakers are faced with a reasonable probability of harassment or intimidation, the State no longer has any interest in enabling the public to locate and contact supporters of a particular measure—for in that instance, disclosure becomes a means of facilitating harassment that impermissibly chills the exercise of First Amendment rights.

In this case, two groups proposed to place on the Internet the names and addresses of all those who signed Referendum 71, and it is alleged that their express aim was to encourage "uncomfortable conversation[s]." If this information is posted on the Internet, then anyone with access to a computer

could compile a wealth of information about all of those persons, including in many cases all of the following: the names of their spouses and neighbors, their telephone numbers, directions to their homes, pictures of their homes, information about their homes (such as size, type of construction, purchase price, and mortgage amount), information about any motor vehicles that they own, any court case in which they were parties, any information posted on a social networking site, and newspaper articles in which their names appeared (including such things as wedding announcements, obituaries, and articles in local papers about their children's school and athletic activities). The potential that such information could be used for harassment is vast.

2

Respondents also maintain that the State has an interest in preserving the integrity of the referendum process and that public disclosure furthers that interest by helping the State detect fraudulent and mistaken signatures. I agree with the Court that preserving the integrity of the referendum process constitutes a sufficiently important state interest. But I harbor serious doubts as to whether public disclosure of signatory information serves that interest in a way that always "reflect[s] the seriousness of the actual burden on First Amendment rights." \*\*\*

\*\*\*As-applied challenges to disclosure requirements play a critical role in protecting First Amendment freedoms. To give speech the breathing room it needs to flourish, prompt judicial remedies must be available well before the relevant speech occurs and the burden of proof must be low. In this case--both through analogy and through their own experiences--plaintiffs have a strong case that they are entitled to as-applied relief, and they will be able to pursue such relief before the District Court.

JUSTICE SOTOMAYOR, WITH WHOM JUSTICE STEVENS AND JUSTICE GINSBURG JOIN, CONCURRING.

I write separately to emphasize a point implicit in the opinion of the Court and the concurring opinions of Justice Stevens, Justice Scalia, and Justice Breyer: In assessing the countervailing interests at stake in this case, we must be mindful of the character of initiatives and referenda. These mechanisms of direct democracy are not compelled by the Federal Constitution. It is instead up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action. States enjoy "considerable leeway" to choose the subjects that are eligible for placement on the ballot and to specify the requirements for obtaining ballot access (e.g., the number of signatures required, the time for submission, and the method of verification). As the Court properly recognizes, each of these structural decisions "inevitably affects--at least to some degree--the individual's right" to speak about political issues and "to associate with others for political ends." \*\*\*

\*\*\*Allowing case-specific invalidation under a more forgiving standard would unduly diminish the substantial breathing room States are afforded to adopt and implement reasonable, nondiscriminatory measures like the disclosure requirement now at issue. Accordingly, courts presented with an as-applied challenge to a regulation authorizing the disclosure of referendum petitions

should be deeply skeptical of any assertion that the Constitution, which embraces political transparency, compels States to conceal the identity of persons who seek to participate in lawmaking through a state-created referendum process. With this understanding, I join the opinion of the Court.

JUSTICE STEVENS, WITH WHOM JUSTICE BREYER JOINS, CONCURRING IN PART AND CONCURRING IN THE JUDGMENT.

This is not a hard case. It is not about a restriction on voting or on speech and does not involve a classic disclosure requirement. Rather, the case concerns a neutral, nondiscriminatory policy of disclosing information already in the State's possession that, it has been alleged, might one day indirectly burden petition signatories. The burden imposed by Washington's application of the Public Records Act (PRA) to referendum petitions in the vast majority, if not all, its applications is not substantial. And the State has given a more than adequate justification for its choice.

For a number of reasons, the application of the PRA to referendum petitions does not substantially burden any individual's expression. First, it is not "a regulation of pure speech." *McIntyre v. Ohio Elections Comm'n* (1995); cf. *United States v. O'Brien* (1968). It does not prohibit expression, nor does it require that any person signing a petition disclose or say anything at all. Nor does the State's disclosure alter the content of a speaker's message.

Second, any effect on speech that disclosure might have is minimal. The PRA does not necessarily make it more difficult to circulate or obtain signatures on a petition, or to communicate one's views generally. Regardless of whether someone signs a referendum petition, that person remains free to say anything to anyone at any time. If disclosure indirectly burdens a speaker, "the amount of speech covered" is small--only a single, narrow message conveying one fact in one place. And while the democratic act of casting a ballot or signing a petition does serve an expressive purpose, the act does not involve any "interactive communication," and is "not principally" a method of "individual expression of political sentiment."

Weighed against the possible burden on constitutional rights are the State's justifications for its rule. In this case, the State has posited a perfectly adequate justification: an interest in deterring and detecting petition fraud. Given the pedigree of this interest and of similar regulations, the State need not produce concrete evidence that the PRA is the best way to prevent fraud.

There remains the issue of petitioners' as-applied challenge. As a matter of law, the Court is correct to keep open the possibility that in particular instances in which a policy such as the PRA burdens expression "by the public enmity attending publicity," *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)* (1982), speakers may have a winning constitutional claim. " '[F]rom time to time throughout history,' " persecuted groups have been able " 'to criticize oppressive practices and laws either anonymously or not at all.' " *McIntyre*.

In my view, this is unlikely to occur in cases involving the PRA. Any burden on speech that petitioners posit is speculative as well as indirect. For an as-applied challenge to a law such as the PRA to succeed, there would have to be a

significant threat of harassment directed at those who sign the petition that cannot be mitigated by law enforcement measures.<sup>5</sup> Moreover, the character of the law challenged in a referendum does not, in itself, affect the analysis. Debates about tax policy and regulation of private property can become just as heated as debates about domestic partnerships. And as a general matter, it is very difficult to show that by later disclosing the names of petition signatories, individuals will be less willing to sign petitions. Just as we have in the past, I would demand strong evidence before concluding that an indirect and speculative chain of events imposes a substantial burden on speech.\*\*\*

Accordingly, I concur with the opinion of the Court to the extent that it is not inconsistent with my own, and I concur in the judgment.

JUSTICE SCALIA, CONCURRING IN THE JUDGMENT.

Plaintiffs claim the First Amendment, as applied to the States through the Fourteenth Amendment, forbids the State of Washington to release to the public signed referendum petitions, which they submitted to the State in order to suspend operation of a law and put it to a popular vote. I doubt whether signing a petition that has the effect of suspending a law fits within "the freedom of speech" at all. But even if, as the Court concludes it does, a long history of practice shows that the First Amendment does not prohibit public disclosure.

#### I

We should not repeat and extend the mistake of *McIntyre v. Ohio Elections Comm'n* (1995). There, with neither textual support nor precedents requiring the result, the Court invalidated a form of election regulation that had been widely used by the States since the end of the 19th century. The Court held that an Ohio statute prohibiting the distribution of anonymous campaign literature violated the First and Fourteenth Amendments. \*\*\*

\*\*\*Plaintiffs contend that disclosure of the names, and other personal information included on the petitions, of those who took this legislative action violates their First Amendment right to anonymity.

Today's opinion acknowledges such a right, finding that it can be denied here only because of the State's interest in "preserving the integrity of the electoral process." In my view this is not a matter for judicial interest-balancing. Our Nation's longstanding traditions of legislating and voting in public refute the claim that the First Amendment accords a right to anonymity in the performance of an act with governmental effect. "A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality." *McIntyre* (Scalia, J., dissenting).

#### A

When a Washington voter signs a referendum petition subject to the PRA, he is acting as a legislator. The Washington Constitution vests "[t]he legislative authority" of the State in the legislature, but "the people reserve to themselves the power . . . to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature." Art. 2, §1. This "referendum" power of popular legislation is exercised by submitting a petition, in accordance

with certain specifications, to the Washington secretary of state with valid signatures of registered voters in number equal to or exceeding four percent of the votes cast in the last gubernatorial election. §1(b); Wash. Rev. Code §29A.72.100, 130, 140, 150, 160 (2008).

\*\*\* Plaintiffs point to no precedent from this Court holding that legislating is protected by the First Amendment. Nor do they identify historical evidence demonstrating that "the freedom of speech" the First Amendment codified encompassed a right to legislate without public disclosure. This should come as no surprise; the exercise of lawmaking power in the United States has traditionally been public.

\*\*\* Moreover, even when the people asked Congress for legislative changes--by exercising their constitutional right to "to petition the Government for a redress of grievances," U. S. Const., Amdt. 1--they did so publicly. The petition was read aloud in Congress. The petitioner's name (when large groups were not involved), his request, and what action Congress had taken on the petition were consistently recorded in the House and Senate Journals. Even when the people exercised legislative power directly, they did so not anonymously, but openly in town hall meetings.

Petitioning the government and participating in the traditional town meeting were precursors of the modern initiative and referendum. Those innovations were modeled after similar devices used by the Swiss democracy in the 1800's, and were first used in the United States by South Dakota in 1898. \*\*\* Plaintiffs' argument implies that the public nature of these practices, so longstanding and unquestioned, violated the freedom of speech. There is no historical support for such a claim.

## B

Legislating was not the only governmental act that was public in America. Voting was public until 1888 when the States began to adopt the Australian secret ballot. See *Burson v. Freeman* (1992) (plurality opinion). We have acknowledged the existence of a First Amendment interest in voting, see, e.g., *Burdick v. Takushi* (1992), but we have never said that it includes the right to vote anonymously. The history of voting in the United States completely undermines that claim.

Initially, the Colonies mostly continued the English traditions of voting by a show of hands or by voice--viva voce voting. \*\*\*

Any suggestion that viva voce voting infringed the accepted understanding of the pre-existing freedom of speech to which the First Amendment's text refers is refuted by the fact that several state constitutions that required or authorized viva voce voting also explicitly guaranteed the freedom of speech. See, e.g., Ky. Const., Art. X, §7, Art. VI, §16 (1799); Ill. Const., Art. VIII, §22, Art. I, §28 (1818). Surely one constitutional provision did not render the other invalid.

Of course the practice of viva voce voting was gradually replaced with the paper ballot, which was thought to reduce fraud and undue influence. There is no indication that the shift resulted from a sudden realization that public voting infringed voters' freedom of speech, and the manner in which it occurred suggests the contrary. States adopted the paper ballot at different times, and

some States changed methods multiple times. New York's 1777 Constitution, for example, explicitly provided for the State to switch between methods. Art. VI. Kentucky's 1792 Constitution required paper ballots, Art. III, §2, but its 1799 Constitution required viva voce voting, Art. VI, §16. The different voting methods simply reflected different views about how democracy should function. One scholar described Virginia's and Kentucky's steadfast use of viva voce voting through the Civil War as follows: "[I]n the appeal to unflinching manliness at the polls these two states insisted still that every voter should show at the hustings the courage of his personal conviction." Schouler, *Evolution of the American Voter*, 2 THE AMERICAN HISTORICAL REVIEW 665, 671 (1897).

The new paper ballots did not make voting anonymous. Taking advantage of this, political parties began printing ballots with their candidates' names on them. They used brightly colored paper and other distinctive markings so that the ballots could be recognized from a distance, making the votes public. Abuse of these unofficial paper ballots was rampant. The polling place had become an "open auction place" where votes could be freely bought or coerced. Employers threatened employees. Party workers kept voters from the other party away from the ballot box. Ballot peddlers paid voters and then watched them place the ballot in the box. Thus, although some state courts said that voting by ballot was meant to be more secret than the public act of viva voce voting; and although some state constitutional requirements of ballot voting were held to guarantee ballot secrecy, thus prohibiting the numbering of ballots for voter identification purposes, in general, voting by ballot was by no means secret. Most important of all for present purposes, I am aware of no assertion of ballot secrecy that relied on federal or state constitutional guarantees of freedom of speech.

It was precisely discontent over the nonsecret nature of ballot voting, and the abuses that produced, which led to the States' adoption of the Australian secret ballot. New York and Massachusetts began that movement in 1888, and almost 90 percent of the States had followed suit by 1896. But I am aware of no contention that the Australian system was required by the First Amendment (or the state counterparts). That would have been utterly implausible, since the inhabitants of the Colonies, the States, and the United States had found public voting entirely compatible with "the freedom of speech" for several centuries.

The long history of public legislating and voting contradicts plaintiffs' claim that disclosure of petition signatures having legislative effect violates the First Amendment. \*\*\*

Plaintiffs raise concerns that the disclosure of petition signatures may lead to threats and intimidation. Of course nothing prevents the people of Washington from keeping petition signatures secret to avoid that--just as nothing prevented the States from moving to the secret ballot. But there is no constitutional basis for this Court to impose that course upon the States--or to insist (as today's opinion does) that it can only be avoided by the demonstration of a "sufficiently important governmental interest." And it may even be a bad idea to keep petition signatures secret. There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public

for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (*McIntyre*) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.

JUSTICE THOMAS, DISSENTING.

Just as "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy," so too is citizen participation in those processes, which necessarily entails political speech and association under the First Amendment. In my view, compelled disclosure of signed referendum and initiative petitions under the Washington Public Records Act (PRA), severely burdens those rights and chills citizen participation in the referendum process. Given those burdens, I would hold that Washington's decision to subject all referendum petitions to public disclosure is unconstitutional because there will always be a less restrictive means by which Washington can vindicate its stated interest in preserving the integrity of its referendum process. I respectfully dissent.

\*\*\* Because the strength of Washington's interest in transparency and a signer's individual First Amendment interest in privacy of political association remain constant across all referendum topics, and because less restrictive means to protect the integrity of the referendum process are not topic specific, I would hold that on-demand public disclosure of referendum petitions under the PRA is not narrowly tailored for any referendum.\*\*\*

Significant practical problems will result from requiring as-applied challenges to protect referendum signers' constitutional rights. \*\*\*

## Notes

1. The Court's other major anonymity cases, discussed in the above cases, are *Talley v. California* (1960); *Brown v. Socialist Workers Party* (1982); and *Buckley v. American Constitutional Law Foundation* (ACLF)(1999). In ACLKF, the Court found a Colorado provision requiring people circulating ballot petitions to wear identification badges unconstitutional under the First Amendment.

2. In *McIntyre*, the Court agreed that Ohio's interest in "preventing fraud and libel" "carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large," but noted that this interest is also (and perhaps better) served by Ohio's Election Code that "includes detailed and specific prohibitions against making or disseminating false statements during

political campaigns.” The constitutionality of these Election Code provisions were the subject of extensive litigation, reaching the United States Supreme Court in *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014), in which the Court reversed the Sixth Circuit and found the case justiciable. When the controversy returned to the district judge, the judge subjected the Election Code provisions to strict scrutiny and found them unconstitutional, relying in large part on *United States v. Alvarez* (2012). *List v. Ohio Elections Comm'n*, No. 1:10-CV-720, 2014 WL 4472634 (S.D. Ohio Sept. 11, 2014).

3. The concurring opinions in *Doe v. Reed* provide different perspectives on how the court on remand should rule in the subsequent as-applied challenge. On cross-motions for summary judgment, the district judge granted summary judgment in favor of Defendants and denied Doe's motion for summary judgment, lifted the injunction that prevented the disclosure of the R-71 petitions, and closed the case. *Doe v. Reed*, No. C09-5456BHS, 2011 WL 5403218, at \*1 (W.D. Wash. Nov. 8, 2011). The Ninth Circuit thereafter dismissed an appeal as moot. *Doe No. 1 v. Reed*, 697 F.3d 1235 (9th Cir. 2012).

## II. Campaign Finance

Understanding First Amendment challenges to campaign finance laws can be difficult. The underlying statutory and regulatory schemes are themselves complex. Additionally, the approximately 20 campaign finance cases decided by the United States Supreme Court tend to be lengthy and closely divided with fractured opinions. *Buckley v. Valeo* (1976), the first major campaign finance case, occupies almost 300 pages in the United States Reports: approximately one third is the Court's per curiam opinion; one third is the Appendix consisting of the Federal Election Campaign Act under review; and one third consists of various opinions concurring and dissenting in part. The Court's opinion in *McConnell v. Federal Election Commission* (2003), considering First Amendment challenges to the Bipartisan Campaign Reform Act of 2002, is likewise almost 300 pages in the United States Reports, 540 U.S. 93-365, with a dizzying array of opinions.## The controversial *Citizens United*

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## Stevens and O' Connor, JJ., delivered the opinion of the Court with respect to BCRA Titles I and II, in which Souter, Ginsburg, and Breyer, JJ., joined. Rehnquist, C. J., delivered the opinion of the Court with respect to BCRA Titles III and IV, in which O'Connor, Scalia, Kennedy, and Souter, JJ., joined, in which Stevens, Ginsburg, and Breyer, JJ., joined except with respect to BCRA §305, and in which Thomas, J., joined with respect to BCRA §§304, 305, 307, 316, 319, and 403(b). Breyer, J., delivered the opinion of the Court with respect to BCRA Title V, in which Stevens, O'Connor, Souter, and Ginsburg, JJ., joined. Scalia, J., filed an opinion concurring with respect to BCRA Titles III and IV, dissenting with respect to BCRA Titles I and V, and concurring in the judgment in part and dissenting in part with respect to BCRA Title II. Thomas, J., filed an opinion concurring with respect to BCRA Titles III and IV, except for BCRA §§311 and 318, concurring in the result with respect to BCRA §318, concurring in the judgment in part and dissenting in part with respect to BCRA Title II, and dissenting with respect to BCRA Titles I, V, and §311, in which opinion Scalia, J., joined as to Parts I, II-A, and II-B. Kennedy, J., filed an opinion concurring in the judgment in part

*v. Federal Election Commission* (2010) is close to 200 pages, 558 U.S. 310-485. The slip opinion for the Court's most recent decision, *McCutcheon v. Federal Election Commission*, is a mere 94 pages.

This section starts with a timeline of campaign finance cases, then has a note on *Buckley v. Valeo*, and concludes with excerpts from the Court's controversial decision in *Citizens United* and its most recent case, *McCutcheon v. Federal Election Commission* (2014).

Optional reading for this section is the most recent report from the Congressional Research Service. R. Sam Garrett, Congressional Research Service, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress* (April 2016), available at: <http://fas.org:8080/sgp/crs/misc/R41542.pdf>.

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and dissenting in part with respect to BCRA Titles I and II, in which Rehnquist, C. J., joined, in which Scalia, J., joined except to the extent the opinion upholds new FECA §323(e) and BCRA §202, and in which Thomas, J., joined with respect to BCRA §213. Rehnquist, C. J., filed an opinion dissenting with respect to BCRA Titles I and V, in which Scalia and Kennedy, JJ., joined. Stevens, J., filed an opinion dissenting with respect to BCRA §305, in which Ginsburg and Breyer, JJ., joined.

**Note: Timeline of First Amendment Campaign Finance Cases**

year	name	Result	opinions
1976	Buckley v. Valeo	FECA's Restrictions on campaign expenditures unconstitutional; restrictions on campaign contributions constitutional	Per curiam with an additional 5 concurring/dissenting opinions
1978	First National Bank of Boston v. Bellotti	Massachusetts statute prohibiting banks and certain corporations from making campaign expenditures to influence votes in referendums held unconstitutional	5-4 opinion (Powell for Court; White, Brennan, Marshall & Rehnquist dissenting)
1981	California Medical Association v. FEC	FECA prohibition of contributions of more than \$5,000 per calendar year to any multicandidate political committee and prohibition of political committees to knowingly accept contributions exceeding the \$5,000 limit held constitutional	5-4
1981	Citizens Against Rent Control v. City of Berkeley	Berkeley, California ordinance placing \$250 limit on contributions to committees formed to oppose or support ballots measures held unconstitutional	8-1 (concurring opinions; White dissenting)
1982	FEC v. National Right To Work Committee	FECA's prohibition of corporations & labor unions from making contributions or expenditures had exception for soliciting funds only members of corporation and was upheld as constitutional	Rehnquist, J., for a unanimous court
1984	FEC v. NCPAC [National Conservative Political Action Committee]	FECA's prohibition, when a candidate elects public financing, of an independent "political committee" to expend more than \$1,000 to further that candidate's election held unconstitutional	Rehnquist for a divided and fractured Court; White and Brennan clearly dissenting; Marshall and Stevens partially dissenting

1986	FEC v. Massachusetts Citizens for Life	FECA's prohibition of corporations making expenditures "in connection with" any federal election, unless financed by voluntary contributions to a separate segregated fund, as applied to "newsletter" highlighting pro-life candidates held unconstitutional	Unanimous Court; fractured opinions
1990	Austin v. Michigan Chamber of Commerce	Michigan Campaign Finance Act's prohibition of corporations (excluding media corporations) using general funds for making expenditures for state candidates upheld as constitutional	6-3 fractured opinions; Kennedy, Scalia & O'Connor dissenting
1996	Colorado Republican Federal Campaign Committee v FEC (Colorado I)	FECA's party expenditure provision placing \$5,000 limit for any candidate as applied to radio advertisements attacking opposition candidate held unconstitutional	fractured opinions
2000	Nixon v. Shrink Missouri Government PAC	Missouri's campaign contribution limits judged under <i>Buckley v. Valeo</i> , and although lower than federal FECA, upheld as constitutional	6-3 Kennedy, Thomas & Scalia dissenting
2001	Colorado Republican Federal Campaign Committee v. FEC (Colorado II)	FECA's party expenditure provision placing \$5,000 limit for any candidate, including "coordinated expenditures" upheld as constitutional	5-4 Souter, J., delivered the opinion of the Court (Stevens, O'Connor, Ginsburg, Breyer joined); Thomas, J., filed a dissenting opinion (Scalia, Kennedy, and Rehnquist in part).

2003	FEC v. Beaumont	Federal law, consistent since 1907, barring corporations from contributing directly to candidates for federal office, even as the prohibition extends to nonprofit advocacy corporations such as North Carolina Right to Life, upheld as constitutional	7-2 Thomas & Scalia dissenting
2003	McConnell v. FEC	Bipartisan Campaign Reform Act of 2002 (BCRA) (also known as the McCain-Feingold Act) provisions, including those regulating “soft money” and “electioneering communications” prohibited to corporations from general funds and requiring disclosure, generally upheld as constitutional	closely divided & fractured
2006	Randall v. Sorell	Vermont law limiting campaign expenditures and placing \$400 limit on contributions held unconstitutional	6-3 Souter, Ginsberg, Stevens dissenting
2007	FEC v. Wisconsin Right to Life	BCRA prohibition on corporations broadcasting, shortly before an election, any communication that names a federal candidate for elected office and is targeted to the electorate, as applied to the “issue ads” (urging filibuster of judicial nominees) held unconstitutional	5-4
2008	Davis v. FEC	BCRA’s “Millionaire’s Amendment” imposing different campaign contribution limits and disclosure requirements depending on personal funds spent held unconstitutional	5-4

2010	Citizens United v FEC	BRCA's provision (similar to FECA's provision) prohibiting corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an "electioneering communication" or for speech expressly advocating the election or defeat of a candidate held unconstitutional. [ <i>Austin v. Michigan Chamber of Commerce</i> overruled; <i>McConnell v. FEC</i> overruled in part].	5-4 fractured opinions: main opinion - Kennedy, joined by Roberts, Scalia, Alito; Thomas (all but Part IV); Stevens, Ginsburg, Breyer, Sotomayor (only as to Part IV)  excerpted in this Chapter
2011	Arizona Free Enterprise Club Freedom Club PAC v. Bennett	Arizona's matching funds scheme, providing additional funds to a publicly funded candidate when expenditures by a privately financed candidate exceed the funding initially allotted to the publicly financed candidate held unconstitutional.	5-4
2012	American Tradition Partnership v. Bullock	Montana's voter-approved ban on corporations' spending of their own money on political campaigns held unconstitutional. [Decided without oral argument; Montana Supreme Court's opinion conflicted with <i>Citizens United</i> ].	Per curiam; 5-4
2014	McCutcheon v. FEC	BCRA's aggregate campaign contribution limits held unconstitutional	5-4  excerpted in this Chapter

## *Note: Buckley v. Valeo*

In *Buckley v. Valeo* (1976), the Court considered a First Amendment challenge to the Federal Election Campaign Act [FECA], which the per curiam opinion described thusly:

The intricate statutory scheme adopted by Congress to regulate federal election campaigns includes restrictions on political contributions and expenditures that apply broadly to all phases of and all participants in the election process. The major contribution and expenditure limitations in the Act prohibit individuals from contributing more than \$25,000 in a single year or more than \$1,000 to any single candidate for an election campaign and from spending more than \$1,000 a year "relative to a clearly identified candidate." Other provisions restrict a candidate's use of personal and family resources in his campaign and limit the overall amount that can be spent by a candidate in campaigning for federal office.

The Court equated money to (pure) (political) speech. The per curiam opinion rejected the relevancy of *United States v. O'Brien*:

The expenditure of money simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non speech element or to reduce the exacting scrutiny required by the First Amendment.

It also rejected the applicability of "time, place, or manner" doctrine:

The critical difference between this case and those time, place, and manner cases is that the present Act's contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties in addition to any reasonable time, place, and manner regulations otherwise imposed.

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Thus, the Court subjects FECA to "exacting scrutiny." In doing so, it establishes a divide between contributions and expenditures.

In sum, the provisions of the Act that impose a \$1,000 limitation on contributions to a single candidate, 608(b)(1), a \$5,000 limitation on contributions by a political committee to a single candidate, 608(b)(2), and a \$25,000 limitation on total contributions by an individual during any calendar year, 608(b)(3), are constitutionally valid. These limitations, along with the disclosure provisions, constitute the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions. The contribution ceilings thus serve the basic governmental interest in safeguarding the integrity of the electoral process

without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion. By contrast, the First Amendment requires the invalidation of the Act's independent expenditure ceiling, 608 (e) (1), its limitation on a candidate's expenditures from his own personal funds, 608 (a), and its ceilings on overall campaign expenditures, 608 (c). These provisions place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.

## *Citizens United v. Federal Election Commission*

558 U.S. 310 (2010)

KENNEDY, J., DELIVERED THE OPINION OF THE COURT, IN WHICH ROBERTS, C. J., AND SCALIA AND ALITO, JJ., JOINED, IN WHICH THOMAS, J., JOINED AS TO ALL BUT PART IV, AND IN WHICH STEVENS, GINSBURG, BREYER, AND SOTOMAYOR, JJ., JOINED AS TO PART IV. ROBERTS, C. J., FILED A CONCURRING OPINION, IN WHICH ALITO, J., JOINED. SCALIA, J., FILED A CONCURRING OPINION, IN WHICH ALITO, J., JOINED, AND IN WHICH THOMAS, J., JOINED IN PART. STEVENS, J., FILED AN OPINION CONCURRING IN PART AND DISSENTING IN PART, IN WHICH GINSBURG, BREYER, AND SOTOMAYOR, JJ., JOINED. THOMAS, J., FILED AN OPINION CONCURRING IN PART AND DISSENTING IN PART.

JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

Federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an "electioneering communication" or for speech expressly advocating the election or defeat of a candidate. 2 U. S. C. §441b. Limits on electioneering communications were upheld in *McConnell v. Federal Election Comm'n* (2003). The holding of *McConnell* rested to a large extent on an earlier case, *Austin v. Michigan Chamber of Commerce* (1990). *Austin* had held that political speech may be banned based on the speaker's corporate identity.

In this case we are asked to reconsider *Austin* and, in effect, *McConnell*. It has been noted that "*Austin* was a significant departure from ancient First Amendment principles," *Federal Election Comm'n v. Wisconsin Right to Life, Inc., (WRTL)* (2007) (Scalia, J., concurring in part and concurring in judgment). We agree with that conclusion and hold that *stare decisis* does not compel the continued acceptance of *Austin*. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether. We turn to the case now before us.

### I

#### A

Citizens United is a nonprofit corporation \*\*\* [with] an annual budget of about \$12 million. Most of its funds are from donations by individuals; but, in addition, it accepts a small portion of its funds from for-profit corporations.

In January 2008, Citizens United released a film entitled *Hillary: The Movie*. We refer to the film as *Hillary*. It is a 90-minute documentary about then-Senator

Hillary Clinton, who was a candidate in the Democratic Party's 2008 Presidential primary elections. *Hillary* mentions Senator Clinton by name and depicts interviews with political commentators and other persons, most of them quite critical of Senator Clinton. *Hillary* was released in theaters and on DVD, but Citizens United wanted to increase distribution by making it available through video-on-demand.

Video-on-demand allows digital cable subscribers to select programming from various menus, including movies, television shows, sports, news, and music. The viewer can watch the program at any time and can elect to rewind or pause the program. In December 2007, a cable company offered, for a payment of \$1.2 million, to make *Hillary* available on a video-on-demand channel called "Elections '08." Some video-on-demand services require viewers to pay a small fee to view a selected program, but here the proposal was to make *Hillary* available to viewers free of charge.

To implement the proposal, Citizens United was prepared to pay for the video-on-demand; and to promote the film, it produced two 10-second ads and one 30-second ad for *Hillary*. Each ad includes a short (and, in our view, pejorative) statement about Senator Clinton, followed by the name of the movie and the movie's Website address. Citizens United desired to promote the video-on-demand offering by running advertisements on broadcast and cable television.

## B

Before the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibited--and still does prohibit--corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections. 2 U. S. C. §441b (2000 ed.) BCRA §203 amended §441b to prohibit any "electioneering communication" as well. An electioneering communication is defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary or 60 days of a general election. The Federal Election Commission's (FEC) regulations further define an electioneering communication as a communication that is "publicly distributed." "In the case of a candidate for nomination for President ... *publicly distributed* means" that the communication "[c]an be received by 50,000 or more persons in a State where a primary election . . . is being held within 30 days." Corporations and unions are barred from using their general treasury funds for express advocacy or electioneering communications. They may establish, however, a "separate segregated fund" (known as a political action committee, or PAC) for these purposes. The moneys received by the segregated fund are limited to donations from stockholders and employees of the corporation or, in the case of unions, members of the union.

## C

Citizens United wanted to make *Hillary* available through video-on-demand within 30 days of the 2008 primary elections. It feared, however, that both the film and the ads would be covered by §441b's ban on corporate-funded independent expenditures, thus subjecting the corporation to civil and criminal penalties under §437g. In December 2007, Citizens United sought declaratory

and injunctive relief against the FEC. It argued that (1) §441b is unconstitutional as applied to *Hillary*; and (2) BCRA's disclaimer and disclosure requirements, BCRA §§201 and 311, are unconstitutional as applied to *Hillary* and to the three ads for the movie.

\*\*\*

## II

Before considering whether *Austin* should be overruled, we first address whether Citizens United's claim that §441b cannot be applied to *Hillary* may be resolved on other, narrower grounds.

\*\*\*

[T]he Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment. See *Morse v. Frederick* (2007). It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications. Indeed, a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling. Here, the lack of a valid basis for an alternative ruling requires full consideration of the continuing effect of the speech suppression upheld in *Austin*.

## III

\*\*\* The law before us is an outright ban, backed by criminal sanctions. Section 441b makes it a felony for all corporations--including nonprofit advocacy corporations--either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. Thus, the following acts would all be felonies under §441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U. S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech. These prohibitions are classic examples of censorship.

Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. See *McConnell* (opinion of Kennedy, J.). A PAC is a separate association from the corporation. So the PAC exemption from §441b's expenditure ban, §441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak--and it does not--the option to form PACs does not alleviate the First Amendment problems with §441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days.

And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is

about to occur. \*\*\* PACs have to comply with these regulations just to speak. This might explain why fewer than 2,000 of the millions of corporations in this country have PACs. PACs, furthermore, must exist before they can speak. Given the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign.

Section 441b's prohibition on corporate independent expenditures is thus a ban on speech. As a "restriction on the amount of money a person or group can spend on political communication during a campaign," that statute "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley v. Valeo* (1976) (*per curiam*). Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process. See *McConnell* (opinion of Scalia, J.) (Government could repress speech by "attacking all levels of the production and dissemination of ideas," for "effective public communication requires the speaker to make use of the services of others"). If §441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect.

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. See *Buckley* ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential"). The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment " 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Comm.* (1989) (quoting *Monitor Patriot Co. v. Roy* (1971)); see *Buckley*, ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution").

For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *WRTL* (opinion of Roberts, C. J.). While it might be maintained that political speech simply cannot be banned or restricted as a categorical matter, the quoted language from *WRTL* provides a sufficient framework for protecting the relevant First Amendment interests in this case. We shall employ it here.

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. See, *e.g.*, *United States v. Playboy Entertainment Group, Inc.* (2000) (striking down content-based restriction). Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. See *First Nat. Bank of Boston v. Bellotti* (1978). As instruments to censor, these categories are interrelated:

Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each. \*\*\* [I]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes. At least before *Austin*, the Court had not allowed the exclusion of a class of speakers from the general public dialogue.

We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion.

A

1

The Court has recognized that First Amendment protection extends to corporations. *Bellotti* (citing *Linmark Associates, Inc. v. Willingboro* (1977); *Time, Inc. v. Firestone* (1976); *Doran v. Salem Inn, Inc.* (1975); *Southeastern Promotions, Ltd. v. Conrad* (1975); *Cox Broadcasting Corp. v. Cohn* (1975); *Miami Herald Publishing Co. v. Tornillo* (1974); *New York Times Co. v. United States* (1971) (*per curiam*); *Time, Inc. v. Hill* (1967); *New York Times Co. v. Sullivan* (1964); *Kingsley Int'l Pictures Corp. v. Regents of Univ. of N. Y.* (1959); *Joseph Burstyn, Inc. v. Wilson* (1952)); see, e.g., *Turner Broadcasting System, Inc. v. FCC* (1997); *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC* (1996); *Turner Broadcasting System, Inc. v. FCC* (1994); *Simon & Schuster v. Crime Victims Board* (1991); *Sable Communications of Cal., Inc. v. FCC* (1989); *Florida Star v. B. J. F.* (1989); *Philadelphia Newspapers, Inc. v. Hepps* (1986); *Landmark Communications, Inc. v. Virginia* (1978); *Young v. American Mini Theatres, Inc.*, (1976); *Gertz v. Robert Welch, Inc.*, (1974); *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler* (1970).

This protection has been extended by explicit holdings to the context of political speech. See, e.g., *NAACP v. Button* (1963); *Grosjean v. American Press Co.* (1936). Under the rationale of these precedents, political speech does not lose First Amendment protection "simply because its source is a corporation." *Bellotti* ("The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster"). The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not "natural persons."

\*\*\*

## B

The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post-*Austin* line that permits them. No case before *Austin* had held that Congress could prohibit independent expenditures for political speech based on the speaker's corporate identity. Before *Austin* Congress had enacted legislation for this purpose, and the Government urged the same proposition before this Court. In neither of these cases did the Court adopt the proposition.

In its defense of the corporate-speech restrictions in §441b, the Government notes the antidistortion rationale on which *Austin* and its progeny rest in part, yet it all but abandons reliance upon it. It argues instead that two other compelling interests support *Austin's* holding that corporate expenditure restrictions are constitutional: an anticorruption interest and a shareholder-protection interest. We consider the three points in turn.

### 1

As for *Austin's* antidistortion rationale, the Government does little to defend it. See Tr. of Oral Arg. 45-48 (Sept. 9, 2009). And with good reason, for the rationale cannot support §441b.

If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form. The Government contends that *Austin* permits it to ban corporate expenditures for almost all forms of communication stemming from a corporation. If *Austin* were correct, the Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books. The Government responds "that the FEC has never applied this statute to a book," and if it did, "there would be quite [a] good as-applied challenge." This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure.

\*\*\* *Austin's* antidistortion rationale would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations.

\*\*\* When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.

### 2

What we have said also shows the invalidity of other arguments made by the Government. For the most part relinquishing the antidistortion rationale, the

Government falls back on the argument that corporate political speech can be banned in order to prevent corruption or its appearance.

\*\*\*

The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. See *Buckley*. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse "to take part in democratic governance" because of additional political speech made by a corporation or any other speaker. *McConnell*.

*Caperton v. A. T. Massey Coal Co.* (2009), is not to the contrary. *Caperton* held that a judge was required to recuse himself "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." The remedy of recusal was based on a litigant's due process right to a fair trial before an unbiased judge. *Caperton's* holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned. \*\*\*

3

The Government contends further that corporate independent expenditures can be limited because of its interest in protecting dissenting shareholders from being compelled to fund corporate political speech. This asserted interest, like *Austin's* antidistortion rationale, would allow the Government to ban the political speech even of media corporations. Assume, for example, that a shareholder of a corporation that owns a newspaper disagrees with the political views the newspaper expresses. Under the Government's view, that potential disagreement could give the Government the authority to restrict the media corporation's political speech. The First Amendment does not allow that power. There is, furthermore, little evidence of abuse that cannot be corrected by shareholders "through the procedures of corporate democracy." *Bellotti*.

Those reasons are sufficient to reject this shareholder-protection interest; and, moreover, the statute is both underinclusive and overinclusive. As to the first, if Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election. A dissenting shareholder's interests would be implicated by speech in any media at any time. As to the second, the statute is overinclusive because it covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders. As to other corporations, the remedy is not to restrict speech but to consider and explore other regulatory mechanisms. The regulatory mechanism here, based on speech, contravenes the First Amendment.

4

We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our

Nation's political process. Cf. 2 U. S. C. §441e (contribution and expenditure ban applied to "foreign national[s]"). Section 441b is not limited to corporations or associations that were created in foreign countries or funded predominately by foreign shareholders. Section 441b therefore would be overbroad even if we assumed, *arguendo*, that the Government has a compelling interest in limiting foreign influence over our political process. \*\*\*

C

\*\*\*

Due consideration leads to this conclusion: *Austin* should be and now is overruled. We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.

JUSTICE STEVENS, WITH WHOM JUSTICE GINSBURG, JUSTICE BREYER, AND JUSTICE SOTOMAYOR JOIN, CONCURRING IN PART AND DISSENTING IN PART.

The real issue in this case concerns how, not if, the appellant may finance its electioneering. Citizens United is a wealthy nonprofit corporation that runs a political action committee (PAC) with millions of dollars in assets. Under the Bipartisan Campaign Reform Act of 2002 (BCRA), it could have used those assets to televise and promote *Hillary: The Movie* wherever and whenever it wanted to. It also could have spent unrestricted sums to broadcast *Hillary* at any time other than the 30 days before the last primary election. Neither Citizens United's nor any other corporation's speech has been "banned." All that the parties dispute is whether Citizens United had a right to use the funds in its general treasury to pay for broadcasts during the 30-day period. The notion that the First Amendment dictates an affirmative answer to that question is, in my judgment, profoundly misguided. Even more misguided is the notion that the Court must rewrite the law relating to campaign expenditures by *for-profit* corporations and unions to decide this case.

The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its "identity" as a corporation. While that glittering generality has rhetorical appeal, it is not a correct statement of the law. Nor does it tell us when a corporation may engage in electioneering that some of its shareholders oppose. It does not even resolve the specific question whether Citizens United may be required to finance some of its messages with the money in its PAC. The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case.

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process.

Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races. \*\*\*

I regret the length of what follows, but the importance and novelty of the Court's opinion require a full response. Although I concur in the Court's decision to sustain BCRA's disclosure provisions and join Part IV of its opinion, I emphatically dissent from its principal holding.

#### I

The Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution. Before turning to the question whether to overrule *Austin* and part of *McConnell*, it is important to explain why the Court should not be deciding that question.

\*\*\*

#### V

Today's decision is backwards in many senses. It elevates the majority's agenda over the litigants' submissions, facial attacks over as-applied claims, broad constitutional theories over narrow statutory grounds, individual dissenting opinions over precedential holdings, assertion over tradition, absolutism over empiricism, rhetoric over reality. Our colleagues have arrived at the conclusion that *Austin* must be overruled and that §203 is facially unconstitutional only after mischaracterizing both the reach and rationale of those authorities, and after bypassing or ignoring rules of judicial restraint used to cabin the Court's lawmaking power. Their conclusion that the societal interest in avoiding corruption and the appearance of corruption does not provide an adequate justification for regulating corporate expenditures on candidate elections relies on an incorrect description of that interest, along with a failure to acknowledge the relevance of established facts and the considered judgments of state and federal legislatures over many decades.

In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules. The majority's rejection of this principle "elevate[s] corporations to a level of deference which has not been seen at least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon established economic interests." *Bellotti* (White, J., dissenting). At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.

I would affirm the judgment of the District Court.

## *McCutcheon v. Federal Election Commission*

572 U.S. \_\_\_\_ (2014)

ROBERTS, C. J., ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED AN OPINION, IN WHICH SCALIA, KENNEDY, AND ALITO, JJ., JOINED. THOMAS, J., FILED AN OPINION CONCURRING IN THE JUDGMENT. BREYER, J., FILED A DISSENTING OPINION, IN WHICH GINSBURG, SOTOMAYOR, AND KAGAN, JJ., JOINED.

CHIEF JUSTICE ROBERTS, ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED AN OPINION, IN WHICH JUSTICE SCALIA, JUSTICE KENNEDY, AND JUSTICE ALITO JOIN.

There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign. This case is about the last of those options.

The right to participate in democracy through political contributions is protected by the First Amendment, but that right is not absolute. Our cases have held that Congress may regulate campaign contributions to protect against corruption or the appearance of corruption. See, e.g., *Buckley v. Valeo* (1976) (*per curiam*). At the same time, we have made clear that Congress may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others. See, e.g., *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011).

Many people might find those latter objectives attractive: They would be delighted to see fewer television commercials touting a candidate's accomplishments or disparaging an opponent's character. Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects. If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition. See *Texas v. Johnson* (1989); *Snyder v. Phelps* (2011); *National Socialist Party of America v. Skokie* (1977) (*per curiam*). Indeed, as we have emphasized, the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy* (1971).

In a series of cases over the past 40 years, we have spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply to limit political speech. We have said that government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. "Ingratiation and access. . . are not corruption." *Citizens United v. Federal Election Comm'n* (2010). They embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.

Any regulation must instead target what we have called "*quid pro quo*" corruption or its appearance. See *id.* That Latin phrase captures the notion of a direct exchange of an official act for money. See *McCormick v. United States* (1991). "The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Federal Election Comm'n v. National Conservative Political Action Comm.* (1985). Campaign finance restrictions that pursue other objectives, we have explained, impermissibly inject the Government "into the debate over who should govern." *Bennett*. And those who govern should be the *last* people to help decide who *should* govern.

The statute at issue in this case imposes two types of limits on campaign contributions. The first, called base limits, restricts how much money a donor may contribute to a particular candidate or committee. 2 U. S. C. §441a(a)(1). The second, called aggregate limits, restricts how much money a donor may contribute in total to all candidates or committees. §441a(a)(3).

This case does not involve any challenge to the base limits, which we have previously upheld as serving the permissible objective of combatting corruption. The Government contends that the aggregate limits also serve that objective, by preventing circumvention of the base limits. We conclude, however, that the aggregate limits do little, if anything, to address that concern, while seriously restricting participation in the democratic process. The aggregate limits are therefore invalid under the First Amendment.

## I

### A

For the 2013-2014 election cycle, the base limits in the Federal Election Campaign Act of 1971 (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), permit an individual to contribute up to \$2,600 per election to a candidate (\$5,200 total for the primary and general elections); \$32,400 per year to a national party committee; \$10,000 per year to a state or local party committee; and \$5,000 per year to a political action committee, or "PAC." 2 U. S. C. §441a(a)(1); 78 Fed. Reg. 8532 (2013). A national committee, state or local party committee, or multicandidate PAC may in turn contribute up to \$5,000 per election to a candidate. §441a(a)(2).

The base limits apply with equal force to contributions that are "in any way earmarked or otherwise directed through an intermediary or conduit" to a candidate. §441a(a)(8). If, for example, a donor gives money to a party committee but directs the party committee to pass the contribution along to a particular candidate, then the transaction is treated as a contribution from the original donor to the specified candidate.

For the 2013-2014 election cycle, the aggregate limits in BCRA permit an individual to contribute a total of \$48,600 to federal candidates and a total of \$74,600 to other political committees. Of that \$74,600, only \$48,600 may be contributed to state or local party committees and PACs, as opposed to national party committees. §441a(a)(3); 78 Fed. Reg. 8532. All told, an individual may contribute up to \$123,200 to candidate and noncandidate committees during each two-year election cycle.

The base limits thus restrict how much money a donor may contribute to any particular candidate or committee; the aggregate limits have the effect of

restricting how many candidates or committees the donor may support, to the extent permitted by the base limits.

## B

In the 2011-2012 election cycle, appellant Shaun McCutcheon contributed a total of \$33,088 to 16 different federal candidates, in compliance with the base limits applicable to each. He alleges that he wished to contribute \$1,776 to each of 12 additional candidates but was prevented from doing so by the aggregate limit on contributions to candidates. McCutcheon also contributed a total of \$27,328 to several noncandidate political committees, in compliance with the base limits applicable to each. He alleges that he wished to contribute to various other political committees, including \$25,000 to each of the three Republican national party committees, but was prevented from doing so by the aggregate limit on contributions to political committees. McCutcheon further alleges that he plans to make similar contributions in the future. In the 2013-2014 election cycle, he again wishes to contribute at least \$60,000 to various candidates and \$75,000 to non-candidate political committees.

Appellant Republican National Committee is a national political party committee charged with the general management of the Republican Party. The RNC wishes to receive the contributions that McCutcheon and similarly situated individuals would like to make—contributions otherwise permissible under the base limits for national party committees but foreclosed by the aggregate limit on contributions to political committees.

In June 2012, McCutcheon and the RNC filed a complaint before a three-judge panel of the U. S. District Court for the District of Columbia. McCutcheon and the RNC asserted that the aggregate limits on contributions to candidates and to noncandidate political committees were unconstitutional under the First Amendment. They moved for a preliminary injunction against enforcement of the challenged provisions, and the Government moved to dismiss the case.

The three-judge District Court denied appellants' motion for a preliminary injunction and granted the Government's motion to dismiss. Assuming that the base limits appropriately served the Government's anticorruption interest, the District Court concluded that the aggregate limits survived First Amendment scrutiny because they prevented evasion of the base limits.

In particular, the District Court imagined a hypothetical scenario that might occur in a world without aggregate limits. A single donor might contribute the maximum amount under the base limits to nearly 50 separate committees, each of which might then transfer the money to the same single committee. That committee, in turn, might use all the transferred money for coordinated expenditures on behalf of a particular candidate, allowing the single donor to circumvent the base limit on the amount he may contribute to that candidate. The District Court acknowledged that "it may seem unlikely that so many separate entities would willingly serve as conduits" for the single donor's interests, but it concluded that such a scenario "is not hard to imagine." It thus rejected a constitutional challenge to the aggregate limits, characterizing the base limits and the aggregate limits "as a coherent system rather than merely a collection of individual limits stacking prophylaxis upon prophylaxis."

McCutcheon and the RNC appealed directly to this Court, as authorized by law. In such a case, "we ha[ve] no discretion to refuse adjudication of the case on its merits," and accordingly we noted probable jurisdiction.

## II

### A

*Buckley v. Valeo* presented this Court with its first opportunity to evaluate the constitutionality of the original contribution and expenditure limits set forth in FECA. FECA imposed a \$1,000 per election base limit on contributions from an individual to a federal candidate. It also imposed a \$25,000 per year aggregate limit on all contributions from an individual to candidates or political committees. 18 U. S. C. §§608(b)(1), 608(b)(3) (1970 ed., Supp. IV). On the expenditures side, FECA imposed limits on both independent expenditures and candidates' overall campaign expenditures. §§608(e)(1), 608(c).

*Buckley* recognized that "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." But it distinguished expenditure limits from contribution limits based on the degree to which each encroaches upon protected First Amendment interests. Expenditure limits, the Court explained, "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." The Court thus subjected expenditure limits to "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." Under exacting scrutiny, the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest.

By contrast, the Court concluded that contribution limits impose a lesser restraint on political speech because they "permit[] the symbolic expression of support evidenced by a contribution but do[] not in any way infringe the contributor's freedom to discuss candidates and issues." *Buckley*. As a result, the Court focused on the effect of the contribution limits on the freedom of political association and applied a lesser but still "rigorous standard of review." *Id.* Under that standard, "[e]ven a 'significant interference' with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Id.*

The primary purpose of FECA was to limit *quid pro quo* corruption and its appearance; that purpose satisfied the requirement of a "sufficiently important" governmental interest. As for the "closely drawn" component, *Buckley* concluded that the \$1,000 base limit "focuses precisely on the problem of large campaign contributions. . . while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." *Id.* The Court therefore upheld the \$1,000 base limit under the "closely drawn" test.

The Court next separately considered an overbreadth challenge to the base limit. The challengers argued that the base limit was fatally overbroad because most large donors do not seek improper influence over legislators' actions. Although the Court accepted that premise, it nevertheless rejected the overbreadth

challenge for two reasons: First, it was too "difficult to isolate suspect contributions" based on a contributor's subjective intent. Second, "Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated."

Finally, in one paragraph of its 139-page opinion, the Court turned to the \$25,000 aggregate limit under FECA. As a preliminary matter, it noted that the constitutionality of the aggregate limit "ha[d] not been separately addressed at length by the parties." Then, in three sentences, the Court disposed of any constitutional objections to the aggregate limit that the challengers might have had:

"The overall \$25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity serves to prevent evasion of the \$1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid."

B

1

The parties and *amici curiae* spend significant energy debating whether the line that *Buckley* drew between contributions and expenditures should remain the law. Notwithstanding the robust debate, we see no need in this case to revisit *Buckley's* distinction between contributions and expenditures and the corollary distinction in the applicable standards of review. *Buckley* held that the Government's interest in preventing *quid pro quo* corruption or its appearance was "sufficiently important"; we have elsewhere stated that the same interest may properly be labeled "compelling," see *National Conservative Political Action Comm.*, so that the interest would satisfy even strict scrutiny. Moreover, regardless whether we apply strict scrutiny or *Buckley's* "closely drawn" test, we must assess the fit between the stated governmental objective and the means selected to achieve that objective. See, e.g., *National Conservative Political Action Comm.*; *Randall v. Sorrell* (2006) (opinion of Breyer, J.). Or to put it another way, if a law that restricts political speech does not "avoid unnecessary abridgement" of First Amendment rights, *Buckley*, it cannot survive "rigorous" review.

Because we find a substantial mismatch between the Government's stated objective and the means selected to achieve it, the aggregate limits fail even under the "closely drawn" test. We therefore need not parse the differences between the two standards in this case.

2

*Buckley* treated the constitutionality of the \$25,000 aggregate limit as contingent upon that limit's ability to prevent circumvention of the \$1,000 base

limit, describing the aggregate limit as "no more than a corollary" of the base limit. The Court determined that circumvention could occur when an individual legally contributes "massive amounts of money to a particular candidate through the use of unearmarked contributions" to entities that are themselves likely to contribute to the candidate. For that reason, the Court upheld the \$25,000 aggregate limit.

Although *Buckley* provides some guidance, we think that its ultimate conclusion about the constitutionality of the aggregate limit in place under FECA does not control here. *Buckley* spent a total of three sentences analyzing that limit; in fact, the opinion pointed out that the constitutionality of the aggregate limit "ha[d] not been separately addressed at length by the parties." We are now asked to address appellants' direct challenge to the aggregate limits in place under BCRA. BCRA is a different statutory regime, and the aggregate limits it imposes operate against a distinct legal backdrop.

Most notably, statutory safeguards against circumvention have been considerably strengthened since *Buckley* was decided, through both statutory additions and the introduction of a comprehensive regulatory scheme. With more targeted anticircumvention measures in place today, the indiscriminate aggregate limits under BCRA appear particularly heavy-handed.

The 1976 FECA Amendments, for example, added another layer of base contribution limits. The 1974 version of FECA had already capped contributions *from* political committees to candidates, but the 1976 version added limits on contributions *to* political committees. This change was enacted at least "in part to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*." *California Medical Assn. v. Federal Election Comm'n* (1981) (plurality opinion); see also *id.*, (Blackmun, J., concurring in part and concurring in judgment). Because a donor's contributions to a political committee are now limited, a donor cannot flood the committee with "huge" amounts of money so that each contribution the committee makes is perceived as a contribution from him. *Buckley, supra*, at 38. Rather, the donor may contribute only \$5,000 to the committee, which hardly raises the specter of abuse that concerned the Court in *Buckley*. Limits on contributions to political committees consequently create an additional hurdle for a donor who seeks both to channel a large amount of money to a particular candidate and to ensure that he gets the credit for doing so.

The 1976 Amendments also added an antiproliferation rule prohibiting donors from creating or controlling multiple affiliated political committees. See 2 U. S. C. §441a(a)(5); 11 CFR §100.5(g)(4). The Government acknowledges that this antiproliferation rule "forecloses what would otherwise be a particularly easy and effective means of circumventing the limits on contributions to any particular political committee." In effect, the rule eliminates a donor's ability to create and use his own political committees to direct funds in excess of the individual base limits. It thus blocks a straightforward method of achieving the circumvention that was the underlying concern in *Buckley*.

The intricate regulatory scheme that the Federal Election Commission has enacted since *Buckley* further limits the opportunities for circumvention of the base limits via "unearmarked contributions to political committees likely to

contribute" to a particular candidate. Although the earmarking provision was in place when *Buckley* was decided, the FEC has since added regulations that define earmarking broadly. For example, the regulations construe earmarking to include any designation, "whether direct or indirect, express or implied, oral or written." 11 CFR §110.6(b)(1). The regulations specify that an individual who has contributed to a particular candidate may not also contribute to a single-candidate committee for that candidate. §110.1(h)(1). Nor may an individual who has contributed to a candidate also contribute to a political committee that has supported or anticipates supporting the same candidate, if the individual knows that "a substantial portion [of his contribution] will be contributed to, or expended on behalf of," that candidate. §110.1(h)(2).

In addition to accounting for statutory and regulatory changes in the campaign finance arena, appellants' challenge raises distinct legal arguments that *Buckley* did not consider. For example, presumably because of its cursory treatment of the \$25,000 aggregate limit, *Buckley* did not separately address an overbreadth challenge with respect to that provision. The Court rejected such a challenge to the *base* limits because of the difficulty of isolating suspect contributions. The propriety of large contributions to individual candidates turned on the subjective intent of donors, and the Court concluded that there was no way to tell which donors sought improper influence over legislators' actions. The aggregate limit, on the other hand, was upheld as an anticircumvention measure, without considering whether it was possible to discern which donations might be used to circumvent the base limits. The Court never addressed overbreadth in the specific context of aggregate limits, where such an argument has far more force.

Given the foregoing, this case cannot be resolved merely by pointing to three sentences in *Buckley* that were written without the benefit of full briefing or argument on the issue. We are confronted with a different statute and different legal arguments, at a different point in the development of campaign finance regulation. Appellants' substantial First Amendment challenge to the system of aggregate limits currently in place thus merits our plenary consideration.

### III

The First Amendment "is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen v. California* (1971). As relevant here, the First Amendment safeguards an individual's right to participate in the public debate through political expression and political association. See *Buckley*. When an individual contributes money to a candidate, he exercises both of those rights: The contribution "serves as a general expression of support for the candidate and his views" and "serves to affiliate a person with a candidate." *Id.*

Those First Amendment rights are important regardless whether the individual is, on the one hand, a "lone pamphleteer[] or street corner orator[] in the Tom Paine mold," or is, on the other, someone who spends "substantial amounts of money in order to communicate [his] political ideas through sophisticated" means. *National Conservative Political Action Comm.* Either way, he is

participating in an electoral debate that we have recognized is "integral to the operation of the system of government established by our Constitution." *Buckley*.

*Buckley* acknowledged that aggregate limits at least diminish an individual's right of political association. As the Court explained, the "overall \$25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." But the Court characterized that restriction as a "quite modest restraint upon protected political activity." We cannot agree with that characterization. An aggregate limit on *how many* candidates and committees an individual may support through contributions is not a "modest restraint" at all. The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.

To put it in the simplest terms, the aggregate limits prohibit an individual from fully contributing to the primary and general election campaigns of ten or more candidates, even if all contributions fall within the base limits Congress views as adequate to protect against corruption. The individual may give up to \$5,200 each to nine candidates, but the aggregate limits constitute an outright ban on further contributions to any other candidate (beyond the additional \$1,800 that may be spent before reaching the \$48,600 aggregate limit). At that point, the limits deny the individual all ability to exercise his expressive and associational rights by contributing to someone who will advocate for his policy preferences. A donor must limit the number of candidates he supports, and may have to choose which of several policy concerns he will advance—clear First Amendment harms that the dissent never acknowledges.

It is no answer to say that the individual can simply contribute less money to more people. To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process. And as we have recently admonished, the Government may not penalize an individual for "robustly exercis[ing]" his First Amendment rights. *Davis v. Federal Election Comm'n* (2008).

The First Amendment burden is especially great for individuals who do not have ready access to alternative avenues for supporting their preferred politicians and policies. In the context of base contribution limits, *Buckley* observed that a supporter could vindicate his associational interests by personally volunteering his time and energy on behalf of a candidate. Such personal volunteering is not a realistic alternative for those who wish to support a wide variety of candidates or causes. Other effective methods of supporting preferred candidates or causes without contributing money are reserved for a select few, such as entertainers capable of raising hundreds of thousands of dollars in a single evening.

The dissent faults this focus on "the individual's right to engage in political speech," saying that it fails to take into account "the public's interest" in "collective speech." (opinion of BREYER, J). This "collective" interest is said to promote "a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects."

But there are compelling reasons not to define the boundaries of the First Amendment by reference to such a generalized conception of the public good. First, the dissent's "collective speech" reflected in laws is of course the will of the majority, and plainly can include laws that restrict free speech. The whole point of the First Amendment is to afford individuals protection against such infringements. The First Amendment does not protect the government, even when the government purports to act through legislation reflecting "collective speech." Cf. *United States v. Alvarez*, (2012); *Wooley v. Maynard* (1977); *West Virginia Bd. of Ed. v. Barnette* (1943).

Second, the degree to which speech is protected cannot turn on a legislative or judicial determination that particular speech is useful to the democratic process. The First Amendment does not contemplate such "ad hoc balancing of relative social costs and benefits." *United States v. Stevens* (2010); see also *United States v. Playboy Entertainment Group, Inc.* (2000) ("What the Constitution says is that" value judgments "are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority").

Third, our established First Amendment analysis already takes account of any "collective" interest that may justify restrictions on individual speech. Under that accepted analysis, such restrictions are measured against the asserted public interest (usually framed as an important or compelling governmental interest). As explained below, we do not doubt the compelling nature of the "collective" interest in preventing corruption in the electoral process. But we permit Congress to pursue that interest only so long as it does not unnecessarily infringe an individual's right to freedom of speech; we do not truncate this tailoring test at the outset.

#### IV

##### A

With the significant First Amendment costs for individual citizens in mind, we turn to the governmental interests asserted in this case. This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption. See *Davis*; *National Conservative Political Action Comm.* We have consistently rejected attempts to suppress campaign speech based on other legislative objectives. No matter how desirable it may seem, it is not an acceptable governmental objective to "level the playing field," or to "level electoral opportunities," or to "equaliz[e] the financial resources of candidates." *Bennett*; *Davis*; *Buckley*. The First Amendment prohibits such legislative attempts to "fine-tun[e]" the electoral process, no matter how well intentioned. *Bennett*.

As we framed the relevant principle in *Buckley*, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." The dissent's suggestion that *Buckley* supports the opposite proposition, simply ignores what *Buckley* actually said on the matter. See also *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley* (1981) ("*Buckley*. . . made clear that contributors cannot be protected from the possibility that others will make larger contributions").

Moreover, while preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption—"quid pro quo" corruption. As *Buckley* explained, Congress may permissibly seek to rein in "large contributions [that] are given to secure a political quid pro quo from current and potential office holders." In addition to "actual quid pro quo arrangements," Congress may permissibly limit "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions" to particular candidates. see also *Citizens United* ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption").

Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such quid pro quo corruption. Nor does the possibility that an individual who spends large sums may garner "influence over or access to" elected officials or political parties. And because the Government's interest in preventing the appearance of corruption is equally confined to the appearance of quid pro quo corruption, the Government may not seek to limit the appearance of mere influence or access. See *Citizens United*.

The dissent advocates a broader conception of corruption, and would apply the label to any individual contributions above limits deemed necessary to protect "collective speech." Thus, under the dissent's view, it is perfectly fine to contribute \$5,200 to nine candidates but somehow corrupt to give the same amount to a tenth.

It is fair to say, as Justice Stevens has, "that we have not always spoken about corruption in a clear or consistent voice." *Citizens United* (opinion concurring in part and dissenting in part). The definition of corruption that we apply today, however, has firm roots in *Buckley* itself. The Court in that case upheld base contribution limits because they targeted "the danger of actual quid pro quo arrangements" and "the impact of the appearance of corruption stemming from public awareness" of such a system of unchecked direct contributions. *Buckley* simultaneously rejected limits on spending that was less likely to "be given as a quid pro quo for improper commitments from the candidate." In any event, this case is not the first in which the debate over the proper breadth of the Government's anticorruption interest has been engaged.

The line between quid pro quo corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights. In addition, "[i]n drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *Federal Election Comm'n v. Wisconsin Right to Life* (2007) (opinion of ROBERTS, C. J.).

The dissent laments that our opinion leaves only remnants of FECA and BCRA that are inadequate to combat corruption. Such rhetoric ignores the fact that we leave the base limits undisturbed. Those base limits remain the primary means of regulating campaign contributions—the obvious explanation for why the aggregate limits received a scant few sentences of attention in *Buckley*.

## B

"When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." Here, the Government seeks to carry that burden by arguing that the aggregate limits further the permissible objective of preventing *quid pro quo* corruption.

The difficulty is that once the aggregate limits kick in, they ban all contributions of *any* amount. But Congress's selection of a \$5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption. If there is no corruption concern in giving nine candidates up to \$5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given \$1,801, and all others corruptible if given a dime. And if there is no risk that additional candidates will be corrupted by donations of up to \$5,200, then the Government must defend the aggregate limits by demonstrating that they prevent circumvention of the base limits.

The problem is that they do not serve that function in any meaningful way. In light of the various statutes and regulations currently in effect, *Buckley's* fear that an individual might "contribute massive amounts of money to a particular candidate through the use of unearmarked contributions" to entities likely to support the candidate is far too speculative. And—importantly—we "have never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon v. Shrink Missouri Government PAC* (2000).

As an initial matter, there is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly. \*\*\*

*Buckley* nonetheless focused on the possibility that "unearmarked contributions" could eventually find their way to a candidate's coffers. Even accepting the validity of *Buckley's* circumvention theory, it is hard to see how a candidate today could receive a "massive amount[] of money" that could be traced back to a particular contributor uninhibited by the aggregate limits. The Government offers a series of scenarios in support of that possibility. But each is sufficiently implausible that the Government has not carried its burden of demonstrating that the aggregate limits further its anticircumvention interest.

The primary example of circumvention, in one form or another, envisions an individual donor who contributes the maximum amount under the base limits to a particular candidate, say, Representative Smith. Then the donor also channels "massive amounts of money" to Smith through a series of contributions to PACs that have stated their intention to support Smith.

Various earmarking and antiproliferation rules disarm this example. Importantly, the donor may not contribute to the most obvious PACs: those that support only Smith. Nor may the donor contribute to the slightly less obvious PACs that he knows will route "a substantial portion" of his contribution to Smith.

The donor must instead turn to other PACs that are likely to give to Smith. When he does so, however, he discovers that his contribution will be significantly diluted by all the contributions from others to the same PACs.

After all, the donor cannot give more than \$5,000 to a PAC and so cannot dominate the PAC's total receipts, as he could when *Buckley* was decided. He cannot retain control over his contribution, direct his money "in any way" to Smith, or even *imply* that he would like his money to be recontributed to Smith. His salience as a Smith supporter has been diminished, and with it the potential for corruption.

It is not clear how many candidates a PAC must support before our dedicated donor can avoid being tagged with the impermissible knowledge that "a substantial portion" of his contribution will go to Smith. But imagine that the donor is one of ten equal donors to a PAC that gives the highest possible contribution to Smith. The PAC may give no more than \$2,600 per election to Smith. Of that sum, just \$260 will be attributable to the donor intent on circumventing the base limits. Thus far he has hardly succeeded in funneling "massive amounts of money" to Smith. *Buckley*.

But what if this donor does the same thing via, say, 100 different PACs? His \$260 contribution will balloon to \$26,000, ten times what he may contribute directly to Smith in any given election.

This 100-PAC scenario is highly implausible. In the first instance, it is not true that the individual donor will necessarily have access to a sufficient number of PACs to effectuate such a scheme. There are many PACs, but they are not limitless. For the 2012 election cycle, the FEC reported about 2,700 nonconnected PACs (excluding PACs that finance independent expenditures only). And not every PAC that supports Smith will work in this scheme: For our donor's pro rata share of a PAC's contribution to Smith to remain meaningful, the PAC must be funded by only a small handful of donors. The antiproliferation rules, which were not in effect when *Buckley* was decided, prohibit our donor from creating 100 pro-Smith PACs of his own, or collaborating with the nine other donors to do so. See 2 U. S. C. §441a(a)(5) ("all contributions made by political committees established or financed or maintained or controlled by . . . any other person, or by any group of such persons, shall be considered to have been made by a single political committee").

Moreover, if 100 PACs were to contribute to Smith and few other candidates, and if specific individuals like our ardent Smith supporter were to contribute to each, the FEC could weigh those "circumstantial factors" to determine whether to deem the PACs affiliated. The FEC's analysis could take account of a "common or overlapping membership" and "similar patterns of contributions or contributors," among other considerations. The FEC has in the past initiated enforcement proceedings against contributors with such suspicious patterns of PAC donations. See, *e.g.*, Conciliation Agreement, *In re Riley*, Matters Under Review 4568, 4633, 4634, 4736 (FEC, Dec. 19, 2001).

On a more basic level, it is hard to believe that a rational actor would engage in such machinations. In the example described, a dedicated donor spent \$500,000—donating the full \$5,000 to 100 different PACs—to add just \$26,000 to Smith's campaign coffers. That same donor, meanwhile, could have spent unlimited funds on independent expenditures on behalf of Smith. Indeed, he could have spent his entire \$500,000 advocating for Smith, without the risk

that his selected PACs would choose not to give to Smith, or that he would have to share credit with other contributors to the PACs.

We have said in the context of independent expenditures that "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . undermines the value of the expenditure to the candidate." *Citizens United* (quoting *Buckley*). But probably not by 95 percent. And at least from the donor's point of view, it strikes us as far more likely that he will want to see his full \$500,000 spent on behalf of his favored candidate—even if it must be spent independently—rather than see it diluted to a small fraction so that it can be contributed directly by someone else.

Another circumvention example \*\*\*

*Buckley* upheld aggregate limits only on the ground that they prevented channeling money to candidates beyond the base limits. The absence of such a prospect today belies the Government's asserted objective of preventing corruption or its appearance. The improbability of circumvention indicates that the aggregate limits instead further the impermissible objective of simply limiting the amount of money in political campaigns.

### C

Quite apart from the foregoing, the aggregate limits violate the First Amendment because they are not "closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley*. In the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Board of Trustees of State Univ. of N. Y. v. Fox* (1989). Here, because the statute is poorly tailored to the Government's interest in preventing circumvention of the base limits, it impermissibly restricts participation in the political process.

### 1

The Government argues that the aggregate limits are justified because they prevent an individual from giving to too many initial recipients who might subsequently re-contribute a donation. After all, only re-contributed funds can conceivably give rise to circumvention of the base limits. Yet all indications are that many types of recipients have scant interest in gifting donations they receive.

Some figures might be useful to put the risk of circumvention in perspective. We recognize that no data can be marshaled to capture perfectly the counterfactual world in which aggregate limits do not exist. But, as we have noted elsewhere, we can nonetheless ask "whether experience under the present law confirms a serious threat of abuse." *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.* (2001). It does not. Experience suggests that the vast majority of contributions made in excess of the aggregate limits are likely to be retained and spent by their recipients rather than rerouted to candidates.

In the 2012 election cycle, federal candidates, political parties, and PACs spent a total of \$7 billion, according to the FEC. In particular, each national political party's spending ran in the hundreds of millions of dollars. The National Republican Senatorial Committee (NRSC), National Republican Congressional Committee (NRCC), Democratic Senatorial Campaign Committee (DSCC), and Democratic Congressional Campaign Committee (DCCC), however, spent less than \$1 million each on direct candidate contributions and less than \$10 million each on coordinated expenditures. Brief for NRSC et al. as *Amici Curiae* 23, 25 (NRSC Brief). Including both coordinated expenditures and direct candidate contributions, the NRSC and DSCC spent just 7% of their total funds on contributions to candidates and the NRCC and DCCC spent just 3%.

Likewise, as explained previously, state parties rarely contribute to candidates in other States. In the 2012 election cycle, the Republican and Democratic state party committees in all 50 States (and the District of Columbia) contributed a paltry \$17,750 to House and Senate candidates in other States. The state party committees spent over half a billion dollars over the same time period, of which the \$17,750 in contributions to other States' candidates constituted just 0.003%.

As with national and state party committees, candidates contribute only a small fraction of their campaign funds to other candidates. \*\*\*

Based on what we can discern from experience, the indiscriminate ban on all contributions above the aggregate limits is disproportionate to the Government's interest in preventing circumvention. The Government has not given us any reason to believe that parties or candidates would dramatically shift their priorities if the aggregate limits were lifted. Absent such a showing, we cannot conclude that the sweeping aggregate limits are appropriately tailored to guard against any contributions that might implicate the Government's anticircumvention interest.

A final point: It is worth keeping in mind that the *base limits* themselves are a prophylactic measure. As we have explained, "restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements." *Citizens United*. The aggregate limits are then layered on top, ostensibly to prevent circumvention of the base limits. This "prophylaxis-upon-prophylaxis approach" requires that we be particularly diligent in scrutinizing the law's fit. *Wisconsin Right to Life* (opinion of ROBERTS, C. J.); see *McConnell* (opinion of THOMAS, J.).

2

Importantly, there are multiple alternatives available to Congress that would serve the Government's anticircumvention interest, while avoiding "unnecessary abridgment" of First Amendment rights. *Buckley*.

The most obvious might involve targeted restrictions on transfers among candidates and political committees. There are currently no such limits on transfers among party committees and from candidates to party committees. \*\*\*

One possible option for restricting transfers would be to require contributions above the current aggregate limits to be deposited into segregated, nontransferable accounts and spent only by their recipients. Such a solution

would address the same circumvention possibilities as the current aggregate limits, while not completely barring contributions beyond the aggregate levels. In addition (or as an alternative), if Congress believes that circumvention is especially likely to occur through creation of a joint fundraising committee, it could require that funds received through those committees be spent by their recipients (or perhaps it could simply limit the size of joint fundraising committees). Such alternatives to the aggregate limits properly refocus the inquiry on the delinquent actor: the recipient of a contribution within the base limits, who then routes the money in a manner that undermines those limits.

Indeed, Congress has adopted transfer restrictions, and the Court has upheld them, in the context of state party spending. \*\*\* *McConnell* upheld those transfer restrictions as "justifiable anticircumvention measures," though it acknowledged that they posed some associational burdens. Here, a narrow transfer restriction on contributions that could otherwise be recontributed in excess of the base limits could rely on a similar justification.

Other alternatives might focus on earmarking. \*\*\*

We do not mean to opine on the validity of any particular proposal. The point is that there are numerous alternative approaches available to Congress to prevent circumvention of the base limits.

#### D

Finally, disclosure of contributions minimizes the potential for abuse of the campaign finance system. Disclosure requirements are in part "justified based on a governmental interest in `provid[ing] the electorate with information' about the sources of election-related spending." *Citizens United* (quoting *Buckley*). They may also "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." Disclosure requirements burden speech, but—unlike the aggregate limits—they do not impose a ceiling on speech. *Citizens United*, but see *McConnell* (opinion of THOMAS, J.). For that reason, disclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech. See, e.g., *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.* (1986).

With modern technology, disclosure now offers a particularly effective means of arming the voting public with information. \*\*\* Reports and databases are available on the FEC's Web site almost immediately after they are filed, supplemented by private entities such as Open-Secrets.org and FollowTheMoney.org. Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided.

The existing aggregate limits may in fact encourage the movement of money away from entities subject to disclosure. Because individuals' direct contributions are limited, would-be donors may turn to other avenues for political speech. See *Citizens United*. Individuals can, for example, contribute unlimited amounts to 501(c) organizations, which are not required to publicly disclose their donors. Such organizations spent some \$300 million on independent expenditures in the 2012 election cycle.

#### V

At oral argument, the Government shifted its focus from *Buckley's* anticircumvention rationale to an argument that the aggregate limits deter corruption regardless of their ability to prevent circumvention of the base limits.  
\*\*\*

The Government suggests that it is the *solicitation* of large contributions that poses the danger of corruption, but the aggregate limits are not limited to any direct solicitation by an officeholder or candidate. Cf. *McConnell* (opinion of KENNEDY, J.) (rejecting a ban on "soft money" contributions to national parties, but approving a ban on the solicitation of such contributions as "a direct and necessary regulation of federal candidates' and officeholders' receipt of *quids*"). We have no occasion to consider a law that would specifically ban candidates from soliciting donations—within the base limits—that would go to many other candidates, and would add up to a large sum. For our purposes here, it is enough that the aggregate limits at issue are not directed specifically to candidate behavior.

For the past 40 years, our campaign finance jurisprudence has focused on the need to preserve authority for the Government to combat corruption, without at the same time compromising the political responsiveness at the heart of the democratic process, or allowing the Government to favor some participants in that process over others. As Edmund Burke explained in his famous speech to the electors of Bristol, a representative owes constituents the exercise of his "mature judgment," but judgment informed by "the strictest union, the closest correspondence, and the most unreserved communication with his constituents." *The Speeches of the Right Hon. Edmund Burke* 129-130 (J. Burke ed. 1867). Constituents have the right to support candidates who share their views and concerns. Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns. Such responsiveness is key to the very concept of self-governance through elected officials.

The Government has a strong interest, no less critical to our democratic system, in combatting corruption and its appearance. We have, however, held that this interest must be limited to a specific kind of corruption—*quid pro quo* corruption—in order to ensure that the Government's efforts do not have the effect of restricting the First Amendment right of citizens to choose who shall govern them. For the reasons set forth, we conclude that the aggregate limits on contributions do not further the only governmental interest this Court accepted as legitimate in *Buckley*. They instead intrude without justification on a citizen's ability to exercise "the most fundamental First Amendment activities." *Buckley*.

The judgment of the District Court is reversed, and the case is remanded for further proceedings.

*It is so ordered.*

JUSTICE THOMAS, CONCURRING IN THE JUDGMENT.

I adhere to the view that this Court's decision in *Buckley v. Valeo*, 424 U. S. 1 (1976) (*per curiam*), denigrates core First Amendment speech and should be overruled. See *Randall v. Sorrell* (2006) (Thomas, J., concurring in judgment);

*Federal Election Comm'n v. Beaumont* (2003) (Thomas, J., dissenting); *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.* (2001) (*Colorado II*) (Thomas, J., dissenting); *Nixon v. Shrink Missouri Government PAC* (2000) (Thomas, J., dissenting); *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'* (1996) (*Colorado I*) (Thomas, J., concurring in judgment and dissenting in part). \*\*\*

This case represents yet another missed opportunity to right the course of our campaign finance jurisprudence by restoring a standard that is faithful to the First Amendment. Until we undertake that reexamination, we remain in a "halfway house" of our own design. *Shrink Missouri* (Kennedy, J., dissenting). For these reasons, I concur only in the judgment.

JUSTICE BREYER, WITH WHOM JUSTICE GINSBURG, JUSTICE SOTOMAYOR, AND JUSTICE KAGAN JOIN, DISSENTING.

Nearly 40 years ago in *Buckley v. Valeo* (1976) (*per curiam*), this Court considered the constitutionality of laws that imposed limits upon the overall amount a single person can contribute to all federal candidates, political parties, and committees taken together. The Court held that those limits did not violate the Constitution. *Id.*; accord, *McConnell v. Federal Election Comm'n* (2003).

\*\*\* Today a majority of the Court overrules this holding. It is wrong to do so. Its conclusion rests upon its own, not a record-based, view of the facts. Its legal analysis is faulty: It misconstrues the nature of the competing constitutional interests at stake. It understates the importance of protecting the political integrity of our governmental institutions. It creates a loophole that will allow a single individual to contribute millions of dollars to a political party or to a candidate's campaign. Taken together with *Citizens United v. Federal Election Comm'n* (2010), today's decision eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve.

## I

The plurality concludes that the aggregate contribution limits "unnecessar[ily] abridg[e]" First Amendment rights. It notes that some individuals will wish to "spen[d] substantial amounts of money in order to communicate [their] political ideas through sophisticated' means." Aggregate contribution ceilings limit an individual's ability to engage in such "broader participation in the democratic process," while insufficiently advancing any legitimate governmental objective. Hence, the plurality finds, they violate the Constitution.

The plurality's conclusion rests upon three separate but related claims. Each is fatally flawed. First, the plurality says that given the base limits on contributions to candidates and political committees, aggregate limits do not further any independent governmental objective worthy of protection. And that is because, given the base limits, "[s]pending large sums of money in connection with elections" does not "give rise to . . . corruption." In making this argument, the plurality relies heavily upon a narrow definition of "corruption" that

excludes efforts to obtain "influence over or access to' elected officials or political parties."

Second, the plurality assesses the instrumental objective of the aggregate limits, namely, safeguarding the base limits. It finds that they "do not serve that function in any meaningful way." That is because, even without the aggregate limits, the possibilities for circumventing the base limits are "implausible" and "divorced from reality."

Third, the plurality says the aggregate limits are not a "reasonable" policy tool. Rather, they are "poorly tailored to the Government's interest in preventing circumvention of the base limits." The plurality imagines several alternative regulations that it says might just as effectively thwart circumvention. Accordingly, it finds, the aggregate caps are out of "proportion to the [anticorruption] interest served."

## II

The plurality's first claim—that large aggregate contributions do not "give rise" to "corruption"—is plausible only because the plurality defines "corruption" too narrowly. The plurality describes the constitutionally permissible objective of campaign finance regulation as follows: "Congress may target only a specific type of corruption—'*quid pro quo*' corruption." It then defines *quid pro quo* corruption to mean no more than "a direct exchange of an official act for money"—an act akin to bribery. It adds specifically that corruption does *not* include efforts to "garner 'influence over or access to' elected officials or political parties." Moreover, the Government's efforts to prevent the "appearance of corruption" are "equally confined to the appearance of *quid pro quo* corruption," as narrowly defined. In the plurality's view, a federal statute could not prevent an individual from writing a million dollar check to a political party (by donating to its various committees), because the rationale for any limit would "dangerously broad[e]n the circumscribed definition of *quid pro quo* corruption articulated in our prior cases."

This critically important definition of "corruption" is inconsistent with the Court's prior case law (with the possible exception of *Citizens United*, as I will explain below). It is virtually impossible to reconcile with this Court's decision in *McConnell*, upholding the Bipartisan Campaign Reform Act of 2002 (BCRA). And it misunderstands the constitutional importance of the interests at stake. In fact, constitutional interests—indeed, First Amendment interests—lie on both sides of the legal equation.

## A

In reality, as the history of campaign finance reform shows and as our earlier cases on the subject have recognized, the anticorruption interest that drives Congress to regulate campaign contributions is a far broader, more important interest than the plurality acknowledges. It is an interest in maintaining the integrity of our public governmental institutions. And it is an interest rooted in the Constitution and in the First Amendment itself.

Consider at least one reason why the First Amendment protects political speech. Speech does not exist in a vacuum. Rather, political communication seeks to secure government action. A politically oriented "marketplace of ideas" seeks to form a public opinion that can and will influence elected representatives.

This is not a new idea. Eighty-seven years ago, Justice Brandeis wrote that the First Amendment's protection of speech was "essential to effective democracy." *Whitney v. California* (1927) (concurring opinion). Chief Justice Hughes reiterated the same idea shortly thereafter: "A fundamental principle of our constitutional system" is the "maintenance of the opportunity for free political discussion *to the end* that government may be responsive to the will of the people." *Stromberg v. California* (1931) (emphasis added). In *Citizens United*, the Court stated that "[s]peech is an essential mechanism of democracy, for it is *the means* to hold officials accountable to the people." (emphasis added).

The Framers had good reason to emphasize this same connection between political speech and governmental action. An influential 18th-century continental philosopher had argued that in a representative democracy, the people lose control of their representatives between elections, during which interim periods they were "in chains." J. ROUSSEAU, AN INQUIRY INTO THE NATURE OF THE SOCIAL CONTRACT 265-266 (transl. 1791).

The Framers responded to this criticism both by requiring frequent elections to federal office, and by enacting a First Amendment that would facilitate a "chain of communication between the people, and those, to whom they have committed the exercise of the powers of government." J. WILSON, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES OF AMERICA 30-31 (1792). This "chain" would establish the necessary "communion of interests and sympathy of sentiments" between the people and their representatives, so that public opinion could be channeled into effective governmental action. THE FEDERALIST NO. 57, p. 386 (J. Cooke ed. 1961) (J. Madison); accord, T. Benton, 1 Abridgement of the Debates of Congress, from 1789 to 1856, p. 141 (1857) (explaining that the First Amendment will strengthen American democracy by giving "the people" a right to "publicly address their representatives," "privately advise them," or "declare their sentiments by petition to the whole body" (quoting James Madison)). Accordingly, the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech *matters*.

What has this to do with corruption? It has everything to do with corruption. Corruption breaks the constitutionally necessary "chain of communication" between the people and their representatives. It derails the essential speech-to-government-action tie. Where enough money calls the tune, the general public will not be heard. Insofar as corruption cuts the link between political thought and political action, a free marketplace of political ideas loses its point. That is one reason why the Court has stressed the constitutional importance of Congress' concern that a few large donations not drown out the voices of the many. See, e.g., *Buckley*.

That is also why the Court has used the phrase "subversion of the political process" to describe circumstances in which "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns."

The "appearance of corruption" can make matters worse. It can lead the public to believe that its efforts to communicate with its representatives or to help sway public opinion have little purpose. And a cynical public can lose interest

in political participation altogether. See *Nixon v. Shrink Missouri Government PAC* (2000) ("[T]he cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance"). Democracy, the Court has often said, cannot work unless "the people have faith in those who govern." *United States v. Mississippi Valley Generating Co.* (1961).

The upshot is that the interests the Court has long described as preventing "corruption" or the "appearance of corruption" are more than ordinary factors to be weighed against the constitutional right to political speech. Rather, they are interests rooted in the First Amendment itself. They are rooted in the constitutional effort to create a democracy responsive to the people—a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects. Given that end, we can and should understand campaign finance laws as resting upon a broader and more significant constitutional rationale than the plurality's limited definition of "corruption" suggests. We should see these laws as seeking in significant part to strengthen, rather than weaken, the First Amendment. To say this is not to deny the potential for conflict between (1) the need to permit contributions that pay for the diffusion of ideas, and (2) the need to limit payments in order to help maintain the integrity of the electoral process. But that conflict takes place within, not outside, the First Amendment's boundaries.

## B

Since the kinds of corruption that can destroy the link between public opinion and governmental action extend well beyond those the plurality describes, the plurality's notion of corruption is flatly inconsistent with the basic constitutional rationale I have just described. Thus, it should surprise no one that this Court's case law (*Citizens United* excepted) insists upon a considerably broader definition.

In *Buckley*, for instance, the Court said explicitly that aggregate limits were constitutional because they helped "prevent evasion . . . [through] huge contributions to the candidate's political party," (the contrary to what the plurality today seems to believe). Moreover, *Buckley* upheld the base limits in significant part because they helped thwart "the appearance of corruption stemming from public awareness of the opportunities for abuse *inherent in a regime of large individual financial contributions.*" (emphasis added). And it said that Congress could reasonably conclude that criminal laws forbidding "the giving and taking of bribes" did *not* adequately "deal with the reality or appearance of corruption." Bribery laws, the Court recognized, address "only the most blatant and specific attempts of those with money to influence governmental action." The concern with corruption extends further.

Other cases put the matter yet more strongly. In *Beaumont*, for example, the Court found constitutional a ban on direct contributions by corporations because of the need to prevent corruption, properly "understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment." *Federal Election Comm'n v. Beaumont* (2003). In *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.* (2001) (*Colorado II*), the Court upheld limits imposed upon coordinated expenditures among parties and candidates because it found they thwarted corruption and its appearance, again understood as including "undue influence" by wealthy donors. In *Shrink*

*Missouri*, the Court upheld limitations imposed by the Missouri Legislature upon contributions to state political candidates, not only because of the need to prevent bribery, but also because of "the broader threat from politicians too compliant with the wishes of large contributors."

### C

Most important, in *McConnell*, this Court considered the constitutionality of the Bipartisan Campaign Reform Act of 2002, an Act that set new limits on "soft money" contributions to political parties. "Soft money" referred to funds that, prior to BCRA, were freely donated to parties for activities other than directly helping elect a federal candidate—activities such as voter registration, "get out the vote" drives, and advertising that did not expressly advocate a federal candidate's election or defeat. BCRA imposed a new ban on soft money contributions to national party committees, and greatly curtailed them in respect to state and local parties.

The Court in *McConnell* upheld these new contribution restrictions under the First Amendment for the very reason the plurality today discounts or ignores. Namely, the Court found they thwarted a significant risk of corruption—understood not as *quid pro quo* bribery, but as privileged access to and pernicious influence upon elected representatives.

In reaching its conclusion in *McConnell*, the Court relied upon a vast record compiled in the District Court. That record consisted of over 100,000 pages of material and included testimony from more than 200 witnesses. What it showed, in detail, was the web of relationships and understandings among parties, candidates, and large donors that underlies privileged access and influence. The District Judges in *McConnell* made clear that the record did "not contain any evidence of bribery or vote buying in exchange for donations of nonfederal money." Indeed, no one had identified a "single discrete instance of *quid pro quo* corruption" due to soft money. But what the record did demonstrate was that enormous soft money contributions, ranging between \$1 million and \$5 million among the largest donors, enabled wealthy contributors to gain disproportionate "access to federal lawmakers" and the ability to "influenc[e] legislation." There was an indisputable link between generous political donations and opportunity after opportunity to make one's case directly to a Member of Congress.

Testimony by elected officials supported this conclusion. \*\*\*

This Court upheld BCRA's limitations on soft money contributions by relying on just the kind of evidence I have described. \*\*\*

We specifically rejected efforts to define "corruption" in ways similar to those the plurality today accepts. We added:

"Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder."

Insofar as today's decision sets forth a significantly narrower definition of "corruption," and hence of the public's interest in political integrity, it is flatly inconsistent with *McConnell*.

## D

One case, however, contains language that offers the plurality support. That case is *Citizens United*. There, as the plurality points out, the Court said that "[w]hen *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption." Further, the Court said that *quid pro quo* corruption does not include "influence over or access to elected officials," because "generic favoritism or influence theory . . . is at odds with standard First Amendment analyses."

How should we treat these statements from *Citizens United* now? They are not essential to the Court's holding in the case—at least insofar as it can be read to require federal law to treat corporations and trade unions like individuals when they independently pay for, *e.g.*, television advertising during the last 60 days of a federal election. *Citizens United*. Taken literally, the statements cited simply refer to and characterize still earlier Court cases. They do not require the more absolute reading that the plurality here gives them.

More than that. Read as the plurality reads them today, the statements from *Citizens United* about the proper contours of the corruption rationale conflict not just with language in the *McConnell* opinion, but with *McConnell*'s very holding. Did the Court in *Citizens United* intend to overrule *McConnell*? I doubt it, for if it did, the Court or certainly the dissent would have said something about it. The total silence of all opinions in *Citizens United* with respect to this matter argues strongly in favor of treating the language quoted above as dictum, as an overstatement, or as limited to the context in which it appears. *Citizens United* itself contains language that supports the last mentioned reading, for it says that "[*Buckley*] did not extend this rationale [about the reality or appearance of corruption] to *independent* expenditures, and the Court does not do so here." (emphasis added). And it adds that, while "[t]he BCRA record establishes that certain donations to political parties, called 'soft money,' were made to gain access to elected officials," "[t]his case, however, is about *independent expenditures*, not soft money." (emphasis added).

The plurality's use of *Citizens United*'s narrow definition of corruption here, however, is a different matter. That use does not come accompanied with a limiting context (independent expenditures by corporations and unions) or limiting language. It applies to the whole of campaign finance regulation. And, as I have pointed out, it is flatly inconsistent with the broader definition of corruption upon which *McConnell*'s holding depends.

So: Does the Court intend today to overrule *McConnell*? Or does it intend to leave *McConnell* and BCRA in place? The plurality says the latter. [in note 6] ("Our holding about the constitutionality of the aggregate limits clearly does not overrule *McConnell*'s holding about 'soft money'"). But how does the plurality explain its rejection of the broader definition of corruption, upon which *McConnell*'s holding depends?

## III

The plurality invalidates the aggregate contribution limits for a second reason. It believes they are no longer needed to prevent contributors from

circumventing federal limits on direct contributions to individuals, political parties, and political action committees. \*\*\*

The plurality is wrong. Here, as in *Buckley*, in the absence of limits on aggregate political contributions, donors can and likely will find ways to channel millions of dollars to parties and to individual candidates, producing precisely the kind of "corruption" or "appearance of corruption" that previously led the Court to hold aggregate limits constitutional. Those opportunities for circumvention will also produce the type of corruption that concerns the plurality today. The methods for using today's opinion to evade the law's individual contribution limits are complex, but they are well known, or will become well known, to party fundraisers. I shall describe three.

#### A

*Example One: Gifts for the Benefit of the Party.* Campaign finance law permits each individual to give \$64,800 over two years to a national party committee. 2 U. S. C. §441a(a)(1)(B); 78 Fed. Reg. 8532 (2013). The two major political parties each have three national committees. Federal law also entitles an individual to give \$20,000 to a state party committee over two years. §441a(a)(1)(D). Each major political party has 50 such committees. Those individual limits mean that, in the absence of any aggregate limit, an individual could legally give to the Republican Party or to the Democratic Party about \$1.2 million over two years. To make it easier for contributors to give gifts of this size, each party could create a "Joint Party Committee," comprising all of its national and state party committees. The titular heads could be the Speaker of the House of Representatives and the Minority Leader of the House. A contributor could then write a single check to the Joint Party Committee—and its staff would divide the funds so that each constituent unit receives no more than it could obtain from the contributor directly (\$64,800 for a national committee over two years, \$20,000 for a state committee over the same). Before today's decision, the total size of Rich Donor's check to the Joint Party Committee was capped at \$74,600—the aggregate limit for donations to political parties over a 2-year election cycle. See §441a(a)(3)(B); 78 Fed. Reg. 8532. After today's decision, Rich Donor can write a single check to the Joint Party Committee in an amount of about \$1.2 million.

Will political parties seek these large checks? Why not? The recipient national and state committees can spend the money to buy generic party advertisements, say television commercials or bumper stickers saying "Support Republicans," "Support Democrats," or the like. They also can transfer the money to party committees in battleground States to increase the chances of winning hotly contested seats. See §441a(a)(4) (permitting national or state political committees to make unlimited "transfers" to other committees "of the same political party").

Will party officials and candidates solicit these large contributions from wealthy donors? Absolutely. Such contributions will help increase the party's power, as well as the candidate's standing among his colleagues.

Will elected officials be particularly grateful to the large donor, feeling obliged to provide him special access and influence, and perhaps even a *quid pro quo* legislative favor? That is what we have previously believed. See *McConnell*

("Large soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder"); *id.* (opinion of KENNEDY, J.) ("The making of a solicited gift is a *quid* both to the recipient of the money and to the one who solicits the payment"); *Colorado II*, (explaining how a candidate can "become a player [in his party] beyond his own race" by "directing donations to the party and making sure that the party knows who raised the money," and that "the donor's influence is multiplied" in such instances). And, as the statements collected in Appendix A, make clear, we have believed this with good reason.

*Example Two: Donations to Individual Candidates (The \$3.6 Million Check).*

The first example significantly *understates* the problem. That is because federal election law also allows a single contributor to give \$5,200 to each party candidate over a 2-year election cycle (assuming the candidate is running in both a primary and a general election). §441a(a)(1)(A); 78 Fed. Reg. 8532. There are 435 party candidates for House seats and 33 party candidates for Senate seats in any given election year. That makes an additional \$2.4 million in allowable contributions. Thus, without an aggregate limit, the law will permit a wealthy individual to write a check, over a 2-year election cycle, for \$3.6 million—all to benefit his political party and its candidates.

To make it easier for a wealthy donor to make a contribution of this size, the parties can simply enlarge the composition of the Joint Party Committee described in *Example One*, so that it now includes party candidates. And a party can proliferate such joint entities, perhaps calling the first the "Smith Victory Committee," the second the "Jones Victory Committee," and the like. See 11 CFR §102.17(c)(5) (2012). (I say "perhaps" because too transparent a name might call into play certain earmarking rules. But the Federal Election Commission's (FEC) database of joint fundraising committees in 2012 shows similarly named entities, *e.g.*, "Landrieu Wyden Victory Fund," etc.).

As I have just said, without any aggregate limit, the law will allow Rich Donor to write a single check to, say, the Smith Victory Committee, for up to \$3.6 million. This check represents "the total amount that the contributor could contribute to all of the participants" in the Committee over a 2-year cycle. The Committee would operate under an agreement that provides a "formula for the allocation of fundraising proceeds" among its constituent units. And that "formula" would divide the proceeds so that no committee or candidate receives more than it could have received from Rich Donor directly—\$64,800, \$20,000, or \$5,200.

So what is wrong with that? The check is considerably larger than *Example One's* check. But is there anything else wrong? The answer is yes, absolutely. The law will also permit a party and its candidates to shift most of Rich Donor's contributions to a *single* candidate, say Smith. Here is how:

The law permits each candidate and each party committee in the Smith Victory Committee to write Candidate Smith a check directly. For his primary and general elections combined, they can write checks of up to \$4,000 (from each candidate's authorized campaign committee) and \$10,000 (from each state and national committee). This yields a potential \$1,872,000 (from candidates) plus \$530,000 (from party committees). Thus, the law permits the candidates and party entities to redirect \$2.37 million of Rich Donor's \$3.6 million check to

Candidate Smith. It also permits state and national committees to contribute to Smith's general election campaign through making coordinated expenditures—in amounts that range from \$46,600 to \$2.68 million for a general election (depending upon the size of Smith's State and whether he is running for a House or Senate seat).

The upshot is that Candidate Smith can receive at least \$2.37 million and possibly the full \$3.6 million contributed by Rich Donor to the Smith Victory Committee, even though the funds must first be divided up among the constituent units before they can be rerouted to Smith. Nothing requires the Smith Victory Committee to explain in advance to Rich Donor all of the various transfers that will take place, and nothing prevents the entities in the Committee from informing the donor and the receiving candidate after the fact what has transpired. Accordingly, the money can be donated and rerouted to Candidate Smith without the donor having violated the base limits or any other FEC regulation. And the evidence in the *McConnell* record reprinted in Appendix A, —with respect to soft money contributions—makes clear that Candidate Smith will almost certainly come to learn from whom he has received this money.

The parties can apply the same procedure to other large donations, channeling money from Rich Donor Two to Candidate Jones. If 10 or 20 candidates face particularly tight races, party committees and party candidates may work together to channel Rich Donor One's multimillion dollar contribution to the Most Embattled Candidate (*e.g.*, Candidate Smith), Rich Donor Two's multimillion dollar contribution to the Second Most Embattled Candidate (*e.g.*, Candidate Jones), and so on down the line. If this does not count as evasion of the base limits, what does? Present aggregate limits confine the size of any individual gift to \$123,200. Today's opinion creates a loophole measured in the millions.

*Example Three: Proliferating Political Action Committees (PACs).* Campaign finance law prohibits an individual from contributing (1) more than \$5,200 to any candidate in a federal election cycle, and (2) more than \$5,000 to a PAC in a calendar year. It also prohibits (3) any PAC from contributing more than \$10,000 to any candidate in an election cycle. But the law does not prohibit an individual from contributing (within the current \$123,200 biannual aggregate limit) \$5,000 to each of an unlimited total number of PACs. And there, so to speak, lies the rub.

Here is how, without any aggregate limits, a party will be able to channel \$2 million from each of ten Rich Donors to each of ten Embattled Candidates. Groups of party supporters—individuals, corporations, or trade unions— create 200 PACs. Each PAC claims it will use the funds it raises to support several candidates from the party, though it will favor those who are most endangered. (Each PAC qualifies for "multicandidate" status because it has received contributions from more than 50 persons and has made contributions to five federal candidates at some point previously. Over a 2-year election cycle, Rich Donor One gives \$10,000 to each PAC (\$5,000 per year)—yielding \$2 million total. Rich Donor 2 does the same. So, too, do the other eight Rich Donors. This

brings their total donations to \$20 million, disbursed among the 200 PACs. Each PAC will have collected \$100,000, and each can use its money to write ten checks of \$10,000—to each of the ten most Embattled Candidates in the party (over two years). See Appendix B. Every Embattled Candidate, receiving a \$10,000 check from 200 PACs, will have collected \$2 million.

The upshot is that ten Rich Donors will have contributed \$2 million each, and ten Embattled Candidates will have collected \$2 million each. In this example, unlike *Example Two*, the recipient candidates may not know which of the ten Rich Donors is personally responsible for the \$2 million he or she receives. But the recipient candidate is highly likely to know who the ten Rich Donors are, and to feel appropriately grateful. Moreover, the ability of a small group of donors to contribute this kind of money to threatened candidates is not insignificant. In the example above—with ten Rich Donors giving \$2 million each, and ten Embattled Candidates receiving \$2 million each—the contributions would have been enough to finance a considerable portion of, and perhaps all of, the candidates' races in the 2012 elections. See Appendix C, (showing that in 2012, the average winning House candidate spent \$1.6 million and the average winning Senate candidate spent \$11.5 million).

## B

The plurality believes that the three scenarios I have just depicted either pose no threat, or cannot or will not take place. \*\*\*

\*\*\* [T]he plurality points to another FEC regulation (also added in 1976), which says that "an individual who has contributed to a candidate" may not "also contribute to a political committee that has supported or anticipates supporting the same candidate if the individual knows that 'a substantial portion [of his contribution] will be contributed to, or expended on behalf of,' that candidate." This regulation is important, for in principle, the FEC might use it to prevent the circumstances that *Examples Two* and *Three* set forth from arising. And it is not surprising that the plurality relies upon the existence of this rule when it describes those circumstances as "implausible," "illegal," or "divorced from reality."

In fact, however, this regulation is not the strong anti-circumvention weapon that the plurality imagines. Despite the plurality's assurances, it does not "disarm" the possibilities for circumvention. That is because the regulation requires a showing that donors have "*knowledge* that a substantial portion" of their contributions will be used by a PAC to support a candidate to whom they have already contributed. §110.1(h)(2) (emphasis added). And "knowledge" is hard to prove.

I have found nine FEC cases decided since the year 2000 that refer to this regulation. In all but one, the FEC failed to find the requisite "knowledge"— \*\*\* Given this record of FEC (in)activity, my reaction to the plurality's reliance upon agency enforcement of this rule (as an adequate substitute for Congress' aggregate limits) is like Oscar Wilde's after reading Dickens' account of the death of Little Nell: "One must have a heart of stone," said Wilde, "to read [it] without laughing." Oxford Dictionary of Humorous Quotations 86 (N. Sherrin 2d ed. 2001).

I have found one contrary example—the single example to which the plurality refers. \*\*\*

Thus, it is not surprising that throughout the many years this FEC regulation has been in effect, political parties and candidates have established ever more joint fundraising committees (numbering over 500 in the last federal elections); candidates have established ever more "Leadership PACs" (numbering over 450 in the last elections); and party supporters have established ever more multicandidate PACs (numbering over 3,000 in the last elections). See Appendix C; FEC, 2014 Committee Summary (reporting the number of "qualified" (or multicandidate) PACs in 2012), online at <http://www.fec.gov/data/CommitteeSummary.do> (all Internet materials as visited Mar. 28, 2014, and available in Clerk of Court's case file).

Using these entities, candidates, parties, and party supporters can transfer and, we are told, have transferred large sums of money to specific candidates, thereby avoiding the base contribution limits \*\*\* . They have done so without drawing FEC prosecution—at least not according to my (and apparently the plurality's) search of publicly available records. That is likely because in the real world, the methods of achieving circumvention are more subtle and more complex than our stylized *Examples Two* and *Three* depict. And persons have used these entities to channel money to candidates without any individual breaching the current aggregate \$123,200 limit. The plurality now removes that limit, thereby permitting wealthy donors to make aggregate contributions not of \$123,200, but of several millions of dollars. If the FEC regulation has failed to plug a small hole, how can it possibly plug a large one?

#### IV

The plurality concludes that even if circumvention were a threat, the aggregate limits are "poorly tailored" to address it. The First Amendment requires "a fit that is . . . reasonable," and there is no such "fit" here because there are several alternative ways Congress could prevent evasion of the base limits. For instance, the plurality posits, Congress (or the FEC) could "tighten . . . transfer rules"; it could require "contributions above the current aggregate limits to be deposited into segregated, nontransferable accounts and spent only by their recipients"; it could define "how many candidates a PAC must support in order to ensure that 'a substantial portion' of a donor's contribution is not rerouted to a certain candidate"; or it could prohibit "donors who have contributed the current maximum sums from further contributing to political committees that have indicated they will support candidates to whom the donor has already contributed."

The plurality, however, does not show, or try to show, that these hypothetical alternatives could effectively replace aggregate contribution limits. Indeed, it does not even "opine on the validity of any particular proposal," presumably because these proposals themselves could be subject to constitutional challenges. For the most part, the alternatives the plurality mentions were similarly available at the time of *Buckley*. Their hypothetical presence did not prevent the Court from upholding aggregate limits in 1976. How can their continued hypothetical presence lead the plurality now to conclude that aggregate limits are "poorly tailored?" How can their continued hypothetical presence lead the Court to overrule *Buckley* now?

In sum, the explanation of why aggregate limits are needed is complicated, as is the explanation of why other methods will not work. But the conclusion is simple: There is no "substantial mismatch" between Congress' legitimate objective and the "means selected to achieve it." The Court, as in *Buckley*, should hold that aggregate contribution limits are constitutional.

V

The District Court in this case, holding that *Buckley* foreclosed McCutcheon's constitutional challenge to the aggregate limits, granted the Government's motion to dismiss the complaint prior to a full evidentiary hearing. If the plurality now believes the District Court was wrong, then why does it not return the case for the further evidentiary development which has not yet taken place?

\*\*\*

For one thing, an evidentiary record can help us determine whether or the extent to which we should defer to Congress' own judgments, particularly those reflecting a balance of the countervailing First Amendment interests I have described. Determining whether anticorruption objectives justify a particular set of contribution limits requires answering empirically based questions, and applying significant discretion and judgment. To what extent will unrestricted giving lead to corruption or its appearance? What forms will any such corruption take? To what extent will a lack of regulation undermine public confidence in the democratic system? To what extent can regulation restore it?

These kinds of questions, while not easily answered, are questions that Congress is far better suited to resolve than are judges. Thus, while court review of contribution limits has been and should be "rigorous," *Buckley* we have also recognized that "deference to legislative choice is warranted." *Beaumont*. And that deference has taken account of facts and circumstances set forth in an evidentiary record.

For another thing, a comparison of the plurality's opinion with this dissent reveals important differences of opinion on fact-related matters. We disagree, for example, on the possibilities for circumvention of the base limits in the absence of aggregate limits. We disagree about how effectively the plurality's "alternatives" could prevent evasion. An evidentiary proceeding would permit the parties to explore these matters, and it would permit the courts to reach a more accurate judgment. The plurality rationalizes its haste to forgo an evidentiary record by noting that "the parties have treated the question as a purely legal one." But without a doubt, the legal question—whether the aggregate limits are closely drawn to further a compelling governmental interest—turns on factual questions about whether corruption, in the absence of such limits, is a realistic threat to our democracy. The plurality itself spends pages citing figures about campaign spending to defend its "legal" conclusion. The problem with such reasoning is that this Court's expertise does not lie in marshaling facts in the primary instance. That is why in the past, when answering similar questions about the constitutionality of restrictions on campaign contributions, we have relied on an extensive evidentiary record produced below to inform our decision.

Without further development of the record, however, I fail to see how the plurality can now find grounds for overturning *Buckley*. The justification for

aggregate contribution restrictions is strongly rooted in the need to assure political integrity and ultimately in the First Amendment itself. The threat to that integrity posed by the risk of special access and influence remains real. Part III, *supra*. Even taking the plurality on its own terms and considering solely the threat of *quid pro quo* corruption (*i.e.*, money-for-votes exchanges), the aggregate limits are a necessary tool to stop circumvention. And there is no basis for finding a lack of "fit" between the threat and the means used to combat it, namely the aggregate limits.

The plurality reaches the opposite conclusion. The result, as I said at the outset, is a decision that substitutes judges' understandings of how the political process works for the understanding of Congress; that fails to recognize the difference between influence resting upon public opinion and influence bought by money alone; that overturns key precedent; that creates huge loopholes in the law; and that undermines, perhaps devastates, what remains of campaign finance reform.

With respect, I dissent.

[Appendices omitted]

### ***Note: "Dark Money" Anonymity, Disclosure, and Campaign Finance***

Soon after *Citizens United*, the DISCLOSE Act (Democracy Is Strengthened by Casting Light On Spending in Elections Act) was introduced in Congress, however it has stalled. The Act would mandate more disclosures regarding contributions.

Disclosure and so-called "dark money" is now considered a major issue, with some arguing that it has increased after *Citizens United*.

Interestingly, Chief Justice Roberts for the Court in *McCutcheon* suggests that disclosure would be one acceptable answer ("Disclosure requirements burden speech, but—unlike the aggregate limits—they do not impose a ceiling on speech). He also notes that "modern technology" facilitates wide disclosure: "Reports and databases are available on the FEC's Web site almost immediately after they are filed, supplemented by private entities such as Open-Secrets.org and FollowTheMoney.org."

But as Roberts also notes, at present, "Individuals can, for example, contribute unlimited amounts to 501(c) organizations, which are not required to publicly disclose their donors," and adds that such "organizations spent some \$300 million on independent expenditures in the 2012 election cycle." This "dark money" is subject to IRS regulation regarding the tax-exempt nonprofit status of the 501(c) corporation, but IRS rule-making has not been successful.

Yet is disclosure the answer? Does mandated disclosure clearly survive a First Amendment challenge given the Court's anonymity cases? And even if constitutional, is disclosure a solution to the practical problems of money in democracy?

### III. Judicial Elections

#### *Republican Party of Minnesota v. White*

536 US 765 (2002)

SCALIA, J., DELIVERED THE OPINION OF THE COURT, IN WHICH REHNQUIST, C. J., AND O'CONNOR, KENNEDY, AND THOMAS, JJ., JOINED. O'CONNOR, J., AND KENNEDY, J., FILED CONCURRING OPINIONS. STEVENS, J., FILED A DISSENTING OPINION, IN WHICH SOUTER, GINSBURG, AND BREYER, JJ., JOINED. GINSBURG, J., FILED A DISSENTING OPINION, IN WHICH STEVENS, SOUTER, AND BREYER, JJ., JOINED.

JUSTICE SCALIA DELIVERED THE OPINION OF THE COURT.

The question presented in this case is whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues.

#### I

Since Minnesota's admission to the Union in 1858, the State's Constitution has provided for the selection of all state judges by popular election. Minn. Const., Art. VI, §7. Since 1912, those elections have been nonpartisan. Act of June 19, ch. 2, 1912 Minn. Laws Special Sess., pp. 4-6. Since 1974, they have been subject to a legal restriction which states that a "candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues." Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000). This prohibition, promulgated by the Minnesota Supreme Court and based on Canon 7(B) of the 1972 American Bar Association (ABA) Model Code of Judicial Conduct, is known as the "announce clause." Incumbent judges who violate it are subject to discipline, including removal, censure, civil penalties, and suspension without pay. Lawyers who run for judicial office also must comply with the announce clause. Minn. Rule of Professional Conduct 8.2(b) (2002) ("A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct"). Those who violate it are subject to, inter alia, disbarment, suspension, and probation. Rule 8.4(a); Minn. Rules on Lawyers Professional Responsibility 8-14, 15(a) (2002).

In 1996, one of the petitioners, Gregory Wersal, ran for associate justice of the Minnesota Supreme Court. In the course of the campaign, he distributed literature criticizing several Minnesota Supreme Court decisions on issues such as crime, welfare, and abortion. A complaint against Wersal challenging, among other things, the propriety of this literature was filed with the Office of Lawyers Professional Responsibility, the agency which, under the direction of the Minnesota Lawyers Professional Responsibility Board, investigates and prosecutes ethical violations of lawyer candidates for judicial office. The

Lawyers Board dismissed the complaint; with regard to the charges that his campaign materials violated the announce clause, it expressed doubt whether the clause could constitutionally be enforced. Nonetheless, fearing that further ethical complaints would jeopardize his ability to practice law, Wersal withdrew from the election. In 1998, Wersal ran again for the same office. Early in that race, he sought an advisory opinion from the Lawyers Board with regard to whether it planned to enforce the announce clause. The Lawyers Board responded equivocally, stating that, although it had significant doubts about the constitutionality of the provision, it was unable to answer his question because he had not submitted a list of the announcements he wished to make.<sup>2</sup>

Shortly thereafter, Wersal filed this lawsuit in Federal District Court against respondents, seeking, inter alia, a declaration that the announce clause violates the First Amendment and an injunction against its enforcement. Wersal alleged that he was forced to refrain from announcing his views on disputed issues during the 1998 campaign, to the point where he declined response to questions put to him by the press and public, out of concern that he might run afoul of the announce clause. Other plaintiffs in the suit, including the Minnesota Republican Party, alleged that, because the clause kept Wersal from announcing his views, they were unable to learn those views and support or oppose his candidacy accordingly. The parties filed cross-motions for summary judgment, and the District Court found in favor of respondents, holding that the announce clause did not violate the First Amendment. Over a dissent by Judge Beam, the United States Court of Appeals for the Eighth Circuit affirmed. We granted certiorari.

## II

Before considering the constitutionality of the announce clause, we must be clear about its meaning. Its text says that a candidate for judicial office shall not "announce his or her views on disputed legal or political issues." Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2002).

We know that "announc[ing] . . . views" on an issue covers much more than promising to decide an issue a particular way. The prohibition extends to the candidate's mere statement of his current position, even if he does not bind himself to maintain that position after election. All the parties agree this is the case, because the Minnesota Code contains a so-called "pledges or promises" clause, which separately prohibits judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," *ibid.*--a prohibition that is not challenged here and on which we express no view.

There are, however, some limitations that the Minnesota Supreme Court has placed upon the scope of the announce clause that are not (to put it politely) immediately apparent from its text. The statements that formed the basis of the complaint against Wersal in 1996 included criticism of past decisions of the Minnesota Supreme Court. One piece of campaign literature stated that "[t]he Minnesota Supreme Court has issued decisions which are marked by their disregard for the Legislature and a lack of common sense." It went on to criticize a decision excluding from evidence confessions by criminal defendants that were not tape-recorded, asking "[s]hould we conclude that because the Supreme

Court does not trust police, it allows confessed criminals to go free?" It criticized a decision striking down a state law restricting welfare benefits, asserting that "[i]t's the Legislature which should set our spending policies." And it criticized a decision requiring public financing of abortions for poor women as "unprecedented" and a "pro-abortion stance." Although one would think that all of these statements touched on disputed legal or political issues, they did not (or at least do not now) fall within the scope of the announce clause. The Judicial Board issued an opinion stating that judicial candidates may criticize past decisions, and the Lawyers Board refused to discipline Wersal for the foregoing statements because, in part, it thought they did not violate the announce clause. The Eighth Circuit relied on the Judicial Board's opinion in upholding the announce clause and the Minnesota Supreme Court recently embraced the Eighth Circuit's interpretation.

There are yet further limitations upon the apparent plain meaning of the announce clause: In light of the constitutional concerns, the District Court construed the clause to reach only disputed issues that are likely to come before the candidate if he is elected judge. The Eighth Circuit accepted this limiting interpretation by the District Court, and in addition construed the clause to allow general discussions of case law and judicial philosophy. The Supreme Court of Minnesota adopted these interpretations as well when it ordered enforcement of the announce clause in accordance with the Eighth Circuit's opinion.

It seems to us, however, that--like the text of the announce clause itself--these limitations upon the text of the announce clause are not all that they appear to be. First, respondents acknowledged at oral argument that statements critical of past judicial decisions are not permissible if the candidate also states that he is against stare decisis. Thus, candidates must choose between stating their views critical of past decisions and stating their views in opposition to stare decisis. Or, to look at it more concretely, they may state their view that prior decisions were erroneous only if they do not assert that they, if elected, have any power to eliminate erroneous decisions. Second, limiting the scope of the clause to issues likely to come before a court is not much of a limitation at all. One would hardly expect the "disputed legal or political issues" raised in the course of a state judicial election to include such matters as whether the Federal Government should end the embargo of Cuba. Quite obviously, they will be those legal or political disputes that are the proper (or by past decisions have been made the improper) business of the state courts. And within that relevant category, "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction." Third, construing the clause to allow "general" discussions of case law and judicial philosophy turns out to be of little help in an election campaign. At oral argument, respondents gave, as an example of this exception, that a candidate is free to assert that he is a "strict constructionist." But that, like most other philosophical generalities, has little meaningful content for the electorate unless it is exemplified by application to a particular issue of construction likely to come before a court--for example, whether a particular statute runs afoul of any provision of the Constitution. Respondents conceded that the announce clause would prohibit the candidate from exemplifying his philosophy in this fashion.

Without such application to real-life issues, all candidates can claim to be "strict constructionists" with equal (and unhelpful) plausibility.

In any event, it is clear that the announce clause prohibits a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions--and in the latter context as well, if he expresses the view that he is not bound by stare decisis.

Respondents contend that this still leaves plenty of topics for discussion on the campaign trail. These include a candidate's "character," "education," "work habits," and "how [he] would handle administrative duties if elected." Indeed, the Judicial Board has printed a list of preapproved questions which judicial candidates are allowed to answer. These include how the candidate feels about cameras in the courtroom, how he would go about reducing the caseload, how the costs of judicial administration can be reduced, and how he proposes to ensure that minorities and women are treated more fairly by the court system. Whether this list of preapproved subjects, and other topics not prohibited by the announce clause, adequately fulfill the First Amendment's guarantee of freedom of speech is the question to which we now turn.

### III

As the Court of Appeals recognized, the announce clause both prohibits speech on the basis of its content and burdens a category of speech that is "at the core of our First Amendment freedoms"--speech about the qualifications of candidates for public office. The Court of Appeals concluded that the proper test to be applied to determine the constitutionality of such a restriction is what our cases have called strict scrutiny; the parties do not dispute that this is correct. Under the strict-scrutiny test, respondents have the burden to prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest. In order for respondents to show that the announce clause is narrowly tailored, they must demonstrate that it does not "unnecessarily circumscrib[e] protected expression."

The Court of Appeals concluded that respondents had established two interests as sufficiently compelling to justify the announce clause: preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary. Respondents reassert these two interests before us, arguing that the first is compelling because it protects the due process rights of litigants, and that the second is compelling because it preserves public confidence in the judiciary. Respondents are rather vague, however, about what they mean by "impartiality." Indeed, although the term is used throughout the Eighth Circuit's opinion, the briefs, the Minnesota Code of Judicial Conduct, and the ABA Codes of Judicial Conduct, none of these sources bothers to define it. Clarity on this point is essential before we can decide whether impartiality is indeed a compelling state interest, and, if so, whether the announce clause is narrowly tailored to achieve it.

### A

One meaning of "impartiality" in the judicial context--and of course its root meaning--is the lack of bias for or against either party to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. This is the traditional sense in which the term is used. See Webster's New International Dictionary 1247 (2d ed. 1950) (defining "impartial" as "[n]ot partial; esp., not favoring one more than another; treating all alike; unbiased; equitable; fair; just"). It is also the sense in which it is used in the cases cited by respondents and amici for the proposition that an impartial judge is essential to due process.

We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is barely tailored to serve that interest at all, inasmuch as it does not restrict speech for or against particular parties, but rather speech for or against particular issues. To be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. Any party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.

## B

It is perhaps possible to use the term "impartiality" in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular legal view. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. Impartiality in this sense may well be an interest served by the announce clause, but it is not a compelling state interest, as strict scrutiny requires. A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. As then-Justice Rehnquist observed of our own Court: "Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers." *Laird v. Tatum* (1972) (memorandum opinion). Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. "Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." *Ibid.* The Minnesota Constitution positively forbids the selection to courts of general jurisdiction of judges who are impartial in the sense of having no views on the law. Minn. Const., Art. VI, §5 ("Judges of the supreme court, the court of appeals and the district court shall be learned in the law"). And since avoiding judicial preconceptions on legal issues is neither possible nor

desirable, pretending otherwise by attempting to preserve the "appearance" of that type of impartiality can hardly be a compelling state interest either.

### C

A third possible meaning of "impartiality" (again not a common one) might be described as openmindedness. This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an equal chance to win the legal points in the case, but at least some chance of doing so. It may well be that impartiality in this sense, and the appearance of it, are desirable in the judiciary, but we need not pursue that inquiry, since we do not believe the Minnesota Supreme Court adopted the announce clause for that purpose.

Respondents argue that the announce clause serves the interest in openmindedness, or at least in the appearance of openmindedness, because it relieves a judge from pressure to rule a certain way in order to maintain consistency with statements the judge has previously made. The problem is, however, that statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible. Before they arrive on the bench (whether by election or otherwise) judges have often committed themselves on legal issues that they must later rule upon. More common still is a judge's confronting a legal issue on which he has expressed an opinion while on the bench. Most frequently, of course, that prior expression will have occurred in ruling on an earlier case. But judges often state their views on disputed legal issues outside the context of adjudication--in classes that they conduct, and in books and speeches. Like the ABA Codes of Judicial Conduct, the Minnesota Code not only permits but encourages this. See Minn. Code of Judicial Conduct, Canon 4(B) (2002) ("A judge may write, lecture, teach, speak and participate in other extra-judicial activities concerning the law ..."); Minn. Code of Judicial Conduct, Canon 4(B), Comment. (2002) ("To the extent that time permits, a judge is encouraged to do so ..."). That is quite incompatible with the notion that the need for openmindedness (or for the appearance of openmindedness) lies behind the prohibition at issue here.

The short of the matter is this: In Minnesota, a candidate for judicial office may not say "I think it is constitutional for the legislature to prohibit same-sex marriages." He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous. \*\*\*

### IV

To sustain the announce clause, the Eighth Circuit relied heavily on the fact that a pervasive practice of prohibiting judicial candidates from discussing disputed legal and political issues developed during the last half of the 20th century. \*\*\*

The first code regulating judicial conduct was adopted by the ABA in 1924. \*\*\* Even today, although a majority of States have adopted either the announce clause or its 1990 ABA successor, adoption is not unanimous. Of the 31 States that select some or all of their appellate and general-jurisdiction judges by election, 4 have adopted no candidate-speech restriction comparable to the announce clause, and 1 prohibits only the discussion of "pending litigation." This practice, relatively new to judicial elections and still not universally adopted, does not compare well with the traditions deemed worthy of our attention in prior cases.

There is an obvious tension between the article of Minnesota's popularly approved Constitution which provides that judges shall be elected, and the Minnesota Supreme Court's announce clause which places most subjects of interest to the voters off limits. (The candidate-speech restrictions of all the other States that have them are also the product of judicial fiat. ) The disparity is perhaps unsurprising, since the ABA, which originated the announce clause, has long been an opponent of judicial elections. That opposition may be well taken (it certainly had the support of the Founders of the Federal Government), but the First Amendment does not permit it to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about.

The Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment. Accordingly, we reverse the grant of summary judgment to respondents and remand the case for proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE O'CONNOR, CONCURRING.

I join the opinion of the Court but write separately to express my concerns about judicial elections generally. \*\*\*

Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan. In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.

JUSTICE KENNEDY, CONCURRING [OMITTED].

JUSTICE STEVENS, WITH WHOM JUSTICE SOUTER, JUSTICE GINSBURG, AND JUSTICE BREYER JOIN, DISSENTING [OMITTED].

JUSTICE GINSBURG, WITH WHOM JUSTICE STEVENS, JUSTICE SOUTER, AND JUSTICE BREYER JOIN, DISSENTING.

Whether state or federal, elected or appointed, judges perform a function fundamentally different from that of the people's elected representatives. Legislative and executive officials act on behalf of the voters who placed them in office; "judge[s] represen[t] the Law." *Chisom v. Roemer* (1991) (Scalia, J., dissenting). Unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide "individual cases and controversies" on individual records, *Plaut v. Spendthrift Farm, Inc.* (1995) (Stevens, J., dissenting), neutrally applying legal principles, and, when necessary, "stand[ing] up to what is generally supreme in a democracy: the popular will," Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1180 (1989).

A judiciary capable of performing this function, owing fidelity to no person or party, is a "longstanding Anglo-American tradition," *United States v. Will* (1980), an essential bulwark of constitutional government, a constant guardian of the rule of law. The guarantee of an independent, impartial judiciary enables society to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette* (1943). "Without this, all the reservations of particular rights or privileges would amount to nothing." THE FEDERALIST NO. 78, p. 466 (C. Rossiter ed. 1961).

The ability of the judiciary to discharge its unique role rests to a large degree on the manner in which judges are selected. The Framers of the Federal Constitution sought to advance the judicial function through the structural protections of Article III, which provide for the selection of judges by the President on the advice and consent of the Senate, generally for lifetime terms. Through its own Constitution, Minnesota, in common with most other States, has decided to allow its citizens to choose judges directly in periodic elections. But Minnesota has not thereby opted to install a corps of political actors on the bench; rather, it has endeavored to preserve the integrity of its judiciary by other means. Recognizing that the influence of political parties is incompatible with the judge's role, for example, Minnesota has designated all judicial elections nonpartisan. And it has adopted a provision, here called the Announce Clause, designed to prevent candidates for judicial office from "publicly making known how they would decide issues likely to come before them as judges."

The question this case presents is whether the First Amendment stops Minnesota from furthering its interest in judicial integrity through this precisely targeted speech restriction.

## I

The speech restriction must fail, in the Court's view, because an electoral process is at stake; if Minnesota opts to elect its judges, the Court asserts, the State may not rein in what candidates may say.

I do not agree with this unilocular, "an election is an election," approach. Instead, I would differentiate elections for political offices, in which the First Amendment holds full sway, from elections designed to select those whose office it is to administer justice without respect to persons. Minnesota's choice to elect its judges, I am persuaded, does not preclude the State from installing an election process geared to the judicial office.

Legislative and executive officials serve in representative capacities. They are agents of the people; their primary function is to advance the interests of their constituencies. Candidates for political offices, in keeping with their representative role, must be left free to inform the electorate of their positions on specific issues. Armed with such information, the individual voter will be equipped to cast her ballot intelligently, to vote for the candidate committed to positions the voter approves. Campaign statements committing the candidate to take sides on contentious issues are therefore not only appropriate in political elections, they are "at the core of our electoral process," for they "enhance the accountability of government officials to the people whom they represent,"

Judges, however, are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency. "[I]t is the business of judges to be indifferent to popularity." They must strive to do what is legally right, all the more so when the result is not the one "the home crowd" wants. Rehnquist, *Dedicatory Address: Act Well Your Part: Therein All Honor Lies*, 7 PEPPERDINE L. REV. 227, 229-300 (1980). Even when they develop common law or give concrete meaning to constitutional text, judges act only in the context of individual cases, the outcome of which cannot depend on the will of the public. See Barnette ("One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

Thus, the rationale underlying unconstrained speech in elections for political office--that representative government depends on the public's ability to choose agents who will act at its behest--does not carry over to campaigns for the bench. \*\*\*

## II

Proper resolution of this case requires correction of the Court's distorted construction of the provision before us for review. \*\*\*

First and most important, the Court ignores a crucial limiting construction placed on the Announce Clause by the courts below. The provision does not bar a candidate from generally "stating [her] views" on legal questions; it prevents her from "publicly making known how [she] would decide" disputed issues. That limitation places beyond the scope of the Announce Clause a wide range of comments that may be highly informative to voters. Consistent with the Eighth Circuit's construction, such comments may include, for example, statements of historical fact ("As a prosecutor, I obtained 15 drunk driving convictions"); qualified statements ("Judges should use sparingly their discretion to grant lenient sentences to drunk drivers"); and statements framed at a sufficient level of generality ("Drunk drivers are a threat to the safety of every driver"). What remains within the Announce Clause is the category of statements that

essentially commit the candidate to a position on a specific issue, such as "I think all drunk drivers should receive the maximum sentence permitted by law."

Second, the Court misportrays the scope of the Clause as applied to a candidate's discussion of past decisions. \*\*\*

The Announce Clause is thus more tightly bounded, and campaigns conducted under that provision more robust, than the Court acknowledges. Judicial candidates in Minnesota may not only convey general information about themselves, they may also describe their conception of the role of a judge and their views on a wide range of subjects of interest to the voters. Further, they may discuss, criticize, or defend past decisions of interest to voters. What candidates may not do--simply or with sophistication--is remove themselves from the constraints characteristic of the judicial office and declare how they would decide an issue, without regard to the particular context in which it is presented, sans briefs, oral argument, and, as to an appellate bench, the benefit of one's colleagues' analyses. Properly construed, the Announce Clause prohibits only a discrete subcategory of the statements the Court's misinterpretation encompasses.

\*\*\* In his 1996 bid for office, petitioner Gregory Wersal distributed literature sharply criticizing three Minnesota Supreme Court decisions. Of the court's holding in the first case--that certain unrecorded confessions must be suppressed--Wersal asked, "Should we conclude that because the Supreme Court does not trust police, it allows confessed criminals to go free?" Of the second case, invalidating a state welfare law, Wersal stated: "The Court should have deferred to the Legislature. It's the Legislature which should set our spending policies." And of the third case, a decision involving abortion rights, Wersal charged that the court's holding was "directly contrary to the opinion of the U. S. Supreme Court," "unprecedented," and a "pro-abortion stance."

When a complaint was filed against Wersal on the basis of those statements, the Lawyers Professional Responsibility Board concluded that no discipline was warranted, in part because it thought the disputed campaign materials did not violate the Announce Clause. And when, at the outset of his 1998 campaign, Wersal sought to avoid the possibility of sanction for future statements, he pursued the option, available to all Minnesota judicial candidates of requesting an advisory opinion concerning the application of the Announce Clause. In response to that request, the Board indicated that it did not anticipate any adverse action against him. Wersal has thus never been sanctioned under the Announce Clause for any campaign statement he made. On the facts before us, in sum, the Announce Clause has hardly stifled the robust communication of ideas and views from judicial candidate to voter.

### III

Even as it exaggerates the reach of the Announce Clause, the Court ignores the significance of that provision to the integrated system of judicial campaign regulation Minnesota has developed. \*\*\*

#### A

\*\*\* The justification for the pledges or promises prohibition follows from these principles. When a judicial candidate promises to rule a certain way on an issue

that may later reach the courts, the potential for due process violations is grave and manifest. If successful in her bid for office, the judicial candidate will become a judge, and in that capacity she will be under pressure to resist the pleas of litigants who advance positions contrary to her pledges on the campaign trail. If the judge fails to honor her campaign promises, she will not only face abandonment by supporters of her professed views, she will also "ris[k] being assailed as a dissembler," willing to say one thing to win an election and to do the opposite once in office.

A judge in this position therefore may be thought to have a "direct, personal, substantial, [and] pecuniary interest" in ruling against certain litigants, for she may be voted off the bench and thereby lose her salary and emoluments unless she honors the pledge that secured her election.

Given this grave danger to litigants from judicial campaign promises, States are justified in barring expression of such commitments, for they typify the "situatio[n] . . . in which experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable." *Withrow v. Larkin* (1975). \*\*\*

In addition to protecting litigants' due process rights, the parties in this case further agree, the pledges or promises clause advances another compelling state interest: preserving the public's confidence in the integrity and impartiality of its judiciary. \*\*\*

Prohibiting a judicial candidate from pledging or promising certain results if elected directly promotes the State's interest in preserving public faith in the bench. When a candidate makes such a promise during a campaign, the public will no doubt perceive that she is doing so in the hope of garnering votes. And the public will in turn likely conclude that when the candidate decides an issue in accord with that promise, she does so at least in part to discharge her undertaking to the voters in the previous election and to prevent voter abandonment in the next. The perception of that unseemly quid pro quo--a judicial candidate's promises on issues in return for the electorate's votes at the polls--inevitably diminishes the public's faith in the ability of judges to administer the law without regard to personal or political self-interest. \*\*\*

## B

The constitutionality of the pledges or promises clause is thus amply supported; the provision not only advances due process of law for litigants in Minnesota courts, it also reinforces the authority of the Minnesota judiciary by promoting public confidence in the State's judges. The Announce Clause, however, is equally vital to achieving these compelling ends, for without it, the pledges or promises provision would be feeble, an arid form, a matter of no real importance.

Uncoupled from the Announce Clause, the ban on pledges or promises is easily circumvented. By prefacing a campaign commitment with the caveat, "although I cannot promise anything," or by simply avoiding the language of promises or pledges altogether, a candidate could declare with impunity how she would decide specific issues. Semantic sanitizing of the candidate's commitment

would not, however, diminish its pernicious effects on actual and perceived judicial impartiality. \*\*\*

\*\*\*

This Court has recognized in the past, as Justice O'Connor does today, a "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." We have no warrant to resolve that tension, however, by forcing States to choose one pole or the other. Judges are not politicians, and the First Amendment does not require that they be treated as politicians simply because they are chosen by popular vote. Nor does the First Amendment command States who wish to promote the integrity of their judges in fact and appearance to abandon systems of judicial selection that the people, in the exercise of their sovereign prerogatives, have devised.

For more than three-quarters of a century, States like Minnesota have endeavored, through experiment tested by experience, to balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary. P. MCFADDEN, *ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS* 86 (1990); Brief for the Conference of Chief Justices as Amicus Curiae. The Announce Clause, borne of this long effort, "comes to this Court bearing a weighty title of respect," *Teamsters v. Hanke* (1950). I would uphold it as an essential component in Minnesota's accommodation of the complex and competing concerns in this sensitive area. Accordingly, I would affirm the judgment of the Court of Appeals for the Eighth Circuit.

## ***Williams-Yulee v. the Florida Bar***

575 US \_\_ (2015)

ROBERTS, C. J., DELIVERED THE OPINION OF THE COURT, EXCEPT AS TO PART II. BREYER, SOTOMAYOR, AND KAGAN, JJ., JOINED THAT OPINION IN FULL, AND GINSBURG, J., JOINED EXCEPT AS TO PART II. BREYER, J., FILED A CONCURRING OPINION. GINSBURG, J., FILED AN OPINION CONCURRING IN PART AND CONCURRING IN THE JUDGMENT, IN WHICH BREYER, J., JOINED AS TO PART II. SCALIA, J., FILED A DISSENTING OPINION, IN WHICH THOMAS, J., JOINED. KENNEDY, J., AND ALITO, J., FILED DISSENTING OPINIONS.

CHIEF JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT, EXCEPT AS TO PART II.

Our Founders vested authority to appoint federal judges in the President, with the advice and consent of the Senate, and entrusted those judges to hold their offices during good behavior. The Constitution permits States to make a different choice, and most of them have done so. In 39 States, voters elect trial or appellate judges at the polls. In an effort to preserve public confidence in the integrity of their judiciaries, many of those States prohibit judges and judicial candidates from personally soliciting funds for their campaigns. We must decide whether the First Amendment permits such restrictions on speech.

We hold that it does. Judges are not politicians, even when they come to the bench by way of the ballot. And a State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office. A State may assure its people that judges will apply the law without fear or favor--and without having personally asked anyone for money. We affirm the judgment of the Florida Supreme Court.

## I

### A

When Florida entered the Union in 1845, its Constitution provided for trial and appellate judges to be elected by the General Assembly. Florida soon followed more than a dozen of its sister States in transferring authority to elect judges to the voting public. \*\*\* Trial judges are still elected by popular vote, unless the local jurisdiction opts instead for merit selection. Fla. Const., Art. V, §10.

Amid the corruption scandals of the 1970s, the Florida Supreme Court adopted a new Code of Judicial Conduct. 281 So. 2d 21 (1973). In its present form, the first sentence of Canon 1 reads, "An independent and honorable judiciary is indispensable to justice in our society." Code of Judicial Conduct for the State of Florida 6 (2014). Canon 1 instructs judges to observe "high standards of conduct" so that "the integrity and independence of the judiciary may be preserved." Canon 2 directs that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Other provisions prohibit judges from lending the prestige of their offices to private interests, engaging in certain business transactions, and personally participating in soliciting funds for nonprofit organizations. Canons 2B, 5C(3)(b)(i), 5D.

Canon 7C(1) governs fundraising in judicial elections. The Canon, which is based on a provision in the American Bar Association's Model Code of Judicial Conduct, provides:

"A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law."

Florida statutes impose additional restrictions on campaign fundraising in judicial elections. Contributors may not donate more than \$1,000 per election to a trial court candidate or more than \$3,000 per retention election to a Supreme Court justice. Campaign committee treasurers must file periodic reports disclosing the names of contributors and the amount of each contribution.

Judicial candidates can seek guidance about campaign ethics rules from the Florida Judicial Ethics Advisory Committee. The Committee has interpreted Canon 7 to allow a judicial candidate to serve as treasurer of his own campaign

committee, learn the identity of campaign contributors, and send thank you notes to donors.

Like Florida, most other States prohibit judicial candidates from soliciting campaign funds personally, but allow them to raise money through committees. According to the American Bar Association, 30 of the 39 States that elect trial or appellate judges have adopted restrictions similar to Canon 7C(1). Brief for American Bar Association as *Amicus Curiae* 4.

## B

Lanell Williams-Yulee, who refers to herself as Yulee, has practiced law in Florida since 1991. In September 2009, she decided to run for a seat on the county court for Hillsborough County, a jurisdiction of about 1.3 million people that includes the city of Tampa. Shortly after filing paperwork to enter the race, Yulee drafted a letter announcing her candidacy. The letter described her experience and desire to "bring fresh ideas and positive solutions to the Judicial bench." The letter then stated:

"An early contribution of \$25, \$50, \$100, \$250, or \$500, made payable to 'Lanell Williams-Yulee Campaign for County Judge', will help raise the initial funds needed to launch the campaign and get our message out to the public. I ask for your support [i]n meeting the primary election fund raiser goals. Thank you in advance for your support."

Yulee signed the letter and mailed it to local voters. She also posted the letter on her campaign Web site.

Yulee's bid for the bench did not unfold as she had hoped. She lost the primary to the incumbent judge. Then the Florida Bar filed a complaint against her. As relevant here, the Bar charged her with violating Rule 4-8.2(b) of the Rules Regulating the Florida Bar. That Rule requires judicial candidates to comply with applicable provisions of Florida's Code of Judicial Conduct, including the ban on personal solicitation of campaign funds in Canon 7C(1).

Yulee admitted that she had signed and sent the fundraising letter. But she argued that the Bar could not discipline her for that conduct because the First Amendment protects a judicial candidate's right to solicit campaign funds in an election. The Florida Supreme Court appointed a referee, who held a hearing and recommended a finding of guilt. As a sanction, the referee recommended that Yulee be publicly reprimanded and ordered to pay the costs of the proceeding (\$1,860).

The Florida Supreme Court adopted the referee's recommendations. The court explained that Canon 7C(1) "clearly restricts a judicial candidate's speech" and therefore must be "narrowly tailored to serve a compelling state interest." The court held that the Canon satisfies that demanding inquiry. First, the court reasoned, prohibiting judicial candidates from personally soliciting funds furthers Florida's compelling interest in "preserving the integrity of [its] judiciary and maintaining the public's confidence in an impartial judiciary." In the court's view, "personal solicitation of campaign funds, even by mass mailing, raises an appearance of impropriety and calls into question, in the public's mind, the judge's impartiality." Second, the court concluded that Canon 7C(1) is narrowly tailored to serve that compelling interest because it "

'insulate[s] judicial candidates from the solicitation and receipt of funds while leaving open, ample alternative means for candidates to raise the resources necessary to run their campaigns.' "

The Florida Supreme Court acknowledged that some Federal Courts of Appeals--"whose judges have lifetime appointments and thus do not have to engage in fundraising"--had invalidated restrictions similar to Canon 7C(1). But the court found it persuasive that every State Supreme Court that had considered similar fundraising provisions--along with several Federal Courts of Appeals--had upheld the laws against First Amendment challenges. Florida's chief justice and one associate justice dissented. We granted certiorari.

## II [plurality]

The First Amendment provides that Congress "shall make no law . . . abridging the freedom of speech." The Fourteenth Amendment makes that prohibition applicable to the States. The parties agree that Canon 7C(1) restricts Yulee's speech on the basis of its content by prohibiting her from soliciting contributions to her election campaign. The parties disagree, however, about the level of scrutiny that should govern our review.

We have applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest. See *Riley v. National Federation of Blind of N. C., Inc.* (1988). As we have explained, noncommercial solicitation "is characteristically intertwined with informative and perhaps persuasive speech." Applying a lesser standard of scrutiny to such speech would threaten "the exercise of rights so vital to the maintenance of democratic institutions." *Schneider v. State (Town of Irvington)* (1939).

The principles underlying these charitable solicitation cases apply with even greater force here. Before asking for money in her fundraising letter, Yulee explained her fitness for the bench and expressed her vision for the judiciary. Her stated purpose for the solicitation was to get her "message out to the public." As we have long recognized, speech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection. Indeed, in our only prior case concerning speech restrictions on a candidate for judicial office, this Court and both parties assumed that strict scrutiny applied. *Republican Party of Minn. v. White* (2002).

Although the Florida Supreme Court upheld Canon 7C(1) under strict scrutiny, the Florida Bar and several *amici* contend that we should subject the Canon to a more permissive standard: that it be "closely drawn" to match a "sufficiently important interest." *Buckley v. Valeo* (1976) (*per curiam*). The "closely drawn" standard is a poor fit for this case. The Court adopted that test in *Buckley* to address a claim that campaign contribution limits violated a contributor's "freedom of political association." Here, Yulee does not claim that Canon 7C(1) violates her right to free association; she argues that it violates her right to free speech. And the Florida Bar can hardly dispute that the Canon infringes Yulee's freedom to discuss candidates and public issues--namely, herself and her qualifications to be a judge. The Bar's call to import the "closely drawn" test from the contribution limit context into a case about solicitation therefore has little avail.

As several of the Bar's *amici* note, we applied the "closely drawn" test to solicitation restrictions in *McConnell v. Federal Election Comm'n* (2003), overruled in part by *Citizens United v. Federal Election Comm'n* (2010). But the Court in that case determined that the solicitation restrictions operated primarily to prevent circumvention of the contribution limits, which were the subject of the "closely drawn" test in the first place. *McConnell* offers no help to the Bar here, because Florida did not adopt Canon 7C(1) as an anticircumvention measure.

In sum, we hold today what we assumed in *White*: A State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest.

### III

The Florida Bar faces a demanding task in defending Canon 7C(1) against Yulee's First Amendment challenge. We have emphasized that "it is the rare case" in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest. *Burson v. Freeman* (1992) (plurality opinion). But those cases do arise. See *ibid.*; *Holder v. Humanitarian Law Project* (2010); *McConnell*, 540 U. S., at 314 (opinion of KENNEDY, J.); cf. *Adarand Constructors, Inc. v. Peña* (1995) ("we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact'"). Here, Canon 7C(1) advances the State's compelling interest in preserving public confidence in the integrity of the judiciary, and it does so through means narrowly tailored to avoid unnecessarily abridging speech. This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny.

### A

The Florida Supreme Court adopted Canon 7C(1) to promote the State's interests in "protecting the integrity of the judiciary" and "maintaining the public's confidence in an impartial judiciary." The way the Canon advances those interests is intuitive: Judges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity. This principle dates back at least eight centuries to Magna Carta, which proclaimed, "To no one will we sell, to no one will we refuse or delay, right or justice." Cl. 40 (1215). The same concept underlies the common law judicial oath, which binds a judge to "do right to all manner of people . . . without fear or favour, affection or ill-will," 10 Encyclopaedia of the Laws of England 105 (2d ed. 1908), and the oath that each of us took to "administer justice without respect to persons, and do equal right to the poor and to the rich." Simply put, Florida and most other States have concluded that the public may lack confidence in a judge's ability to administer justice without fear or favor if he comes to office by asking for favors.

The interest served by Canon 7C(1) has firm support in our precedents. We have recognized the "vital state interest" in safeguarding "public confidence in the fairness and integrity of the nation's elected judges." *Caperton v. A. T. Massey Coal Co.* (2009). The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government. Unlike the executive or the legislature, the judiciary "has no influence over either the sword or the purse; . . . neither force nor will but merely judgment." The

Federalist No. 78. The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions. As Justice Frankfurter once put it for the Court, "justice must satisfy the appearance of justice." *Offutt v. United States* (1954). It follows that public perception of judicial integrity is "a state interest of the highest order." *Caperton* (quoting *White* (KENNEDY, J., concurring)).

The principal dissent observes that bans on judicial candidate solicitation lack a lengthy historical pedigree. We do not dispute that fact, but it has no relevance here. As the precedent cited by the principal dissent demonstrates, a history and tradition of regulation are important factors in determining whether to recognize "new categories of unprotected speech." *Brown v. Entertainment Merchants Assn* (2011). But nobody argues that solicitation of campaign funds by judicial candidates is a category of unprotected speech. As explained above, the First Amendment fully applies to Yulee's speech. The question is instead whether that Amendment permits the particular regulation of speech at issue here.

The parties devote considerable attention to our cases analyzing campaign finance restrictions in political elections. But a State's interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections. As we explained in *White*, States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians. 536 U. S., at 783; *id.*, at 805 (GINSBURG, J., dissenting). Politicians are expected to be appropriately responsive to the preferences of their supporters. Indeed, such "responsiveness is key to the very concept of self-governance through elected officials." *McCutcheon v. Federal Election Comm'n* (2014) (plurality opinion). The same is not true of judges. In deciding cases, a judge is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors. A judge instead must "observe the utmost fairness," striving to be "perfectly and completely independent, with nothing to influence or controul him but God and his conscience." Address of John Marshall, in *Proceedings and Debates of the Virginia State Convention of 1829-1830* (1830). As in *White*, therefore, our precedents applying the First Amendment to political elections have little bearing on the issues here.

The vast majority of elected judges in States that allow personal solicitation serve with fairness and honor. But "[e]ven if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributions is likely to undermine the public's confidence in the judiciary." *White* (O'Connor, J., concurring). In the eyes of the public, a judge's personal solicitation could result (even unknowingly) in "a possible temptation . . . which might lead him not to hold the balance nice, clear and true." *Tumey v. Ohio* (1927). That risk is especially pronounced because most donors are lawyers and litigants who may appear before the judge they are supporting.

The concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record. But no one denies that it is genuine and compelling. In short, it is the regrettable but unavoidable appearance that judges who personally ask for money may

diminish their integrity that prompted the Supreme Court of Florida and most other States to sever the direct link between judicial candidates and campaign contributors. \*\*\* A State's decision to elect its judges does not require it to tolerate these risks. The Florida Bar's interest is compelling.

## B

Yulee acknowledges the State's compelling interest in judicial integrity. She argues, however, that the Canon's failure to restrict other speech equally damaging to judicial integrity and its appearance undercuts the Bar's position. In particular, she notes that Canon 7C(1) allows a judge's campaign committee to solicit money, which arguably reduces public confidence in the integrity of the judiciary just as much as a judge's personal solicitation. Yulee also points out that Florida permits judicial candidates to write thank you notes to campaign donors, which ensures that candidates know who contributes and who does not.

It is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech. We have recognized, however, that underinclusiveness can raise "doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*. In a textbook illustration of that principle, we invalidated a city's ban on ritual animal sacrifices because the city failed to regulate vast swaths of conduct that similarly diminished its asserted interests in public health and animal welfare. *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993).

Underinclusiveness can also reveal that a law does not actually advance a compelling interest. For example, a State's decision to prohibit newspapers, but not electronic media, from releasing the names of juvenile defendants suggested that the law did not advance its stated purpose of protecting youth privacy. *Smith v. Daily Mail Publishing Co.* (1979).

Although a law's underinclusivity raises a red flag, the First Amendment imposes no freestanding "underinclusiveness limitation." *R. A. V. v. St. Paul* (1992). A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws--even under strict scrutiny--that conceivably could have restricted even greater amounts of speech in service of their stated interests. *Burson*; see *McConnell; Metromedia, Inc. v. San Diego* (1981) (plurality opinion); *Buckley*.

Viewed in light of these principles, Canon 7C(1) raises no fatal underinclusivity concerns. The solicitation ban aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges and judicial candidates. The Canon applies evenhandedly to all judges and judicial candidates, regardless of their viewpoint or chosen means of solicitation. And unlike some laws that we have found impermissibly underinclusive, Canon 7C(1) is not riddled with exceptions. See *City of Ladue v. Gilleo* (1994). Indeed, the Canon contains zero exceptions to its ban on personal solicitation.

Yulee relies heavily on the provision of Canon 7C(1) that allows solicitation by a candidate's campaign committee. But Florida, along with most other States, has reasonably concluded that solicitation by the candidate personally creates a

categorically different and more severe risk of undermining public confidence than does solicitation by a campaign committee. The identity of the solicitor matters, as anyone who has encountered a Girl Scout selling cookies outside a grocery store can attest. When the judicial candidate himself asks for money, the stakes are higher for all involved. The candidate has personally invested his time and effort in the fundraising appeal; he has placed his name and reputation behind the request. The solicited individual knows that, and also knows that the solicitor might be in a position to singlehandedly make decisions of great weight: The same person who signed the fundraising letter might one day sign the judgment. This dynamic inevitably creates pressure for the recipient to comply, and it does so in a way that solicitation by a third party does not. Just as inevitably, the personal involvement of the candidate in the solicitation creates the public appearance that the candidate will remember who says yes, and who says no.

In short, personal solicitation by judicial candidates implicates a different problem than solicitation by campaign committees. However similar the two solicitations may be in substance, a State may conclude that they present markedly different appearances to the public. Florida's choice to allow solicitation by campaign committees does not undermine its decision to ban solicitation by judges.

Likewise, allowing judicial candidates to write thank you notes to campaign donors does not detract from the State's interest in preserving public confidence in the integrity of the judiciary. Yulee argues that permitting thank you notes heightens the likelihood of actual bias by ensuring that judicial candidates know who supported their campaigns, and ensuring that the supporter knows that the candidate knows. Maybe so. But the State's compelling interest is implicated most directly by the candidate's personal solicitation itself. A failure to ban thank you notes for contributions not solicited by the candidate does not undercut the Bar's rationale.

In addition, the State has a good reason for allowing candidates to write thank you notes and raise money through committees. These accommodations reflect Florida's effort to respect the First Amendment interests of candidates and their contributors--to resolve the "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Chisom v. Roemer* (1991). They belie the principal dissent's suggestion that Canon 7C(1) reflects general "hostility toward judicial campaigning" and has "nothing to do with the appearances created by judges' asking for money." Nothing?

The principal dissent also suggests that Canon 7C(1) is underinclusive because Florida does not ban judicial candidates from asking individuals for personal gifts or loans. But Florida law treats a personal "gift" or "loan" as a campaign contribution if the donor makes it "for the purpose of influencing the results of an election," and Florida's Judicial Qualifications Commission has determined that a judicial candidate violates Canon 7C(1) by personally soliciting such a loan. In any event, Florida can ban personal solicitation of campaign funds by judicial candidates without making them obey a comprehensive code to leading an ethical life. Underinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*. See

*Florida Star v. B. J. F.* (1989). The principal dissent offers no basis to conclude that judicial candidates are in the habit of soliciting personal loans, football tickets, or anything of the sort. Even under strict scrutiny, "[t]he First Amendment does not require States to regulate for problems that do not exist." *Burson*.

Taken to its logical conclusion, the position advanced by Yulee and the principal dissent is that Florida may ban the solicitation of funds by judicial candidates only if the State bans *all* solicitation of funds in judicial elections. The First Amendment does not put a State to that all-or-nothing choice. We will not punish Florida for leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pretextual motive.

### C

After arguing that Canon 7C(1) violates the First Amendment because it restricts too little speech, Yulee argues that the Canon violates the First Amendment because it restricts too much. In her view, the Canon is not narrowly tailored to advance the State's compelling interest through the least restrictive means. See *United States v. Playboy Entertainment Group, Inc.* (2000).

By any measure, Canon 7C(1) restricts a narrow slice of speech. A reader of Justice Kennedy's dissent could be forgiven for concluding that the Court has just upheld a latter-day version of the Alien and Sedition Acts, approving "state censorship" that "locks the First Amendment out," imposes a "gag" on candidates, and inflicts "dead weight" on a "silenced" public debate. But in reality, Canon 7C(1) leaves judicial candidates free to discuss any issue with any person at any time. Candidates can write letters, give speeches, and put up billboards. They can contact potential supporters in person, on the phone, or online. They can promote their campaigns on radio, television, or other media. They cannot say, "Please give me money." They can, however, direct their campaign committees to do so. Whatever else may be said of the Canon, it is surely not a "wildly disproportionate restriction upon speech." (Scalia, J., dissenting).

Indeed, Yulee concedes--and the principal dissent seems to agree --that Canon 7C(1) is valid in numerous applications. Yulee acknowledges that Florida can prohibit judges from soliciting money from lawyers and litigants appearing before them. In addition, she says the State "might" be able to ban "direct one-to-one solicitation of lawyers and individuals or businesses that could reasonably appear in the court for which the individual is a candidate." She also suggests that the Bar could forbid "in person" solicitation by judicial candidates. Tr. of Oral Arg. 7; cf. *Ohralik v. Ohio State Bar Assn.* (1978) (permitting State to ban in person solicitation of clients by lawyers). But Yulee argues that the Canon cannot constitutionally be applied to her chosen form of solicitation: a letter posted online and distributed via mass mailing. No one, she contends, will lose confidence in the integrity of the judiciary based on personal solicitation to such a broad audience.

This argument misperceives the breadth of the compelling interest that underlies Canon 7C(1). Florida has reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance of

impropriety that may cause the public to lose confidence in the integrity of the judiciary. That interest may be implicated to varying degrees in particular contexts, but the interest remains whenever the public perceives the judge personally asking for money.

Moreover, the lines Yulee asks us to draw are unworkable. Even under her theory of the case, a mass mailing would create an appearance of impropriety if addressed to a list of all lawyers and litigants with pending cases. So would a speech soliciting contributions from the 100 most frequently appearing attorneys in the jurisdiction. Yulee says she might accept a ban on one-to-one solicitation, but is the public impression really any different if a judicial candidate tries to buttonhole not one prospective donor but two at a time? Ten? Yulee also agrees that in person solicitation creates a problem. But would the public's concern recede if the request for money came in a phone call or a text message?

We decline to wade into this swamp. The First Amendment requires that Canon 7C(1) be narrowly tailored, not that it be "perfectly tailored." *Burson*. The impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as public confidence in the integrity of the judiciary. Yulee is of course correct that some personal solicitations raise greater concerns than others. A judge who passes the hat in the courthouse creates a more serious appearance of impropriety than does a judicial candidate who makes a tasteful plea for support on the radio. But most problems arise in greater and lesser gradations, and the First Amendment does not confine a State to addressing evils in their most acute form. Here, Florida has concluded that all personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the judiciary; banning all personal solicitations by judicial candidates is narrowly tailored to address that concern.

In considering Yulee's tailoring arguments, we are mindful that most States with elected judges have determined that drawing a line between personal solicitation by candidates and solicitation by committees is necessary to preserve public confidence in the integrity of the judiciary. These considered judgments deserve our respect, especially because they reflect sensitive choices by States in an area central to their own governance--how to select those who "sit as their judges." *Gregory v. Ashcroft* (1991).

Finally, Yulee contends that Florida can accomplish its compelling interest through the less restrictive means of recusal rules and campaign contribution limits. We disagree. A rule requiring judges to recuse themselves from every case in which a lawyer or litigant made a campaign contribution would disable many jurisdictions. And a flood of postelection recusal motions could "erode public confidence in judicial impartiality" and thereby exacerbate the very appearance problem the State is trying to solve. *Caperton* (Roberts, C. J., dissenting). Moreover, the rule that Yulee envisions could create a perverse incentive for litigants to make campaign contributions to judges solely as a means to trigger their later recusal--a form of peremptory strike against a judge that would enable transparent forum shopping.

As for campaign contribution limits, Florida already applies them to judicial elections. A State may decide that the threat to public confidence created by personal solicitation exists apart from the amount of money that a judge or judicial candidate seeks. Even if Florida decreased its contribution limit, the appearance that judges who personally solicit funds might improperly favor their campaign donors would remain. Although the Court has held that contribution limits advance the interest in preventing *quid pro quo* corruption and its appearance in political elections, we have never held that adopting contribution limits precludes a State from pursuing its compelling interests through additional means. And in any event, a State has compelling interests in regulating judicial elections that extend beyond its interests in regulating political elections, because judges are not politicians.

In sum, because Canon 7C(1) is narrowly tailored to serve a compelling government interest, the First Amendment poses no obstacle to its enforcement in this case. As a result of our decision, Florida may continue to prohibit judicial candidates from personally soliciting campaign funds, while allowing them to raise money through committees and to otherwise communicate their electoral messages in practically any way. The principal dissent faults us for not answering a slew of broader questions, such as whether Florida may cap a judicial candidate's spending or ban independent expenditures by corporations. *Post*, at 8-9. Yulee has not asked these questions, and for good reason--they are far afield from the narrow regulation actually at issue in this case.

We likewise have no cause to consider whether the citizens of States that elect their judges have decided anything about the "oracular sanctity of judges" or whether judges are due "a hearty helping of humble pie." The principal dissent could be right that the decision to adopt judicial elections "probably springs," at least in part, from a desire to make judges more accountable to the public, although the history on this matter is more complicated. In any event, it is a long way from general notions of judicial accountability to the principal dissent's view, which evokes nothing so much as Delacroix's painting of Liberty leading a determined band of *citoyens*, this time against a robed aristocracy scurrying to shore up the ramparts of the judicial castle through disingenuous ethical rules. We claim no similar insight into the People's passions, hazard no assertions about ulterior motives of those who promulgated Canon 7C(1), and firmly reject the charge of a deceptive "pose of neutrality" on the part of those who uphold it.

\* \* \*

The desirability of judicial elections is a question that has sparked disagreement for more than 200 years. Hamilton believed that appointing judges to positions with life tenure constituted "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws." The Federalist No. 78, at 465. Jefferson thought that making judges "dependent on none but themselves" ran counter to the principle of "a government founded on the public will." 12 THE WORKS OF THOMAS JEFFERSON 5 (P. Ford ed. 1905). The federal courts reflect the view of Hamilton; most States have sided with Jefferson. Both methods have given our Nation jurists of wisdom and rectitude who have devoted themselves to maintaining "the public's respect . . . and a reserve of public goodwill, without

becoming subservient to public opinion." Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 596 (2004).

It is not our place to resolve this enduring debate. Our limited task is to apply the Constitution to the question presented in this case. Judicial candidates have a First Amendment right to speak in support of their campaigns. States have a compelling interest in preserving public confidence in their judiciaries. When the State adopts a narrowly tailored restriction like the one at issue here, those principles do not conflict. A State's decision to elect judges does not compel it to compromise public confidence in their integrity.

The judgment of the Florida Supreme Court is

*Affirmed.*

JUSTICE BREYER, CONCURRING.

As I have previously said, I view this Court's doctrine referring to tiers of scrutiny as guidelines informing our approach to the case at hand, not tests to be mechanically applied. See, e.g., *United States v. Alvarez* (2012) (Breyer, J., concurring in judgment); *Nixon v. Shrink Missouri Government PAC* (2000) (Breyer, J., concurring). On that understanding, I join the Court's opinion.

JUSTICE GINSBURG, WITH WHOM JUSTICE BREYER JOINS AS TO PART II, CONCURRING IN PART AND CONCURRING IN THE JUDGMENT.

I

I join the Court's opinion save for Part II. As explained in my dissenting opinion in *Republican Party of Minnesota v. White* (2002), I would not apply exacting scrutiny to a State's endeavor sensibly to "differentiate elections for political offices . . . , from elections designed to select those whose office it is to administer justice without respect to persons."

II

I write separately to reiterate the substantial latitude, in my view, States should possess to enact campaign-finance rules geared to judicial elections. "Judges," the Court rightly recognizes, "are not politicians," so "States may regulate judicial elections differently than they regulate political elections." And because "the role of judges differs from the role of politicians," this Court's "precedents applying the First Amendment to political elections [should] have little bearing" on elections to judicial office.

The Court's recent campaign-finance decisions, trained on political actors, should not hold sway for judicial elections. In *Citizens United v. Federal Election Comm'n* (2010), the Court invalidated a campaign-finance restriction designed to check the outsized influence of monied interests in politics. Addressing the Government's asserted interest in preventing "influence over or access to elected officials," the Court observed that "[f]avoritism and influence" are inevitable "in representative politics." A plurality of the Court responded similarly in *McCutcheon v. Federal Election Comm'n* (2014), when it addressed the prospect that wealthy donors would have ready access to, and could therefore influence, elected policymakers. "[A] central feature of democracy," the

plurality maintained, is "that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns."

For reasons spelled out in the dissenting opinions in *Citizens United* and *McCutcheon*, I would have upheld the legislation there at issue. But even if one agrees with those judgments, they are geared to elections for representative posts, and should have "little bearing" on judicial elections. \*\*\*

States may therefore impose different campaign-finance rules for judicial elections than for political elections. Experience illustrates why States may wish to do so. When the political campaign-finance apparatus is applied to judicial elections, the distinction of judges from politicians dims. Donors, who gain audience and influence through contributions to political campaigns, anticipate that investment in

In recent years, moreover, issue-oriented organizations and political action committees have spent millions of dollars opposing the reelection of judges whose decisions do not tow a party line or are alleged to be out of step with public opinion. Following the Iowa Supreme Court's 2009 invalidation of the State's same-sex marriage ban, for example, national organizations poured money into a successful campaign to remove three justices from that Court. Attack advertisements funded by issue or politically driven organizations portrayed the justices as political actors; they lambasted the Iowa Supreme Court for "usurp[ing] the will of voters."

Similarly portraying judges as belonging to another political branch, huge amounts have been spent on advertisements opposing retention of judges because they rendered unpopular decisions in favor of criminal defendants. In North Carolina, for example, in 2014, a political action committee aired "a widely condemned TV spot accusing [North Carolina Supreme Court Justice Robin] Hudson of being 'soft' on child-molesters." And in West Virginia, as described in *Caperton v. A. T. Massey Coal Co.* (2009), coal executive Don Blankenship lavishly funded a political action committee called "And For The Sake Of The Kids." That group bought advertisements accusing Justice Warren McGraw of freeing a "child rapist" and allowing that "rapist" to "work as a janitor at a West Virginia school."

Disproportionate spending to influence court judgments threatens both the appearance and actuality of judicial independence. Numerous studies report that the money pressure groups spend on judicial elections "can affect judicial decision-making across a broad range of cases." Brief for Professors of Law, Economics, and Political Science as *Amici Curiae*; J. Shepherd & M. Kang, *SKEWED JUSTICE 1* (2014), available at <http://skewedjustice.org> (All Internet materials as visited Apr. 24, 2015, and included in Clerk of Court's case file) (finding that a recent "explosion in spending on television attack advertisements . . . has made courts less likely to rule in favor of defendants in criminal appeals").

How does the electorate perceive outsized spending on judicial elections? Multiple surveys over the past 13 years indicate that voters overwhelmingly believe direct contributions to judges' campaigns have at least "some influence" on judicial decisionmaking. \*\*\*

"A State's decision to elect its judges does not require it to tolerate these risks." What may be true of happy families, L. Tolstoy, *Anna Karenina* 1 (R. Pevear and L. Volokhonsky transls. 2000) ("All happy families are alike"), or of roses, G. Stein, *Sacred Emily*, in *Geography and Plays* 178, 187 (1922) (reprint 1968) ("Rose is a rose is a rose is a rose"), does not hold true in elections of every kind. States should not be put to the polar choices of either equating judicial elections to political elections, or else abandoning public participation in the selection of judges altogether. Instead, States should have leeway to "balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary." *White* (Ginsburg, J., dissenting).

JUSTICE SCALIA, WITH WHOM JUSTICE THOMAS JOINS, DISSENTING.

An ethics canon adopted by the Florida Supreme Court bans a candidate in a judicial election from asking anyone, under any circumstances, for a contribution to his campaign. Faithful application of our precedents would have made short work of this wildly disproportionate restriction upon speech. Intent upon upholding the Canon, however, the Court flattens one settled First Amendment principle after another.

## I

The first axiom of the First Amendment is this: As a general rule, the state has no power to ban speech on the basis of its content. One need not equate judges with politicians to see that this principle does not grow weaker merely because the censored speech is a judicial candidate's request for a campaign contribution. Our cases hold that speech enjoys the full protection of the First Amendment unless a widespread and longstanding tradition ratifies its regulation. No such tradition looms here. Georgia became the first State to elect its judges in 1812, and judicial elections had spread to a large majority of the States by the time of the Civil War. Yet there appears to have been no regulation of judicial candidates' speech throughout the 19th and early 20th centuries. The American Bar Association first proposed ethics rules concerning speech of judicial candidates in 1924, but these rules did not achieve widespread adoption until after the Second World War.

Rules against soliciting campaign contributions arrived more recently still. The ABA first proposed a canon advising against it in 1972, and a canon prohibiting it only in 1990. Even now, 9 of the 39 States that elect judges allow judicial candidates to ask for campaign contributions. In the absence of any long-settled custom about judicial candidates' speech in general or their solicitations in particular, we have no basis for relaxing the rules that normally apply to laws that suppress speech because of content.

\*\*\* Because Canon 7C(1) restricts fully protected speech on the basis of content, it presumptively violates the First Amendment. We may uphold it only if the State meets its burden of showing that the Canon survives strict scrutiny—that is to say, only if it shows that the Canon is narrowly tailored to serve a compelling interest. I do not for a moment question the Court's conclusion that States have different compelling interests when regulating judicial elections than when regulating political ones. Unlike a legislator, a judge must be

impartial--without bias for or against any party or attorney who comes before him. I accept for the sake of argument that States have a compelling interest in ensuring that its judges are *seen* to be impartial. I will likewise assume that a judicial candidate's request to a litigant or attorney presents a danger of coercion that a political candidate's request to a constituent does not. But Canon 7C(1) does not narrowly target concerns about impartiality or its appearance; it applies even when the person asked for a financial contribution has no chance of ever appearing in the candidate's court. And Florida does not invoke concerns about coercion, presumably because the Canon bans solicitations regardless of whether their object is a lawyer, litigant, or other person vulnerable to judicial pressure. So Canon 7C(1) fails exacting scrutiny and infringes the First Amendment. This case should have been just that straightforward.

II

\*\*\*

[ABC omitted]

D

Even if Florida could show that banning all personal appeals for campaign funds is necessary to protect public confidence in judicial integrity, the Court must overpower one last sentinel of free speech before it can uphold Canon 7C(1). Among its other functions, the First Amendment is a kind of Equal Protection Clause for ideas. The state ordinarily may not regulate one message because it harms a government interest yet refuse to regulate other messages that impair the interest in a comparable way. Applying this principle, we invalidated a law that prohibited picketing dwellings but made an exception for picketing about labor issues; the State could not show that labor picketing harmed its asserted interest in residential privacy any less than other kinds of picketing. *Carey v. Brown* (1980). In another case, we set aside a ban on showing movies containing nudity in drive-in theaters, because the government did not demonstrate that movies with nude scenes would distract passing drivers any more than, say, movies with violent scenes. *Erznoznik v. Jacksonville* (1975).

The Court's decision disregards these principles. The Court tells us that "all personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the judiciary." But Canon 7C(1) does not restrict *all* personal solicitations; it restricts only personal solicitations related to campaigns. The part of the Canon challenged here prohibits personal pleas for "campaign funds," and the Canon elsewhere prohibits personal appeals to attorneys for "publicly stated support." So although Canon 7C(1) prevents Yulee from asking a lawyer for a few dollars to help her buy campaign pamphlets, it does not prevent her asking the same lawyer for a personal loan, access to his law firm's luxury suite at the local football stadium, or even a donation to help her fight the Florida Bar's charges. What could possibly justify these distinctions? Surely the Court does not believe that requests for campaign favors erode public confidence in a way that requests for favors unrelated to elections do not. Could anyone say with a straight face that it looks *worse* for a candidate to say "please give my campaign \$25" than to say "please give *me* \$25"?

Fumbling around for a fig-leaf, the Court says that "the First Amendment imposes no freestanding 'underinclusiveness limitation.'" This analysis elides the distinction between selectivity on the basis of content and selectivity on other grounds. Because the First Amendment does not prohibit underinclusiveness as such, lawmakers may target a problem only at certain times or in certain places. Because the First Amendment *does* prohibit content discrimination as such, lawmakers may *not* target a problem only in certain messages. Explaining this distinction, we have said that the First Amendment would allow banning obscenity "only in certain media or markets" but would preclude banning "only that obscenity which includes offensive political messages." *R. A. V. v. St. Paul* (1992). This case involves selectivity on the basis of content. The Florida Supreme Court has decided to eliminate the appearances associated with "personal appeals for money," when the appeals seek money for a campaign but not when the appeals seek money for other purposes. That distinction violates the First Amendment. \*\*\*

The Court tries to strike a pose of neutrality between appointment and election of judges, but no one should be deceived. A Court that sees impropriety in a candidate's request for *any* contributions to his election campaign does not much like judicial selection by the people. One cannot have judicial elections without judicial campaigns, and judicial campaigns without funds for campaigning, and funds for campaigning without asking for them. When a society decides that its judges should be elected, it necessarily decides that selection by the people is more important than the oracular sanctity of judges, their immunity from the (shudder!) indignity of begging for funds, and their exemption from those shadows of impropriety that fall over the proletarian public officials who must run for office. A free society, accustomed to electing its rulers, does not much care whether the rulers operate through statute and executive order, or through judicial distortion of statute, executive order, and constitution. The prescription that judges be elected probably springs from the people's realization that their judges can become their rulers--and (it must be said) from just a deep-down feeling that members of the Third Branch will profit from a hearty helping of humble pie, and from a severe reduction of their great remove from the (ugh!) People. (It should not be thought that I myself harbor such irreverent and revolutionary feelings; but I think it likely--and year by year more likely--that those who favor the election of judges do so.) In any case, hostility to campaigning by judges entitles the people of Florida to amend their Constitution to replace judicial elections with the selection of judges by lawyers' committees; it does not entitle the Florida Supreme Court to adopt, or this Court to endorse, a rule of judicial conduct that abridges candidates' speech in the judicial elections that the Florida Constitution prescribes.

\* \* \*

This Court has not been shy to enforce the First Amendment in recent Terms--even in cases that do not involve election speech. It has accorded robust protection to depictions of animal torture, sale of violent video games to children, and lies about having won military medals. See *United States v. Stevens* (2010); *Brown v. Entertainment Merchants v. Brown* (2011); *United States v. Alvarez* (2012). Who would have thought that the same Court would today exert such heroic efforts to save so plain an abridgement of the freedom of

speech? It is no great mystery what is going on here. The judges of this Court, like the judges of the Supreme Court of Florida who promulgated Canon 7C(1), evidently consider the preservation of public respect for the courts a policy objective of the highest order. So it is--but so too are preventing animal torture, protecting the innocence of children, and honoring valiant soldiers. The Court did not relax the Constitution's guarantee of freedom of speech when legislatures pursued those goals; it should not relax the guarantee when the Supreme Court of Florida pursues this one. The First Amendment is not abridged for the benefit of the Brotherhood of the Robe.

I respectfully dissent.

JUSTICE KENNEDY, DISSENTING.

The dissenting opinion by Justice Scalia gives a full and complete explanation of the reasons why the Court's opinion contradicts settled First Amendment principles. This separate dissent is written to underscore the irony in the Court's having concluded that the very First Amendment protections judges must enforce should be lessened when a judicial candidate's own speech is at issue. It is written to underscore, too, the irony in the Court's having weakened the rigors of the First Amendment in a case concerning elections, a paradigmatic forum for speech and a process intended to protect freedom in so many other manifestations.

First Amendment protections are both personal and structural. Free speech begins with the right of each person to think and then to express his or her own ideas. Protecting this personal sphere of intellect and conscience, in turn, creates structural safeguards for many of the processes that define a free society. The individual speech here is political speech. The process is a fair election. These realms ought to be the last place, not the first, for the Court to allow unprecedented content-based restrictions on speech. \*\*\*

With all due respect for the Court, it seems fair and necessary to say its decision rests on two premises, neither one correct. One premise is that in certain elections--here an election to choose the best qualified judge--the public lacks the necessary judgment to make an informed choice. Instead, the State must protect voters by altering the usual dynamics of free speech. The other premise is that since judges should be accorded special respect and dignity, their election can be subject to certain content-based rules that would be unacceptable in other elections. In my respectful view neither premise can justify the speech restriction at issue here. Although States have a compelling interest in seeking to ensure the appearance and the reality of an impartial judiciary, it does not follow that the State may alter basic First Amendment principles in pursuing that goal. See *Republican Party of Minn. v. White* (2002).

While any number of troubling consequences will follow from the Court's ruling, a simple example can suffice to illustrate the dead weight its decision now ties to public debate. Assume a judge retires, and two honest lawyers, Doe and Roe, seek the vacant position. Doe is a respected, prominent lawyer who has been active in the community and is well known to business and civic leaders. Roe, a lawyer of extraordinary ability and high ethical standards, keeps a low profile.

As soon as Doe announces his or her candidacy, a campaign committee organizes of its own accord and begins raising funds. But few know or hear about Roe's potential candidacy, and no one with resources or connections is available to assist in raising the funds necessary for even a modest plan to speak to the electorate. Today the Court says the State can censor Roe's speech, imposing a gag on his or her request for funds, no matter how close Roe is to the potential benefactor or donor. The result is that Roe's personal freedom, the right of speech, is cut off by the State.

The First Amendment consequences of the Court's ruling do not end with its denial of the individual's right to speak. For the very purpose of the candidate's fundraising was to facilitate a larger speech process: an election campaign. By cutting off one candidate's personal freedom to speak, the broader campaign debate that might have followed--a debate that might have been informed by new ideas and insights from both candidates--now is silenced.

Elections are a paradigmatic forum for speech. Though present day campaign rhetoric all too often might thwart or obscure deliberative discourse, the idea of elections is that voters can engage in, or at least consider, a principled debate. That debate can be a means to find consensus for a civic course that is prudent and wise. This pertains both to issues and to the choice of elected officials. The First Amendment seeks to make the idea of discussion, open debate, and consensus-building a reality. But the Court decides otherwise. The Court locks the First Amendment out.

Whether an election is the best way to choose a judge is itself the subject of fair debate. But once the people of a State choose to have elections, the First Amendment protects the candidate's right to speak and the public's ensuing right to open and robust debate. One advantage of judicial elections is the opportunity offered for the public to become more knowledgeable about their courts and their law. This might stimulate discourse over the requisite and highest ethical standards for the judiciary, including whether the people should elect a judge who personally solicits campaign funds. Yet now that teaching process is hindered by state censorship. By allowing the State's speech restriction, the Court undermines the educational process that free speech in elections should facilitate.

It is not within our Nation's First Amendment tradition to abridge speech simply because the government believes a question is too difficult or too profound for voters. If the State is concerned about unethical campaign practices, it need not revert to the assumption that voters themselves are insensitive to ethics. Judicial elections were created to enable citizens to decide for themselves which judges are best qualified and which are most likely to "stand by the constitution of the State against the encroachment of power." REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 672 (1846). The Court should not now presume citizens are unequipped for that task when it comes to judging for themselves who should judge them.

If there is concern about principled, decent, and thoughtful discourse in election campaigns, the First Amendment provides the answer. That answer is more speech. See, *e.g.*, *Whitney v. California* (1927) (Brandeis, J., concurring)

(when the government objects to speech, "the remedy to be applied is more speech, not enforced silence"). For example, candidates might themselves agree to appoint members of a panel charged with periodic evaluation of campaign statements, candor, and fairness. Those evaluations could be made public. And any number of private organizations or voter groups seeking to evaluate campaign rhetoric could do the same. See *White* (Kennedy, J. concurring).

Modern communication technologies afford voters and candidates an unparalleled opportunity to engage in the campaign and election process. These technologies may encourage a discourse that is principled and informed. The Internet, in particular, has increased in a dramatic way the rapidity and pervasiveness with which ideas may spread. Whether as a result of disclosure laws or a candidate's voluntary decision to make the campaign transparent, the Internet can reveal almost at once how a candidate sought funds; who the donors were; and what amounts they gave. Indeed, disclosure requirements offer a powerful, speech-enhancing method of deterring corruption--one that does not impose limits on how and when people can speak. See *Doe v. Reed* (2010) ("Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot"). Based on disclosures the voters can decide, among other matters, whether the public is well served by an elected judiciary; how each candidate defines appropriate campaign conduct (which may speak volumes about his or her judicial demeanor); and what persons and groups support or oppose a particular candidate. See *Buckley v. Valeo* (1976) (*per curiam*). \*\*\*

In addition to narrowing the First Amendment's reach, there is another flaw in the Court's analysis. That is its error in the application of strict scrutiny. \*\*\* This law comes nowhere close to being narrowly tailored. And by saying that it survives that vital First Amendment requirement, the Court now writes what is literally a casebook guide to eviscerating strict scrutiny any time the Court encounters speech it dislikes. On these premises, and for the reasons explained in more detail by Justice Scalia, it is necessary for me to file this respectful dissent.

JUSTICE ALITO, DISSENTING.

I largely agree with what I view as the essential elements of the dissents filed by Justices Scalia and Kennedy. The Florida rule before us regulates speech that is part of the process of selecting those who wield the power of the State. Such speech lies at the heart of the protection provided by the First Amendment. The Florida rule regulates that speech based on content and must therefore satisfy strict scrutiny. This means that it must be narrowly tailored to further a compelling state interest. Florida has a compelling interest in making sure that its courts decide cases impartially and in accordance with the law and that its citizens have no good reason to lack confidence that its courts are performing their proper role. But the Florida rule is not narrowly tailored to serve that interest.

Indeed, this rule is about as narrowly tailored as a burlap bag. \*\*\*

## Notes

1. *Williams-Yulee* involves judicial elections and Chief Justice Roberts's opinion for the Court discusses the differences between judicial and legislative elections. But some have argued that *Williams-Yulee* has the potential to undermine allegiance to the narrow anti-corruption rationale (quid-pro-quo) of current campaign finance doctrine.
2. Many commentators were surprised by Chief Justice Roberts's position in *Williams-Yulee*. During oral arguments, he seemingly leaned toward equating judicial and political elections, stating that "it's self-evident, particularly in judicial races" that "prohibiting a form of raising funds is to the great advantage of the incumbent" because the only way "incumbents are going to be challenged if you have somebody who can get their own distinct message out." Later he stated that the "fundamental choice was made by the State when they said we're going to have judges elected," echoing Justice O'Connor's concurring opinion in *Republican Party of Minnesota v. White*, (2002). Note that since her retirement from the Court, Sandra Day O'Connor has been vocal in her criticism of judicial elections.
3. Note the references in *Williams-Yulee* to *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009). In *Caperton*, the Court held that the "extreme facts" of the case - - - an outsized campaign contribution to a West Virginia state supreme court judge by a party subsequently appearing before the court - - - created the probability of bias meriting recusal as a matter of due process under the Fourteenth Amendment. The decision was closely divided; but interestingly Justice Kennedy writing for the Court, and Chief Justice Roberts authoring the primary dissent. The outcomes of these cases seem to point to the Court's willingness to uphold judicial integrity, but the positions of some Justices seem internally inconsistent.

# Chapter Nine: COMMERCIAL SPEECH

This chapter charts the ascent of “commercial speech” from unprotected to arguably as fully protected as political speech. The first subsection addresses the beginning of the protections of commercial speech and its definitions. The second subsection explores the current “intermediate scrutiny” type test for commercial speech and its application, including to attorney advertising. The last subsection focuses on *Sorrell v. IMS Health*, the Court’s most recent major commercial speech decision and arguably an elevation of commercial speech in any First Amendment hierarchy.

## Chapter Outline

### I. From Unprotected to Protected Speech

Valentine v. Chrestensen

Bigelow v. Commonwealth of Virginia

Virginia State Pharmacy Board v. Virginia Citizens Consumer Council

Notes

### II. The Central Hudson Test & Its Applications

Central Hudson Gas & Electric Corp. v. Public Service Commission

Bolger v. Youngs Drug Products Corp.

Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio

Florida Bar v. Went For It, Inc.

Lorillard Tobacco Co. v. Reilly

Notes

### III. The Ascendency of Commercial Speech?

Sorrell v. IMS Health Inc.

Notes

## I. From Unprotected to Protected Speech

### *Valentine v. Chrestensen*

316 U.S. 52 (1942)

JUSTICE ROBERTS DELIVERED THE OPINION OF THE [UNANIMOUS] COURT.

The respondent, a citizen of Florida, owns a former United States Navy submarine which he exhibits for profit. In 1940 he brought it to New York City and moored it at a State pier in the East River. He prepared and printed a handbill advertising the boat and soliciting visitors for a stated admission fee. On his attempting to distribute the bill in the city streets, he was advised by the petitioner, as Police Commissioner, that this activity would violate § 318 of the Sanitary Code, which forbids distribution in the streets of commercial and business advertising matter but was told that he might freely distribute handbills solely devoted to "information or a public protest."

Respondent thereupon prepared and showed to the petitioner, in proof form, a double-faced handbill. On one side was a revision of the original, altered by the removal of the statement as to admission fee but consisting only of commercial advertising. On the other side was a protest against the action of the City Dock Department in refusing the respondent wharfage facilities at a city pier for the exhibition of his submarine, but no commercial advertising. The Police Department advised that distribution of a bill containing only the protest would not violate § 318, and would not be restrained, but that distribution of the double-faced bill was prohibited. The respondent, nevertheless, proceeded with the printing of his proposed bill and started to distribute it. He was restrained by the police.

Respondent then brought this suit to enjoin the petitioner from interfering with the distribution. In his complaint he alleged diversity of citizenship; an amount in controversy in excess of \$3,000; the acts and threats of the petitioner under the purported authority of § 318; asserted a consequent violation of § 1 of the Fourteenth Amendment of the Constitution; and prayed an injunction. The District Court granted an interlocutory injunction, and after trial on a stipulation from which the facts appear as above recited, granted a permanent injunction. The Circuit Court of Appeals, by a divided court, affirmed.

The question is whether the application of the ordinance to the respondent's activity was, in the circumstances, an unconstitutional abridgement of the freedom of the press and of speech.

1. This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall

be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated. If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct.

2. The respondent contends that, in truth, he was engaged in the dissemination of matter proper for public information, none the less so because there was inextricably attached to the medium of such dissemination commercial advertising matter. The court below appears to have taken this view, since it adverts to the the difficulty of apportioning, in a given case, the contents of the communication as between what is of public interest and what is for private profit. We need not indulge nice appraisal based upon subtle distinctions in the present instance nor assume possible cases not now presented. It is enough for the present purpose that the stipulated facts justify the conclusion that the affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance. If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command.

The decree is

*Reversed.*

## ***Bigelow v. Commonwealth of Virginia***

421 U.S. 809 (1975)

BLACKMUN, J., DELIVERED THE OPINION OF THE COURT, IN WHICH BURGER, C. J., AND DOUGLAS, BRENNAN, STEWART, MARSHALL, AND POWELL, JJ., JOINED. REHNQUIST, J., FILED A DISSENTING OPINION, IN WHICH WHITE, J., JOINED.

JUSTICE BLACKMUN DELIVERED THE OPINION OF THE COURT.

An advertisement carried in appellant's newspaper led to his conviction for a violation of a Virginia statute that made it a misdemeanor, by the sale or circulation of any publication, to encourage or prompt the procuring of an abortion. The issue here is whether the editor-appellant's First Amendment rights were unconstitutionally abridged by the statute. The First Amendment, of course, is applicable to the States through the Fourteenth Amendment. *Schneider v. State* (1939).

### I

The Virginia Weekly was a newspaper published by the Virginia Weekly Associates of Charlottesville. It was issued in that city and circulated in Albemarle County, with particular focus on the campus of the University of Virginia. Appellant, Jeffrey C. Bigelow, was a director and the managing editor and responsible officer of the newspaper.

On February 8, 1971, the Weekly's Vol. V, No. 6, was published and circulated under the direct responsibility of the appellant. On page 2 of that issue was the following advertisement:

"UNWANTED PREGNANCY  
LET US HELP YOU  
Abortions are now legal in New York.  
There are no residency requirements.  
FOR IMMEDIATE PLACEMENT IN ACCREDITED  
HOSPITALS AND CLINICS AT LOW COST  
Contact WOMEN'S PAVILION  
515 Madison Avenue  
New York, N. Y. 10022  
or call any time (212) 371-6670 or (212) 371-6650  
AVAILABLE 7 DAYS A WEEK  
STRICTLY CONFIDENTIAL. We will make  
all arrangements for you and help you  
with information and counseling."

It is to be observed that the advertisement announced that the Women's Pavilion of New York City would help women with unwanted pregnancies to obtain "immediate placement in accredited hospitals and clinics at low cost" and would "make all arrangements" on a "strictly confidential" basis; that it offered "information and counseling"; that it gave the organization's address and telephone numbers; and that it stated that abortions "are now legal in New York" and there "are no residency requirements." Although the advertisement did not contain the name of any licensed physician, the "placement" to which it referred was to "accredited hospitals and clinics."

On May 13 Bigelow was charged with violating Va. Code Ann. § 18.1-63 (1960). The statute at that time read:

"If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor."

Shortly after the statute was utilized in Bigelow's case, and apparently before it was ever used again, the Virginia Legislature amended it and changed its prior application and scope.

Appellant was first tried and convicted in the County Court of Albemarle County. He appealed to the Circuit Court of that county where he was entitled to a *de novo* trial. In the Circuit Court he waived a jury and in July 1971 was tried to the judge. The evidence consisted of stipulated facts; an excerpt, containing the advertisement in question, from the Weekly's issue of February 8, 1971; and the June 1971 issue of Redbook magazine, containing abortion information and distributed in Virginia and in Albemarle County. The court rejected appellant's claim that the statute was unconstitutional and adjudged him guilty. He was sentenced to pay a fine of \$500, with \$350 thereof suspended "conditioned upon no further violation" of the statute.

The Supreme Court of Virginia granted review and, by a 4-2 vote, affirmed Bigelow's conviction. The court first rejected the appellant's claim that the advertisement was purely informational and thus was not within the "encourage or prompt" language of the statute. It held, instead, that the

advertisement "clearly exceeded an informational status" and "constituted an active offer to perform a service, rather than a passive statement of fact." It then rejected Bigelow's First Amendment claim. This, the court said, was a "commercial advertisement" and, as such, "may be constitutionally prohibited by the state," particularly "where, as here, the advertising relates to the medical-health field." The issue, in the court's view, was whether the statute was a valid exercise of the State's police power. It answered this question in the affirmative, noting that the statute's goal was "to ensure that pregnant women in Virginia who decided to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder." The court then turned to Bigelow's claim of overbreadth. It held that because the appellant himself lacked a legitimate First Amendment interest, inasmuch as his activity "was of a purely commercial nature," he had no "standing to rely upon the hypothetical rights of those in the non-commercial zone."

Bigelow took a timely appeal to this Court. During the pendency of his appeal, *Roe v. Wade* (1973) and *Doe v. Bolton* (1973) were decided. We subsequently vacated Bigelow's judgment of conviction and remanded the case for further consideration in the light of *Roe* and *Doe*.

The Supreme Court of Virginia, on such reconsideration, but without further oral argument, again affirmed appellant's conviction, observing that neither *Roe* nor *Doe* "mentioned the subject of abortion advertising" and finding nothing in those decisions "which in any way affects our earlier view. Once again, Bigelow appealed. We noted probable jurisdiction in order to review the important First Amendment issue presented.

## II

This Court often has recognized that a defendant's standing to challenge a statute on First Amendment grounds as facially overbroad does not depend upon whether his own activity is shown to be constitutionally privileged. The Court consistently has permitted "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." \*\*\*

This "exception to the usual rules governing standing," reflects the transcendent value to all society of constitutionally protected expression. We give a defendant standing to challenge a statute on grounds that it is facially overbroad, regardless of whether his own conduct could be regulated by a more narrowly drawn statute, because of the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.

\*\*\* Declaring a statute facially unconstitutional because of overbreadth "is, manifestly, strong medicine," and "has been employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma* (1973). \*\*\* In view of the statute's amendment since Bigelow's conviction in such a way as "effectively to repeal" its prior application, there is no possibility now that the statute's pre-1972 form will be applied again to appellant or will chill the rights of others. As a practical matter, the issue of its overbreadth has become moot for the future.

We therefore decline to rest our decision on overbreadth and we pass on to the further inquiry, of greater moment not only for Bigelow but for others, whether the statute as applied to appellant infringed constitutionally protected speech.

### III

#### A.

The central assumption made by the Supreme Court of Virginia was that the First Amendment guarantees of speech and press are inapplicable to paid commercial advertisements. Our cases, however, clearly establish that speech is not stripped of First Amendment protection merely because it appears in that form. *Pittsburgh Press Co. v. Human Rel. Comm'n* (1973); *New York Times Co. v. Sullivan* (1964).

The fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees. The State was not free of constitutional restraint merely because the advertisement involved sales or "solicitations," or because appellant was paid for printing it, or because appellant's motive or the motive of the advertiser may have involved financial gain. The existence of "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment."

Although other categories of speech—such as fighting words, *Chaplinsky v. New Hampshire* (1942), or obscenity, *Roth v. United States* (1957), *Miller v. California* (1973), or libel, *Gertz v. Robert Welch, Inc.* (1974), or incitement, *Brandenburg v. Ohio* (1969)—have been held unprotected, no contention has been made that the particular speech embraced in the advertisement in question is within any of these categories.

The appellee, as did the Supreme Court of Virginia, relies on *Valentine v. Chrestensen* (1942), where a unanimous Court, in a brief opinion, sustained an ordinance which had been interpreted to ban the distribution of a handbill advertising the exhibition of a submarine. The handbill solicited customers to tour the ship for a fee. The promoter-advertiser had first attempted to distribute a single-faced handbill consisting only of the advertisement, and was denied permission to do so. He then had printed, on the reverse side of the handbill, a protest against official conduct refusing him the use of wharfage facilities. The Court found that the message of asserted "public interest" was appended solely for the purpose of evading the ordinance and therefore did not constitute an "exercise of the freedom of communicating information and disseminating opinion." It said:

"We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."

But the holding is distinctly a limited one: the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed. The fact that it had the effect of banning a particular handbill does not mean that *Chrestensen* is authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge. The case obviously does not support any sweeping proposition that advertising is unprotected *per se*.

This Court's cases decided since *Chrestensen* clearly demonstrate as untenable any reading of that case that would give it so broad an effect. In *New York Times Co. v. Sullivan*, a city official instituted a civil libel action against four clergymen and the New York Times. The suit was based on an advertisement carried in the newspaper criticizing police action against members of the civil rights movement and soliciting contributions for the movement. The Court held that this advertisement, although containing factually erroneous defamatory content, was entitled to the same degree of constitutional protection as ordinary speech. It said:

"That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold."

*Chrestensen* was distinguished on the ground that the handbill advertisement there did no more than propose a purely commercial transaction, whereas the one in *New York Times*

"communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."

The principle that commercial advertising enjoys a degree of First Amendment protection was reaffirmed in *Pittsburgh Press Co. v. Human Rel. Comm'n* (1973). There, the Court, although divided, sustained an ordinance that had been construed to forbid newspapers to carry help-wanted advertisements in sex-designated columns except where based upon a bona fide occupational exemption. The Court did describe the advertisements at issue as "classic examples of commercial speech," for each was "no more than a proposal of possible employment." But the Court indicated that the advertisements would have received some degree of First Amendment protection if the commercial proposal had been legal. The illegality of the advertised activity was particularly stressed:

"Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."

## B.

The legitimacy of appellant's First Amendment claim in the present case is demonstrated by the important differences between the advertisement presently at issue and those involved in *Chrestensen* and in *Pittsburgh Press*. The advertisement published in appellant's newspaper did more than simply propose a commercial transaction. It contained factual material of clear "public interest." Portions of its message, most prominently the lines, "Abortions are now legal in New York. There are no residency requirements," involve the exercise of the freedom of communicating information and disseminating opinion.

Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of

the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia. The mere existence of the Women's Pavilion in New York City, with the possibility of its being typical of other organizations there, and the availability of the services offered, were not unnewsworthy. Also, the activity advertised pertained to constitutional interests. See *Roe v. Wade* (1973) and *Doe v. Bolton* (1973). Thus, in this case, appellant's First Amendment interests coincided with the constitutional interests of the general public.

Moreover, the placement services advertised in appellant's newspaper were legally provided in New York at that time. The Virginia Legislature could not have regulated the advertiser's activity in New York, and obviously could not have proscribed the activity in that State. Neither could Virginia prevent its residents from traveling to New York to obtain those services or, as the State conceded, prosecute them for going there. Virginia possessed no authority to regulate the services provided in New York—the skills and credentials of the New York physicians and of the New York professionals who assisted them, the standards of the New York hospitals and clinics to which patients were referred, or the practices and charges of the New York referral services.

A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State. It may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave. But it may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State.

### C.

We conclude, therefore, that the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection and that appellant Bigelow had no legitimate First Amendment interest. We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit.

Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.

The Court has stated that "a State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*. Regardless of the particular label asserted by the State—whether it calls speech "commercial" or "commercial advertising" or "solicitation"—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation. The diverse motives, means,

and messages of advertising may make speech "commercial" in widely varying degrees. We need not decide here the extent to which constitutional protection is afforded commercial advertising under all circumstances and in the face of all kinds of regulation.

#### IV

The task of balancing the interests at stake here was one that should have been undertaken by the Virginia courts before they reached their decision. We need not remand for that purpose, however, because the outcome is readily apparent from what has been said above.

\*\*\*Here, Virginia is really asserting an interest in regulating what Virginians may *hear* or *read* about the New York services. It is, in effect, advancing an interest in shielding its citizens from information about activities outside Virginia's borders, activities that Virginia's police powers do not reach. This asserted interest, even if understandable, was entitled to little, if any, weight under the circumstances.

No claim has been made, nor could any be supported on this record, that the advertisement was deceptive or fraudulent, or that it related to a commodity or service that was then illegal in either Virginia or in New York, or that it otherwise furthered a criminal scheme in Virginia. There was no possibility that appellant's activity would invade the privacy of other citizens, or infringe on other rights. Observers would not have the advertiser's message thrust upon them as a captive audience.

The strength of appellant's interest was augmented by the fact that the statute was applied against him as publisher and editor of a newspaper, not against the advertiser or a referral agency or a practitioner. The prosecution thus incurred more serious First Amendment overtones.

If application of this statute were upheld under these circumstances, Virginia might exert the power sought here over a wide variety of national publications or interstate newspapers carrying advertisements similar to the one that appeared in Bigelow's newspaper or containing articles on the general subject matter to which the advertisement referred. Other States might do the same. The burdens thereby imposed on publications would impair, perhaps severely, their proper functioning. The policy of the First Amendment favors dissemination of information and opinion, and "[t]he guarantees of freedom of speech and press were not designed to prevent the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential . . . ." 2 COOLEY, CONSTITUTIONAL LIMITATIONS 886 (8th ed.)."

We conclude that Virginia could not apply Va. Code Ann. § 18.1-63 (1960), as it read in 1971, to appellant's publication of the advertisement in question without unconstitutionally infringing upon his First Amendment rights. The judgment of the Supreme Court of Virginia is therefore reversed.

*It is so ordered.*

JUSTICE REHNQUIST, WITH WHOM JUSTICE WHITE JOINS, DISSENTING.

The Court's opinion does not confront head-on the question which this case poses, but makes contact with it only in a series of verbal sideswipes. The

result is the fashioning of a doctrine which appears designed to obtain reversal of this judgment, but at the same time to save harmless from the effects of that doctrine the many prior cases of this Court which are inconsistent with it.

I am in agreement with the Court that Virginia's statute cannot properly be invalidated on grounds of overbreadth, given that the sole prosecution which has ever been brought under this now substantially altered statute is that now in issue. \*\*\*

Since the Court concludes, apparently from two lines of the advertisement, that it conveyed information of value to those interested in the "subject matter or the law of another State and its development" and to those "seeking reform in Virginia," and since the ad relates to abortion, elevated to constitutional stature by the Court, it concludes that this advertisement is entitled to something more than the limited constitutional protection traditionally accorded commercial advertising. Although recognizing that "[a]dvertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest," the Court for reasons not entirely clear to me concludes that Virginia's interest is of "little, if any, weight."

If the Court's decision does, indeed, turn upon its conclusion that the advertisement here in question was protected by the First and Fourteenth Amendments, the subject of the advertisement ought to make no difference. It will not do to say, as the Court does, that this advertisement conveyed information about the "subject matter or the law of another State and its development" to those "seeking reform in Virginia," and that it related to abortion, as if these factors somehow put it on a different footing from other commercial advertising. This was a proposal to furnish services on a commercial basis, and since we have always refused to distinguish for First Amendment purposes on the basis of content, it is no different from an advertisement for a bucket shop operation or a Ponzi scheme which has its headquarters in New York. If Virginia may not regulate advertising of commercial abortion agencies because of the interest of those seeking to reform Virginia's abortion laws, it is difficult to see why it is not likewise precluded from regulating advertising for an out-of-state bucket shop on the ground that such information might be of interest to those interested in repealing Virginia's "blue sky" laws.

As a threshold matter the advertisement appears to me, as it did to the courts below, to be a classic commercial proposition directed toward the exchange of services rather than the exchange of ideas. It was apparently also so interpreted by the newspaper which published it which stated in apparent apology in its following issue that the " *Weekly* collective has since learned that this abortion agency . . . as well as a number of other commercial groups are charging women a fee for a service which is done free by Women's Liberation, Planned Parenthood, and others." Whatever slight factual content the advertisement may contain and whatever expression of opinion may be laboriously drawn from it does not alter its predominantly commercial content. "If that evasion were successful, every merchant who desires to broadcast . . . need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command." *Valentine v. Chrestensen* (1942). I am unable to perceive any relationship between the instant advertisement and that for example in issue in

*New York Times Co. v. Sullivan* (1964). Nor am I able to distinguish this commercial proposition from that held to be purely commercial in *Pittsburgh Press Co. v. Human Rel. Comm'n* (1973). As the Court recognizes, a purely commercial proposal is entitled to little constitutional protection.

Assuming *arguendo* that this advertisement is something more than a normal commercial proposal, I am unable to see why Virginia does not have a legitimate public interest in its regulation. The Court apparently concedes, and our cases have long held, that the States have a strong interest in the prevention of commercial advertising in the health field—both in order to maintain high ethical standards in the medical profession and to protect the public from unscrupulous practices. And the interest asserted by the Supreme Court of Virginia in the Virginia statute was the prevention of commercial exploitation of those women who elect to have an abortion:

"It is clearly within the police power of the state to enact reasonable measures to ensure that pregnant women in Virginia who decide to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder. And the state is rightfully interested in seeing that Virginia women who do decide to have abortions obtain proper medical care and do not fall into the hands of those interested only in financial gain, and not in the welfare of the patient."

\*\*\* Were the Court's statements taken literally, they would presage a standard of the lowest common denominator for commercial ethics and business conduct. Securities issuers could circumvent the established blue sky laws of States which had carefully drawn such laws for the protection of their citizens by establishing as a situs for transactions those States without such regulations, while spreading offers throughout the country. Loan sharks might well choose States with unregulated small loan industries, luring the unwary with immune commercial advertisements. And imagination would place the only limit on the use of such a "no-man's land" together with artificially created territorial contacts to bilk the public and circumvent long-established state schemes of regulation.

Since the Court saves harmless from its present opinion our prior cases in this area, it may be fairly inferred that it does not intend the results which might otherwise come from a literal reading of its opinion. But solely on the facts before it, I think the Court today simply errs in assessing Virginia's interest in its statute because it does not focus on the impact of the practices in question on the State. Although the commercial referral agency, whose advertisement in Virginia was barred, was physically located outside the State, this physical contact says little about Virginia's concern for the touted practices. Virginia's interest in this statute lies in preventing commercial exploitation of the health needs of its citizens. So long as the statute bans commercial advertising by publications within the State, the extraterritorial location at which the services are actually provided does not diminish that interest.

**Virginia State Pharmacy Board v. Virginia Citizens  
Consumer Council**  
425 U.S. 748 (1976)

BLACKMUN, J., DELIVERED THE OPINION OF THE COURT, IN WHICH BURGER, C. J., AND BRENNAN, STEWART, WHITE, MARSHALL, AND POWELL, JJ., JOINED. BURGER, C.J. AND STEWART, J., FILED CONCURRING OPINIONS. REHNQUIST, J., FILED A DISSENTING OPINION. STEVENS, J., TOOK NO PART IN THE CONSIDERATION OR DECISION OF THE CASE.

JUSTICE BLACKMUN DELIVERED THE OPINION OF THE COURT.

The plaintiff-appellees in this case attack, as violative of the First and Fourteenth Amendments, that portion of § 54-524.35 of Va. Code Ann. (1974), which provides that a pharmacist licensed in Virginia is guilty of unprofessional conduct if he "(3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription." The three-judge District Court declared the quoted portion of the statute "void and of no effect," and enjoined the defendant-appellants, the Virginia State Board of Pharmacy and the individual members of that Board, from enforcing it. We noted probable jurisdiction of the appeal.

I

Since the challenged restraint is one that peculiarly concerns the licensed pharmacist in Virginia, we begin with a description of that profession as it exists under Virginia law.

The "practice of pharmacy" is statutorily declared to be "a professional practice affecting the public health, safety and welfare," and to be "subject to regulation and control in the public interest." Indeed, the practice is subject to extensive regulation aimed at preserving high professional standards. The regulatory body is the appellant Virginia State Board of Pharmacy. The Board is broadly charged by statute with various responsibilities, including the "[m]aintenance of the quality, quantity, integrity, safety and efficacy of drugs or devices distributed, dispensed or administered." It also is to concern itself with "[m]aintaining the integrity of, and public confidence in, the profession and improving the delivery of quality pharmaceutical services to the citizens of Virginia." The Board is empowered to "make such bylaws, rules and regulations. . . as may be necessary for the lawful exercise of its powers."

The Board is also the licensing authority. It may issue a license, necessary for the practice of pharmacy in the State, only upon evidence that the applicant is "of good moral character," is a graduate in pharmacy of a school approved by the Board, and has had "a suitable period of experience [the period required not to exceed 12 months] acceptable to the Board." The applicant must pass the examination prescribed by the Board. One approved school is the School of Pharmacy of the Medical College of Virginia, where the curriculum is for three years following two years of college. Prescribed prepharmacy courses, such as biology and chemistry, are to be taken in college, and study requirements at the school itself include courses in organic chemistry, biochemistry, comparative anatomy, physiology, and pharmacology. Students are also trained in the ethics

of the profession, and there is some clinical experience in the school's hospital pharmacies and in the medical center operated by the Medical College. This is "a rigid, demanding curriculum in terms of what the pharmacy student is expected to know about drugs."

Once licensed, a pharmacist is subject to a civil monetary penalty, or to revocation or suspension of his license, if the Board finds that he "is not of good moral character," or has violated any of a number of stated professional standards (among them that he not be "negligent in the practice of pharmacy" or have engaged in "fraud or deceit upon the consumer . . . in connection with the practice of pharmacy"), or is guilty of "unprofessional conduct." "Unprofessional conduct" is specifically defined in § 54-524.35, n. 2, the third numbered phrase of which relates to advertising of the price for any prescription drug, and is the subject of this litigation.

Inasmuch as only a licensed pharmacist may dispense prescription drugs in Virginia, § 54-524.48, advertising or other affirmative dissemination of prescription drug price information is effectively forbidden in the State. Some pharmacies refuse even to quote prescription drug prices over the telephone. The Board's position, however, is that this would not constitute an unprofessional publication. It is clear, nonetheless, that all advertising of such prices, in the normal sense, is forbidden. The prohibition does not extend to nonprescription drugs, but neither is it confined to prescriptions that the pharmacist compounds himself. Indeed, about 95% of all prescriptions now are filled with dosage forms prepared by the pharmaceutical manufacturer.

## II

This is not the first challenge to the constitutionality of § 54-524.35 and what is now its third-numbered phrase. Shortly after the phrase was added to the statute in 1968, a suit seeking to enjoin its operation was instituted by a drug retailing company and one of its pharmacists. Although the First Amendment was invoked, the challenge appears to have been based primarily on the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In any event, the prohibition on drug price advertising was upheld. \*\*\*

The present, and second, attack on the statute is one made not by one directly subject to its prohibition, that is, a pharmacist, but by prescription drug consumers who claim that they would greatly benefit if the prohibition were lifted and advertising freely allowed. The plaintiffs are an individual Virginia resident who suffers from diseases that require her to take prescription drugs on a daily basis, and two nonprofit organizations. Their claim is that the First Amendment entitles the user of prescription drugs to receive information that pharmacists wish to communicate to them through advertising and other promotional means, concerning the prices of such drugs.

Certainly that information may be of value. Drug prices in Virginia, for both prescription and nonprescription items, strikingly vary from outlet to outlet even within the same locality. It is stipulated, for example, that in Richmond "the cost of 40 Achromycin tablets ranges from \$2.59 to \$6.00, a difference of 140% [*sic*]," and that in the Newport News-Hampton area the cost of tetracycline ranges from \$1.20 to \$9.00, a difference of 650%.

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### III

The question first arises whether, even assuming that First Amendment protection attaches to the flow of drug price information, it is a protection enjoyed by the appellees as recipients of the information, and not solely, if at all, by the advertisers themselves who seek to disseminate that information.

Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases. \*\*\* If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees.

### IV

The appellants contend that the advertisement of prescription drug prices is outside the protection of the First Amendment because it is "commercial speech." There can be no question that in past decisions the Court has given some indication that commercial speech is unprotected. In *Valentine v. Chrestensen* the Court upheld a New York statute that prohibited the distribution of any "handbill, circular . . . or other advertising matter whatsoever in or upon any street." The Court concluded that, although the First Amendment would forbid the banning of all communication by handbill in the public thoroughfares, it imposed "no such restraint on government as respect purely commercial advertising." \*\*\*

Last Term, in *Bigelow v. Virginia*, the notion of unprotected "commercial speech" all but passed from the scene. We reversed a conviction for violation of a Virginia statute that made the circulation of any publication to encourage or promote the processing of an abortion in Virginia a misdemeanor. The defendant had published in his newspaper the availability of abortions in New York. The advertisement in question, in addition to announcing that abortions were legal in New York, offered the services of a referral agency in that State. We rejected the contention that the publication was unprotected because it was commercial. *Chrestensen's* continued validity was questioned, and its holding was described as "distinctly a limited one" that merely upheld "a reasonable regulation of the manner in which commercial advertising could be distributed." We concluded that "the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection," and we observed that the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."

Some fragment of hope for the continuing validity of a "commercial speech" exception arguably might have persisted because of the subject matter of the advertisement in *Bigelow*. We noted that in announcing the availability of legal abortions in New York, the advertisement "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.'" And, of course, the advertisement related to activity with which, at least in some respects, the State could not interfere. See *Roe v. Wade* (1973); *Doe v. Bolton* (1973). Indeed, we observed: "We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit."

Here, in contrast, the question whether there is a First Amendment exception for "commercial speech" is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment.

## V

We begin with several propositions that already are settled or beyond serious dispute. It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. *Buckley v. Valeo* (1976); *Pittsburgh Press Co. v. Human Relations Comm'n*; *New York Times Co. v. Sullivan*. Speech likewise is protected even though it is carried in a form that is "sold" for profit, *Smith v. California* (1959) (books); *Joseph Burstyn, Inc. v. Wilson* (1952) (motion pictures); *Murdock v. Pennsylvania* (religious literature), and even though it may involve a solicitation to purchase or otherwise pay or contribute money, *New York Times Co. v. Sullivan*; *NAACP v. Button*.

If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject. No one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden. Nor can it be dispositive that a commercial advertisement is noneditorial, and merely reports a fact. Purely factual matter of public interest may claim protection.

Our question is whether speech which does "no more than propose a commercial transaction," is so removed from any "exposition of ideas," *Chaplinsky v. New Hampshire* (1942), and from "truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government," *Roth v. United States* (1957), that it lacks all protection. Our answer is that it is not.

Focusing first on the individual parties to the transaction that is proposed in the commercial advertisement, we may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment. The interests of the Contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome. \*\*\*

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. Appellees' case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription

drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.

Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest. \*\*\* Obviously, not all commercial messages contain the same or even a very great public interest element. There are few to which such an element, however, could not be added. Our pharmacist, for example, could cast himself as a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not.

Moreover, there is another consideration that suggests that no line between publicly "interesting" or "important" commercial advertising and the opposite kind could ever be drawn. Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Arrayed against these substantial individual and societal interests are a number of justifications for the advertising ban. These have to do principally with maintaining a high degree of professionalism on the part of licensed pharmacists. Indisputably, the State has a strong interest in maintaining that professionalism. It is exercised in a number of ways for the consumer's benefit. There is the clinical skill involved in the compounding of drugs, although, as has been noted, these now make up only a small percentage of the prescriptions filled. Yet, even with respect to manufacturer-prepared compounds, there is room for the pharmacist to serve his customer well or badly. Drugs kept too long on the shelf may lose their efficacy or become adulterated. They can be packaged for the user in such a way that the same results occur. The expertise of the pharmacist may supplement that of the prescribing physician, if the latter has not specified the amount to be dispensed or the directions that are to appear on the label. The pharmacist, a specialist in the potencies and dangers of drugs, may even be consulted by the physician as to what to prescribe. He may know of a particular antagonism between the prescribed drug and another that the customer is or might be taking, or with an allergy the customer may suffer. The pharmacist himself may have supplied the other drug or treated the allergy. Some pharmacists, concededly not a large

number, "monitor" the health problems and drug consumptions of customers who come to them repeatedly. A pharmacist who has a continuous relationship with his customer is in the best position, of course, to exert professional skill for the customer's protection.

Price advertising, it is argued, will place in jeopardy the pharmacist's expertise and, with it, the customer's health. It is claimed that the aggressive price competition that will result from unlimited advertising will make it impossible for the pharmacist to supply professional services in the compounding, handling, and dispensing of prescription drugs. Such services are time consuming and expensive; if competitors who economize by eliminating them are permitted to advertise their resulting lower prices, the more painstaking and conscientious pharmacist will be forced either to follow suit or to go out of business. It is also claimed that prices might not necessarily fall as a result of advertising. If one pharmacist advertises, others must, and the resulting expense will inflate the cost of drugs. It is further claimed that advertising will lead people to shop for their prescription drugs among the various pharmacists who offer the lowest prices, and the loss of stable pharmacist-customer relationships will make individual attention—and certainly the practice of monitoring—impossible. Finally, it is argued that damage will be done to the professional image of the pharmacist. This image, that of a skilled and specialized craftsman, attracts talent to the profession and reinforces the better habits of those who are in it. Price advertising, it is said, will reduce the pharmacist's status to that of a mere retailer.

The strength of these proffered justifications is greatly undermined by the fact that high professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject. And this case concerns the retail sale by the pharmacist more than it does his professional standards. Surely, any pharmacist guilty of professional dereliction that actually endangers his customer will promptly lose his license. At the same time, we cannot discount the Board's justifications entirely. The Court [has previously] regarded justifications of this type sufficient to sustain the advertising bans challenged on due process and equal protection grounds \*\*\* .

The challenge now made, however, is based on the First Amendment. This casts the Board's justifications in a different light, for on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information. There is no claim that the advertising ban in any way prevents the cutting of corners by the pharmacist who is so inclined. That pharmacist is likely to cut corners in any event. The only effect the advertising ban has on him is to insulate him from price competition and to open the way for him to make a substantial, and perhaps even excessive, profit in addition to providing an inferior service. The more painstaking pharmacist is also protected but, again, it is a protection based in large part on public ignorance.

It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost,

low-quality service and drive the "professional" pharmacist out of business. They will respond only to costly and excessive advertising, and end up paying the price. They will go from one pharmacist to another, following the discount, and destroy the pharmacist-customer relationship. They will lose respect for the profession because it advertises. All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what.

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the "professional" pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is. We so hold.

## VI

In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible. We mention a few only to make clear that they are not before us and therefore are not foreclosed by this case.

There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place, and manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information. Whatever may be the proper bounds of time, place, and manner restrictions on commercial speech, they are plainly exceeded by this Virginia statute, which singles out speech of a particular content and seeks to prevent its dissemination completely.

Nor is there any claim that prescription drug price advertisements are forbidden because they are false or misleading in any way. Untruthful speech, commercial or otherwise, has never been protected for its own sake. Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.

Also, there is no claim that the transactions proposed in the forbidden advertisements are themselves illegal in any way. Finally, the special problems of the electronic broadcast media are likewise not in this case.

What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative.

The judgment of the District Court is affirmed.

*It is so ordered.*

CHIEF JUSTICE BURGER, CONCURRING. [OMITTED]

JUSTICE STEWART, CONCURRING.

\*\*\* Today the Court ends the anomalous situation created by *Chrestensen* and holds that a communication which does no more than propose a commercial transaction is not "wholly outside the protection of the First Amendment." But since it is a cardinal principle of the First Amendment that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content," the Court's decision calls into immediate question the constitutional legitimacy of every state and federal law regulating false or deceptive advertising. I write separately to explain why I think today's decision does not preclude such governmental regulation.

The Court has on several occasions addressed the problem posed by false statements of fact in libel cases. Those cases demonstrate that even with respect to expression at the core of the First Amendment, the Constitution does not provide absolute protection for false factual statements that cause private injury.\*\*\*

The principles recognized in the libel decisions suggest that government may take broader action to protect the public from injury produced by false or deceptive price or product advertising than from harm caused by defamation.\*\*\*

Commercial price and product advertising differs markedly from ideological expression because it is confined to the promotion of specific goods or services. The First Amendment protects the advertisement because of the "information of potential interest and value" conveyed, *Bigelow v. Virginia*, rather than because of any direct contribution to the interchange of ideas. Since the factual claims contained in commercial price or product advertisements relate to tangible goods or services, they may be tested empirically and corrected to reflect the truth without in any manner jeopardizing the free dissemination of thought. Indeed, the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking.

JUSTICE REHNQUIST, DISSENTING.

The logical consequences of the Court's decision in this case, a decision which elevates commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas, are far reaching indeed. Under the Court's opinion the way will be open not only for dissemination of price information but for active promotion of prescription drugs, liquor, cigarettes, and other products the use of which it has previously been thought desirable to discourage. Now, however, such promotion is protected by the First Amendment so long as it is not misleading or does not promote an illegal product or enterprise. In coming to this conclusion, the Court has overruled a legislative determination that such advertising should not be allowed and has done so on behalf of a consumer group which is not directly disadvantaged by the statute in question. This effort to reach a result which the Court obviously considers desirable is a troublesome one, for two reasons. It extends standing to raise First Amendment claims beyond the previous decisions of this Court. It also extends the protection of that Amendment to purely commercial endeavors which its most vigorous champions on this Court had thought to be beyond its pale.

I

I do not find the question of the appellees' standing to urge the claim which the Court decides quite as easy as the Court does. \*\*\*

Here, the only group truly restricted by this statute, the pharmacists, have not even troubled to join in this litigation and may well feel that the expense and competition of advertising is not in their interest.

II

Thus the issue on the merits is not, as the Court phrases it, whether "[o]ur pharmacist" may communicate the fact that he "will sell you the X prescription drug at the Y price." No pharmacist is asserting any such claim to so communicate. The issue is rather whether appellee consumers may override the legislative determination that pharmacists should not advertise even though the pharmacists themselves do not object. In deciding that they may do so, the Court necessarily adopts a rule which cannot be limited merely to dissemination of price alone, and which cannot possibly be confined to pharmacists but must likewise extend to lawyers, doctors, and all other professions.

The Court speaks of the consumer's interest in the free flow of commercial information, particularly in the case of the poor, the sick, and the aged. It goes on to observe that "society also may have a strong interest in the free flow of commercial information." One need not disagree with either of these statements in order to feel that they should presumptively be the concern of the Virginia Legislature, which sits to balance these and other claims in the process of making laws such as the one here under attack. The Court speaks of the importance in a "predominantly free enterprise economy" of intelligent and well-informed decisions as to allocation of resources. While there is again much to be said for the Court's observation as a matter of desirable public policy, there is certainly nothing in the United States Constitution which requires the

Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession.

\*\*\* Similarly in *Williamson v. Lee Optical Co.* (1955), the Court, in dealing with a state prohibition against the advertisement of eyeglass frames, held: "We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers."

\*\*\* The Court concedes that legislatures may prohibit false and misleading advertisements, and may likewise prohibit advertisements seeking to induce transactions which are themselves illegal. In a final footnote the opinion tosses a bone to the traditionalists in the legal and medical professions by suggesting that because they sell services rather than drugs the holding of this case is not automatically applicable to advertising in those professions. But if the sole limitation on permissible state proscription of advertising is that it may not be false or misleading, surely the difference between pharmacists' advertising and lawyers' and doctors' advertising can be only one of degree and not of kind. I cannot distinguish between the public's right to know the price of drugs and its right to know the price of title searches or physical examinations or other professional services for which standardized fees are charged. Nor is it apparent how the pharmacists in this case are less engaged in a regulatable profession than were the opticians in *Williamson*.

\*\*\* There are undoubted difficulties with an effort to draw a bright line between "commercial speech" on the one hand and "protected speech" on the other, and the Court does better to face up to these difficulties than to attempt to hide them under labels. In this case, however, the Court has unfortunately substituted for the wavering line previously thought to exist between commercial speech and protected speech a no more satisfactory line of its own—that between "truthful" commercial speech, on the one hand, and that which is "false and misleading" on the other. The difficulty with this line is not that it wavers, but on the contrary that it is simply too Procrustean to take into account the congeries of factors which I believe could, quite consistently with the First and Fourteenth Amendments, properly influence a legislative decision with respect to commercial advertising.

The Court insists that the rule it lays down is consistent even with the view that the First Amendment is "primarily an instrument to enlighten public decisionmaking in a democracy." I had understood this view to relate to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo. It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment. It is one thing to say that the line between strictly ideological and political commentaries and other kinds of commentary is difficult to draw, and that the mere fact that the former may have in it an element of commercialism does not strip it of First Amendment protection. See *New York Times Co. v. Sullivan* (1964). But it is another thing to say that because that line is difficult to draw, we will stand at the other end of the spectrum and reject out of hand

the observation of so dedicated a champion of the First Amendment as Mr. Justice Black that the protections of that Amendment do not apply to a "merchant" who goes from door to door "selling pots." *Breard v. City of Alexandria* (1951) (dissenting).

In the case of "our" hypothetical pharmacist, he may now presumably advertise not only the prices of prescription drugs, but may attempt to energetically promote their sale so long as he does so truthfully. Quite consistently with Virginia law requiring prescription drugs to be available only through a physician, "our" pharmacist might run any of the following representative advertisements in a local newspaper:

"Pain getting you down? Insist that your physician prescribe Demerol. You pay a little more than for aspirin, but you get a lot more relief."

"Can't shake the flu? Get a prescription for Tetracycline from your doctor today."

"Don't spend another sleepless night. Ask your doctor to prescribe Seconal without delay."

Unless the State can show that these advertisements are either actually untruthful or misleading, it presumably is not free to restrict in any way commercial efforts on the part of those who profit from the sale of prescription drugs to put them in the widest possible circulation. But such a line simply makes no allowance whatever for what appears to have been a considered legislative judgment in most States that while prescription drugs are a necessary and vital part of medical care and treatment, there are sufficient dangers attending their widespread use that they simply may not be promoted in the same manner as hair creams, deodorants, and toothpaste. The very real dangers that general advertising for such drugs might create in terms of encouraging, even though not sanctioning, illicit use of them by individuals for whom they have not been prescribed, or by generating patient pressure upon physicians to prescribe them, are simply not dealt with in the Court's opinion. If prescription drugs may be advertised, they may be advertised on television during family viewing time. Nothing we know about the acquisitive instincts of those who inhabit every business and profession to a greater or lesser extent gives any reason to think that such persons will not do everything they can to generate demand for these products in much the same manner and to much the same degree as demand for other commodities has been generated.

Both Congress and state legislatures have by law sharply limited the permissible dissemination of information about some commodities because of the potential harm resulting from those commodities, even though they were not thought to be sufficiently demonstrably harmful to warrant outright prohibition of their sale. Current prohibitions on television advertising of liquor and cigarettes are prominent in this category, but apparently under the Court's holding so long as the advertisements are not deceptive they may no longer be prohibited.

This case presents a fairly typical First Amendment problem—that of balancing interests in individual free speech against public welfare determinations embodied in a legislative enactment. \*\*\*

Here the rights of the appellees seem to me to be marginal at best. There is no ideological content to the information which they seek and it is freely available to them—they may even publish it if they so desire. The only persons directly affected by this statute are not parties to this lawsuit. On the other hand, the societal interest against the promotion of drug use for every ill, real or imaginary, seems to me extremely strong. I do not believe that the First Amendment mandates the Court's "open door policy" toward such commercial advertising.

## Notes

1. Why did the Court originally decide commercial speech should be excluded from First Amendment protection? Is there any contemporary merit to such a position?
2. Justice Rehnquist's dissenting opinion in *Virginia State Pharmacy Board* contains a "parade of horrors" that have mostly been realized. Is this the necessary consequence of a capitalist society in which a "particular consumer's interest in the free flow of commercial information" "may be as keen, if not keener by far, than his interest in the day's most urgent political debate," as Justice Blackmun writes for the Court?
3. The issue of what "level of scrutiny" and the definition of commercial speech are taken up in the next section.

## II. The Central Hudson Test & Its Applications

### *Central Hudson Gas & Electric Corp. v. Public Service Commission*

447 U.S. 557 (1980)

POWELL, J., DELIVERED THE OPINION OF THE COURT, IN WHICH BURGER, C.J., AND STEWART, WHITE, AND MARSHALL, JJ., JOINED. BRENNAN, J., FILED AN OPINION CONCURRING IN THE JUDGMENT. BLACKMUN, J., AND STEVENS, J., FILED OPINIONS CONCURRING IN THE JUDGMENT, IN WHICH BRENNAN, J., JOINED. REHNQUIST, J., FILED A DISSENTING OPINION.

JUSTICE POWELL DELIVERED THE OPINION OF THE COURT.

The case presents the question whether a regulation of the Public Service Commission of the state of New York violates the First and Fourteenth Amendments because it completely bans promotional advertising by an electrical utility.

#### I

In December 1973, the Commission, appellee here, ordered electric utilities in New York State to cease all advertising that "promot[es] the use of electricity." The order was based on the Commission's finding that "the interconnected utility system in New York State does not have sufficient fuel stocks or sources

of supply to continue furnishing all customer demands for the 1973-1974 winter."

Three years later, when the fuel shortage had eased, the Commission requested comments from the public on its proposal to continue the ban on promotional advertising. Central Hudson Gas & Electric Corp., the appellant in this case, opposed the ban on First Amendment grounds. After reviewing the public comments, the Commission extended the prohibition in a Policy Statement issued on February 25, 1977.

The Policy Statement divided advertising expenses "into two broad categories: promotional—advertising intended to stimulate the purchase of utility services—and institutional and informational, a broad category inclusive of all advertising not clearly intended to promote sales." The Commission declared all promotional advertising contrary to the national policy of conserving energy. It acknowledged that the ban is not a perfect vehicle for conserving energy. For example, the Commissioner's order prohibits promotional advertising to develop consumption during periods when demand for electricity is low. By limiting growth in "off-peak" consumption, the ban limits the "beneficial side effects" of such growth in terms of more efficient use of existing powerplants. And since oil dealers are not under the Commissioner's jurisdiction and thus remain free to advertise, it was recognized that the ban can achieve only "piecemeal conservationism." Still, the Commission adopted the restriction because it was deemed likely to "result in some dampening of unnecessary growth" in energy consumption.

The Commission's order explicitly permitted "informational" advertising designed to encourage "*shifts* of consumption" from peak demand times to periods of low electricity demand. (emphasis in original). Information advertising would not seek to increase aggregate consumption, but would invite a leveling of demand throughout any given 24-hour period. The agency offered to review "specific proposals by the companies for specifically described [advertising] programs that meet these criteria."

When it rejected requests for rehearing on the Policy Statement, the Commission supplemented its rationale for the advertising ban. The agency observed that additional electricity probably would be more expensive to produce than existing output. Because electricity rates in New York were not then based on marginal cost, the Commission feared that additional power would be priced below the actual cost of generation. The additional electricity would be subsidized by all consumers through generally higher rates. The state agency also thought that promotional advertising would give "misleading signals" to the public by appearing to encourage energy consumption at a time when conservation is needed.

Appellant challenged the order in state court, arguing that the Commission had restrained commercial speech in violation of the First and Fourteenth Amendments. The Commission's order was upheld by the trial court and at the intermediate appellate level. The New York Court of Appeals affirmed. It found little value to advertising in "the noncompetitive market in which electric corporations operate." Since consumers "have no choice regarding the source of their electric power," the court denied that "promotional advertising of electricity

might contribute to society's interest in 'informed and reliable' economic decisionmaking." The court also observed that by encouraging consumption, promotional advertising would only exacerbate the current energy situation. The court concluded that the governmental interest in the prohibition outweighed the limited constitutional value of the commercial speech at issue. We noted probable jurisdiction, and now reverse.

## II

The Commission's order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience. *Virginia Pharmacy Board v. Virginia Citizens Consumer Council* (1976). The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[P]eople will perceive their own best interest if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . ." Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.

Nevertheless, our decisions have recognized "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

The First Amendment's concern for commercial speech is based on the informational function of advertising. See *First National Bank of Boston v. Bellotti* (1978). Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Under the first criterion, the Court has declined to uphold regulations that only indirectly advance the state interest involved. In both *Bates [v. State Bar of Arizona (1977)]* and *Virginia Pharmacy Board*, the Court concluded that an advertising ban could not be imposed to protect the ethical or performance standards of a profession. The Court noted in *Virginia Pharmacy Board* that "[t]he advertising ban does not directly affect professional standards one way or the other." In *Bates*, the Court overturned an advertising prohibition that was designed to protect the "quality" of a lawyer's work. "Restraints on advertising . . . are an ineffective way of deterring shoddy work."

The second criterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." The regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest, see *First National Bank of Boston v. Bellotti*, nor can it completely suppress information when narrower restrictions on expression would serve its interest as well. For example, in *Bates* the Court explicitly did not "foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like might be required" in promotional materials. And in *Carey v. Population Services International (1977)*, we held that the State's "arguments . . . do not justify the total suppression of advertising concerning contraceptives." This holding left open the possibility that the State could implement more carefully drawn restrictions.

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

### III

We now apply this four-step analysis for commercial speech to the Commission's arguments in support of its ban on promotional advertising.

#### A

The Commission does not claim that the expression at issue either is inaccurate or relates to unlawful activity. Yet the New York Court of Appeals questioned whether Central Hudson's advertising is protected commercial speech. Because appellant holds a monopoly over the sale of electricity in its service area, the state court suggested that the Commission's order restricts no commercial speech of any worth. The court stated that advertising in a "noncompetitive market" could not improve the decisionmaking of consumers. The court saw no constitutional problem with barring commercial speech that it viewed as conveying little useful information.

The reasoning falls short of establishing that appellant's advertising is not commercial speech protected by the First Amendment. Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of fuel oil and natural gas in several markets, such as those for home heating and industrial power. This Court noted the existence of interfuel competition 45 years ago. Each

energy source continues to offer peculiar advantages and disadvantages that may influence consumer choice. For consumers in those competitive markets, advertising by utilities is just as valuable as advertising by unregulated firms.

Even in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment. The New York court's argument appears to assume that the providers of a monopoly service or product are willing to pay for wholly ineffective advertising. Most businesses— even regulated monopolies—are unlikely to underwrite promotional advertising that is of no interest or use to consumers. Indeed, a monopoly enterprise legitimately may wish to inform the public that it has developed new services or terms of doing business. A consumer may need information to aid his decision whether or not to use the monopoly services at all, or how much of the service he should purchase. In the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising. Since no such extraordinary conditions have been identified in this case, appellant's monopoly position does not alter the First Amendment's protection for its commercial speech.

#### B

The Commission offers two state interests as justifications for the ban on promotional advertising. The first concerns energy conservation. Any increase in demand for electricity— during peak or off-peak periods—means greater consumption of energy. The Commission argues, and the New York court agreed, that the State's interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity. In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial.

The Commission also argues that promotional advertising will aggravate inequities caused by the failure to base the utilities' rates on marginal cost. The utilities argued to the Commission that if they could promote the use of electricity in periods of low demand, they would improve their utilization of generating capacity. The Commission responded that promotion of off-peak consumption also would increase consumption during peak periods. If peak demand were to rise, the absence of marginal cost rates would mean that the rates charged for the additional power would not reflect the true costs of expanding production. Instead, the extra costs would be borne by all consumers through higher overall rates. Without promotional advertising, the Commission stated, this inequitable turn of events would be less likely to occur. The choice among rate structures involves difficult and important questions of economic supply and distributional fairness. The State's concern that rates be fair and efficient represents a clear and substantial governmental interest.

#### C

Next, we focus on the relationship between the State's interests and the advertising ban. Under this criterion, the Commission's laudable concern over the equity and efficiency of appellant's rates does not provide a constitutionally adequate reason for restricting protected speech. The link between the advertising prohibition and appellant's rate structure is, at most, tenuous. The

impact of promotional advertising on the equity of appellant's rates is highly speculative. Advertising to increase off-peak usage would have to increase peak usage, while other factors that directly affect the fairness and efficiency of appellant's rates remained constant. Such conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising.

In contrast, the State's interest in energy conservation is directly advanced by the Commission order at issue here. There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

#### D

We come finally to the critical inquiry in this case: whether the Commission's complete suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the State's interest in energy conservation. The Commission's order reaches all promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests.

Appellant insists that but for the ban, it would advertise products and services that use energy efficiently. These include the "heat pump," which both parties acknowledge to be a major improvement in electric heating, and the use of electric heat as a "backup" to solar and other heat sources. Although the Commission has questioned the efficiency of electric heating before this Court, neither the Commission's Policy Statement nor its order denying rehearing made findings on this issue. In the absence of authoritative findings to the contrary, we must credit as within the realm of possibility the claim that electric heat can be an efficient alternative in some circumstances.

The Commission's order prevents appellant from promoting electric services that would reduce energy use by diverting demand from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources. In neither situation would the utility's advertising endanger conservation or mislead the public. To the extent that the Commission's order suppresses speech that in no way impairs the State's interest in energy conservation, the Commission's order violates the First and Fourteenth Amendments and must be invalidated. See *First National Bank of Boston v. Bellotti* (1978).

The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression. To further its policy of conservation, the Commission could attempt to restrict the format and content of Central Hudson's advertising. It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future. In the absence of a showing

that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.

#### IV

Our decision today in no way disparages the national interest in energy conservation. We accept without reservation the argument that conservation, as well as the development of alternative energy sources, is an imperative national goal. Administrative bodies empowered to regulate electric utilities have the authority—and indeed the duty—to take appropriate action to further this goal. When, however, such action involves the suppression of speech, the First and Fourteenth Amendments require that the restriction be no more extensive than is necessary to serve the state interest. In this case, the record before us fails to show that the total ban on promotional advertising meets this requirement.

Accordingly, the judgment of the New York Court of Appeals is

*Reversed.*

JUSTICE BRENNAN, CONCURRING IN THE JUDGMENT.

One of the major difficulties in this case is the proper characterization of the Commission's Policy Statement. I find it impossible to determine on the present record whether the Commission's ban on all "promotional" advertising, in contrast to "institutional and informational" advertising, is intended to encompass more than "commercial speech." \*\*\*

JUSTICE BLACKMUN, WITH WHOM JUSTICE BRENNAN JOINS, CONCURRING IN THE JUDGMENT.

I agree with the Court that the Public Service Commission's ban on promotional advertising of electricity by public utilities is inconsistent with the First and Fourteenth Amendments. I concur only in the Court's judgment, however, because I believe the test now evolved and applied by the Court is not consistent with our prior cases and does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech.

The Court asserts that "a four-part analysis has developed" from our decisions concerning commercial speech. Under this four-part test a restraint on commercial "communication [that] is neither misleading nor related to unlawful activity" is subject to an intermediate level of scrutiny, and suppression is permitted whenever it "directly advances" a "substantial" governmental interest and is "not more extensive than is necessary to serve that interest." I agree with the Court that this level of intermediate scrutiny is appropriate for a restraint on commercial speech designed to protect consumers from misleading or coercive speech, or a regulation related to the time, place, or manner of commercial speech. I do not agree, however, that the Court's four-part test is the proper one to be applied when a State seeks to suppress information about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly.

Since the Court, without citing empirical data or other authority, finds a "direct link" between advertising and energy consumption, it leaves open the possibility

that the State may suppress advertising of electricity in order to lessen demand for electricity. I, of course, agree with the Court that, in today's world, energy conservation is a goal of paramount national and local importance. I disagree with the Court, however, when it says that suppression of speech may be a permissible means to achieve that goal. \*\*\*

The Court recognizes that we have never held that commercial speech may be suppressed in order to further the State's interest in discouraging purchases of the underlying product that is advertised. Permissible restraints on commercial speech have been limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques. Those designed to deprive consumers of information about products or services that are legally offered for sale consistently have been invalidated.

I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to "dampen" demand for or use of the product. Even though "commercial" speech is involved, such a regulatory measure strikes at the heart of the First Amendment. This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice. As the Court recognizes, the State's policy choices are insulated from the visibility and scrutiny that direct regulation would entail and the conduct of citizens is molded by the information that government chooses to give them.

If the First Amendment guarantee means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public. Our cases indicate that this guarantee applies even to commercial speech. In *Virginia Pharmacy Board v. Virginia Consumer Council* (1976), we held that Virginia could not pursue its goal of encouraging the public to patronize the "professional pharmacist" (one who provided individual attention and a stable pharmacist-customer relationship) by "keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering." We noted that our decision left the State free to pursue its goal of maintaining high standards among its pharmacists by "requir[ing] whatever professional standards it wishes of its pharmacists."

\*\*\* Our prior references to the "commonsense differences" between commercial speech and other speech "suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." We have not suggested that the "commonsense differences" between commercial speech and other speech justify relaxed scrutiny of restraints that suppress truthful, nondeceptive, noncoercive commercial speech. The differences articulated by the Court justify a more permissive approach to regulation of the manner of commercial speech for the purpose of protecting consumers from deception or coercion, and these differences explain why doctrines designed to prevent "chilling" of protected speech are inapplicable to commercial speech. No differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information. \*\*\*

It appears that the Court would permit the State to ban all direct advertising of air conditioning, assuming that a more limited restriction on such advertising would not effectively deter the public from cooling its homes. In my view, our cases do not support this type of suppression. If a governmental unit believes that use or overuse of air conditioning is a serious problem, it must attack that problem directly, by prohibiting air conditioning or regulating thermostat levels. Just as the Commonwealth of Virginia may promote professionalism of pharmacists directly, so too New York may *not* promote energy conservation "by keeping the public in ignorance."

JUSTICE STEVENS, WITH WHOM JUSTICE BRENNAN JOINS, CONCURRING IN THE JUDGMENT.

Because "commercial speech" is afforded less constitutional protection than other forms of speech, it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed. The issue in this case is whether New York's prohibition on the promotion of the use of electricity through advertising is a ban on nothing but commercial speech.

In my judgment one of the two definitions the Court uses in addressing that issue is too broad and the other may be somewhat too narrow. The Court first describes commercial speech as "expression related solely to the economic interests of the speaker and its audience." Although it is not entirely clear whether this definition uses the subject matter of the speech or the motivation of the speaker as the limiting factor, it seems clear to me that it encompasses speech that is entitled to the maximum protection afforded by the First Amendment. Neither a labor leader's exhortation to strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the subject matter concerns only the economic interests of the audience. Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward. Thus, the Court's first definition of commercial speech is unquestionably too broad.

The Court's second definition refers to "speech proposing a commercial transaction." A salesman's solicitation, a broker's offer, and a manufacturer's publication of a price list or the terms of his standard warranty would unquestionably fit within this concept. Presumably, the definition is intended to encompass advertising that advises possible buyers of the availability of specific products at specific prices and describes the advantages of purchasing such items. Perhaps it also extends to other communications that do little more than make the name of a product or a service more familiar to the general public. Whatever the precise contours of the concept, and perhaps it is too early to enunciate an exact formulation, I am persuaded that it should not include the entire range of communication that is embraced within the term "promotional advertising."

This case involves a governmental regulation that completely bans promotional advertising by an electric utility. This ban encompasses a great deal more than mere proposals to engage in certain kinds of commercial transactions. It

prohibits all advocacy of the immediate or future use of electricity. It curtails expression by an informed and interested group of persons of their point of view on questions relating to the production and consumption of electrical energy—questions frequently discussed and debated by our political leaders. For example, an electric company's advocacy of the use of electric heat for environmental reasons, as opposed to wood-burning stoves, would seem to fall squarely within New York's promotional advertising ban and also within the bounds of maximum First Amendment protection. The breadth of the ban thus exceeds the boundaries of the commercial speech concept, however that concept may be defined.

The justification for the regulation is nothing more than the expressed fear that the audience may find the utility's message persuasive. Without the aid of any coercion, deception, or misinformation, truthful communication may persuade some citizens to consume more electricity than they otherwise would. I assume that such a consequence would be undesirable and that government may therefore prohibit and punish the unnecessary or excessive use of electricity. But if the perceived harm associated with greater electrical usage is not sufficiently serious to justify direct regulation, surely it does not constitute the kind of clear and present danger that can justify the suppression of speech.

Although they were written in a different context, the words used by Mr. Justice Brandeis in his concurring opinion in *Whitney v. California*, explain my reaction to the prohibition against advocacy involved in this case:

"But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution." (Footnote omitted.)

In sum, I concur in the result because I do not consider this to be a "commercial speech" case. Accordingly, I see no need to decide whether the Court's four-part analysis, adequately protects commercial speech—as properly defined—in the face of a blanket ban of the sort involved in this case.

JUSTICE REHNQUIST, DISSENTING.

The Court today invalidates an order issued by the New York Public Service Commission designed to promote a policy that has been declared to be of critical national concern. The order was issued by the Commission in 1973 in response to the Mideastern oil embargo crisis. It prohibits electric corporations "from *promoting* the use of electricity through the use of advertising, subsidy payments . . . , or employee incentives." State of New York Public Service Commission, Case No. 26532 (Dec. 5, 1973) (emphasis added). Although the immediate crisis created by the oil embargo has subsided, the ban on promotional advertising remains in effect. The regulation was re-examined by the New York Public Service Commission in 1977. Its constitutionality was subsequently upheld by the New York Court of Appeals, which concluded that the paramount national interest in energy conservation justified its retention.

The Court's asserted justification for invalidating the New York law is the public interest discerned by the Court to underlie the First Amendment in the free flow of commercial information. Prior to this Court's recent decision in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council* (1976), however, commercial speech was afforded no protection under the First Amendment whatsoever. See, e. g., *Breard v. Alexandria* (1951); *Valentine v. Chrestensen*, (1942). Given what seems to me full recognition of the holding of *Virginia Pharmacy Board* that commercial speech is entitled to some degree of First Amendment protection, I think the Court is nonetheless incorrect in invalidating the carefully considered state ban on promotional advertising in light of pressing national and state energy needs.

The Court's analysis in my view is wrong in several respects. Initially, I disagree with the Court's conclusion that the speech of a state-created monopoly, which is the subject of a comprehensive regulatory scheme, is entitled to protection under the First Amendment. I also think that the Court errs here in failing to recognize that the state law is most accurately viewed as an economic regulation and that the speech involved (if it falls within the scope of the First Amendment at all) occupies a significantly more subordinate position in the hierarchy of First Amendment values than the Court gives it today. Finally, the Court in reaching its decision improperly substitutes its own judgment for that of the State in deciding how a proper ban on promotional advertising should be drafted. With regard to this latter point, the Court adopts as its final part of a four-part test a "no more extensive than necessary" analysis that will unduly impair a state legislature's ability to adopt legislation reasonably designed to promote interests that have always been rightly thought to be of great importance to the State.

I

In concluding that appellant's promotional advertising constitutes protected speech, the Court reasons that speech by electric utilities is valuable to consumers who must decide whether to use the monopoly service or turn to an alternative energy source, and if they decide to use the service how much of it to purchase. The Court in so doing "assume[s] that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising." The Court's analysis ignores the fact that the monopoly here

is entirely state-created and subject to an extensive state regulatory scheme from which it derives benefits as well as burdens.

While this Court has stated that the "capacity [of speech] for informing the public does not depend upon the identity of its source," *First National Bank of Boston v. Bellotti* (1978), the source of the speech nevertheless may be relevant in determining whether a given message is protected under the First Amendment. When the source of the speech is a state-created monopoly such as this, traditional First Amendment concerns, if they come into play at all, certainly do not justify the broad interventionist role adopted by the Court today. \*\*\*

Thus, although *First National Bank of Boston v. Bellotti* holds that speech of a corporation is entitled to some First Amendment protection, it by no means follows that a utility with monopoly power conferred by a State is also entitled to such protection.

The state-created monopoly status of a utility arises from the unique characteristics of the services that a utility provides. \*\*\* A utility, by contrast, fulfills a function that serves special public interests as a result of the natural monopoly of the service provided. Indeed, the extensive regulations governing decisionmaking by public utilities suggest that for purposes of First Amendment analysis, a utility is far closer to a state-controlled enterprise than is an ordinary corporation. Accordingly, I think a State has broad discretion in determining the statements that a utility may make in that such statements emanate from the entity created by the State to provide important and unique public services. And a state regulatory body charged with the oversight of these types of services may reasonably decide to impose on the utility a special duty to conform its conduct to the agency's conception of the public interest. Thus I think it is constitutionally permissible for it to decide that promotional advertising is inconsistent with the public interest in energy conservation. I also think New York's ban on such advertising falls within the scope of permissible state regulation of an economic activity by an entity that could not exist in corporate form, say nothing of enjoy monopoly status, were it not for the laws of New York.

## II

This Court has previously recognized that although commercial speech may be entitled to First Amendment protection, that protection is not as extensive as that accorded to the advocacy of ideas. \*\*\*

The Court's decision today fails to give due deference to this subordinate position of commercial speech. The Court in so doing returns to the bygone era of *Lochner v. New York* (1905), in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies.

I had thought by now it had become well established that a State has broad discretion in imposing economic regulations. \*\*\*

The State of New York has determined here that economic realities require the grant of monopoly status to public utilities in order to distribute efficiently the

services they provide, and in granting utilities such status it has made them subject to an extensive regulatory scheme. When the State adopted this scheme and when its Public Service Commission issued its initial ban on promotional advertising in 1973, commercial speech had not been held to fall within the scope of the First Amendment at all. *Virginia Pharmacy Board v. Virginia Citizens Consumer Council* (1976), however, subsequently accorded commercial speech a limited measure of First Amendment protection.

The Court today holds not only that commercial speech is entitled to First Amendment protection, but also that when it is protected a State may not regulate it unless its reason for doing so amounts to a "substantial" governmental interest, its regulation "directly advances" that interest, and its manner of regulation is "not more extensive than necessary" to serve the interest. The test adopted by the Court thus elevates the protection accorded commercial speech that falls within the scope of the First Amendment to a level that is virtually indistinguishable from that of noncommercial speech. I think the Court in so doing has effectively accomplished the "devitalization" of the First Amendment that it counseled against in *Ohralik [v. Ohio State Bar Assn. (1978)]*. I think it has also, by labeling economic regulation of business conduct as a restraint on "free speech," gone far to resurrect the discredited doctrine of cases such as *Lochner* and *Tyson & Brother v. Banton* (1927). New York's order here is in my view more akin to an economic regulation to which virtually complete deference should be accorded by this Court.

I doubt there would be any question as to the constitutionality of New York's conservation effort if the Public Service Commission had chosen to raise the price of electricity, to condition its sale on specified terms, or to restrict its production. In terms of constitutional values, I think that such controls are virtually indistinguishable from the State's ban on promotional advertising.

An ostensible justification for striking down New York's ban on promotional advertising is that this Court has previously "rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech. '[P]eople will perceive their own best interests if only they are well enough informed and . . . the best means to that end is to open the channels of communication, rather than to close them. . . .'" Whatever the merits of this view, I think the Court has carried its logic too far here.

The view apparently derives from the Court's frequent reference to the "marketplace of ideas," which was deemed analogous to the commercial market in which a laissez-faire policy would lead to optimum economic decisionmaking under the guidance of the "invisible hand." See, e. g., ADAM SMITH, WEALTH OF NATIONS (1776). This notion was expressed by Mr. Justice Holmes in his dissenting opinion in *Abrams v. United States* (1919), wherein he stated that "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." See also, e. g., J. MILL, ON LIBERTY (1858); J. MILTON, AREOPAGITICA, A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING (1644).

While it is true that an important objective of the First Amendment is to foster the free flow of information, identification of speech that falls within its protection is not aided by the metaphorical reference to a "marketplace of ideas." There is no reason for believing that the marketplace of ideas is free

from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market. Indeed, many types of speech have been held to fall outside the scope of the First Amendment, thereby subject to governmental regulation, despite this Court's references to a marketplace of ideas. See, e.g., *Chaplinsky v. New Hampshire* (1942) (fighting words); *Beauharnais v. Illinois* (1952) (group libel); *Roth v. United States* (1957) (obscenity). It also has been held that the government has a greater interest in regulating some types of protected speech than others. See, e.g., *FCC v. Pacifica Foundation* (1978) (indecent speech); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council* (commercial speech). And as this Court stated in *Gertz v. Robert Welch, Inc.* (1974): "Of course, an opportunity for rebuttal seldom suffices to undo [the] harm of a defamatory falsehood. Indeed the law of defamation is rooted in our experience that the truth rarely catches up with a lie." The Court similarly has recognized that false and misleading commercial speech is not entitled to any First Amendment protection.

The above examples illustrate that in a number of instances government may constitutionally decide that societal interests justify the imposition of restrictions on the free flow of information. When the question is whether a given commercial message is protected, I do not think this Court's determination that the information will "assist" consumers justifies judicial invalidation of a reasonably drafted state restriction on such speech when the restriction is designed to promote a concededly substantial state interest. I consequently disagree with the Court's conclusion that the societal interest in the dissemination of commercial information is sufficient to justify a restriction on the State's authority to regulate promotional advertising by utilities; indeed, in the case of a regulated monopoly, it is difficult for me to distinguish "society" from the state legislature and the Public Service Commission. Nor do I think there is any basis for concluding that individual citizens of the State will recognize the need for and act to promote energy conservation to the extent the government deems appropriate, if only the channels of communication are left open. Thus, even if I were to agree that commercial speech is entitled to some First Amendment protection, I would hold here that the State's decision to ban promotional advertising, in light of the substantial state interest at stake, is a constitutionally permissible exercise of its power to adopt regulations designed to promote the interests of its citizens.

The plethora of opinions filed in this case highlights the doctrinal difficulties that emerge from this Court's decisions granting First Amendment protection to commercial speech. \*\*\*

Two ideas are here at war with one another, and their resolution, although it be on a judicial battlefield, will be a very difficult one. The sort of "advocacy" of which Mr. Justice Brandeis spoke was not the advocacy on the part of a utility to use more of its product. Nor do I think those who won our independence, while declining to "exalt order at the cost of liberty," would have viewed a merchant's unfettered freedom to advertise in hawking his wares as a "liberty" not subject to extensive regulation in light of the government's substantial interest in attaining "order" in the economic sphere.

\*\*\* Nor does the Court today apply the clear-and-present-danger test in invalidating New York's ban on promotional advertising. As noted above, in these and other contexts the Court has clearly rejected the notion that there must be a free "marketplace of ideas."

If the complaint of those who feel the Court's opinion does not go far enough is that the "only test of truth is its ability to get itself accepted in the marketplace of ideas"—the test advocated by Thomas Jefferson in his first inaugural address, and by Mr. Justice Holmes in *Abrams v. United States* (1919) (dissenting opinion)—there is no reason whatsoever to limit the protection accorded commercial speech to "truthful, nonmisleading, noncoercive" speech. If the "commercial speech" is in fact misleading, the "marketplace of ideas" will in time reveal that fact. It may not reveal it sufficiently soon to avoid harm to numerous people, but if the reasoning of Brandeis and Holmes is applied in this context, that was one of the risks we took in protecting free speech in a democratic society.

Unfortunately, although the "marketplace of ideas" has a historically and sensibly defined context in the world of political speech, it has virtually none in the realm of business transactions. \*\*\*

I remain of the view that the Court unlocked a Pandora's Box when it "elevated" commercial speech to the level of traditional political speech by according it First Amendment protection in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council* (1976). The line between "commercial speech," and the kind of speech that those who drafted the First Amendment had in mind, may not be a technically or intellectually easy one to draw, but it surely produced far fewer problems than has the development of judicial doctrine in this area since *Virginia Pharmacy Board*. For in the world of political advocacy and its marketplace of ideas, there is no such thing as a "fraudulent" idea: there may be useless proposals, totally unworkable schemes, as well as very sound proposals that will receive the imprimatur of the "marketplace of ideas" through our majoritarian system of election and representative government. The free flow of information is important in this context not because it will lead to the discovery of any objective "truth," but because it is essential to our system of self-government.

The notion that more speech is the remedy to expose falsehood and fallacies is wholly out of place in the commercial bazaar, where if applied logically the remedy of one who was defrauded would be merely a statement, available upon request, reciting the Latin maxim "*caveat emptor*." But since "fraudulent speech" in this area is to be remediable under *Virginia Pharmacy Board* the remedy of one defrauded is a lawsuit or an agency proceeding based on common-law notions of fraud that are separated by a world of difference from the realm of politics and government. What time, legal decisions, and common sense have so widely severed, I declined to join in *Virginia Pharmacy Board*, and regret now to see the Court reaping the seeds that it there sowed. For in a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence.

### III

The Court concedes that the state interest in energy conservation is plainly substantial, as is the State's concern that its rates be fair and efficient. It also concedes that there is a direct link between the Commission's ban on promotional advertising and the State's interest in conservation. The Court nonetheless strikes down the ban on promotional advertising because the Commission has failed to demonstrate, under the final part of the Court's four-part test, that its regulation is no more extensive than necessary to serve the State's interest. In reaching this conclusion, the Court conjures up potential advertisements that a utility might make that conceivably would result in net energy savings. The Court does not indicate that the New York Public Service Commission has in fact construed its ban on "promotional" advertising to preclude the dissemination of information that clearly would result in a net energy savings, nor does it even suggest that the Commission has been confronted with and rejected such an advertising proposal. The final part of the Court's test thus leaves room for so many hypothetical "better" ways that any ingenious lawyer will surely seize on one of them to secure the invalidation of what the state agency actually did. \*\*\*

It is in my view inappropriate for the Court to invalidate the State's ban on commercial advertising here, based on its speculation that in some cases the advertising may result in a net savings in electrical energy use, and in the cases in which it is clear a net energy savings would result from utility advertising, the Public Service Commission would apply its ban so as to proscribe such advertising. Even assuming that the Court's speculation is correct, I do not think it follows that facial invalidation of the ban is the appropriate course. \*\*\*

For the foregoing reasons, I would affirm the judgment of the New York Court of Appeals.

### ***Bolger v. Youngs Drug Products Corp.***

463 U.S. 60 (1983)

MARSHALL, J., DELIVERED THE OPINION OF THE COURT, IN WHICH BURGER, C.J., AND WHITE, BLACKMUN, AND POWELL, JJ., JOINED. REHNQUIST, J., FILED AN OPINION CONCURRING IN THE JUDGMENT, IN WHICH O'CONNOR, J., JOINED. STEVENS, J., FILED AN OPINION CONCURRING IN THE JUDGMENT. BRENNAN, J., TOOK NO PART IN THE DECISION OF THE CASE.

JUSTICE MARSHALL DELIVERED THE OPINION OF THE COURT.

Title 39 U. S. C. § 3001(e)(2) prohibits the mailing of unsolicited advertisements for contraceptives. The District Court held that, as applied to appellee's mailings, the statute violates the First Amendment. We affirm.

#### I

Section 3001(e)(2) states that "[a]ny unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs . . . . As interpreted by Postal Service regulations, the statutory provision does not apply to unsolicited advertisements in which the mailer has no commercial interest. In addition to the civil consequences of a

violation of § 3001(e)(2), 18 U. S. C. § 1461 makes it a crime knowingly to use the mails for anything declared by § 3001(e) to be nonmailable.

Appellee Youngs Drug Products Corp. (Youngs) is engaged in the manufacture, sale, and distribution of contraceptives. Youngs markets its products primarily through sales to chain warehouses and wholesale distributors, who in turn sell contraceptives to retail pharmacists, who then sell those products to individual customers. Appellee publicizes the availability and desirability of its products by various methods. This litigation resulted from Youngs' decision to undertake a campaign of unsolicited mass mailings to members of the public. In conjunction with its wholesalers and retailers, Youngs seeks to mail to the public on an unsolicited basis three types of materials:

- multi-page, multi-item flyers promoting a large variety of products available at a drugstore, including prophylactics;
- flyers exclusively or substantially devoted to promoting prophylactics;
- informational pamphlets discussing the desirability and availability of prophylactics in general or Youngs' products in particular.

In 1979 the Postal Service traced to a wholesaler of Youngs' products an allegation of an unsolicited mailing of contraceptive advertisements. The Service warned the wholesaler that the mailing violated 39 U. S. C. § 3001(e)(2). Subsequently, Youngs contacted the Service and furnished it with copies of Youngs' three types of proposed mailings, stating its view that the statute could not constitutionally restrict the mailings. The Service rejected Youngs' legal argument and notified the company that the proposed mailings would violate §3001(e)(2). Youngs then brought this action for declaratory and injunctive relief in the United States District Court for the District of Columbia. It claimed that the statute, as applied to its proposed mailings, violated the First Amendment and that Youngs and its wholesaler were refraining from distributing the advertisements because of the Service's warning.

The District Court determined that § 3001(e)(2), by its plain language, prohibited all three types of proposed mailings. The court then addressed the constitutionality of the statute as applied to these mailings. Finding all three types of materials to be commercial solicitations, the court considered the constitutionality of the statute within the framework established by this Court for analyzing restrictions imposed on commercial speech. The court concluded that the statutory prohibition was more extensive than necessary to the interests asserted by the Government, and it therefore held that the statute's absolute ban on the three types of mailings violated the First Amendment.

Appellants brought this direct appeal and we noted probable jurisdiction.

## II

Beginning with *Bigelow v. Virginia* (1975), this Court extended the protection of the First Amendment to commercial speech. Nonetheless, our decisions have recognized "the `common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." Thus, we have held that the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression. *Central Hudson Gas & Electric*

*Corp. v. Public Service Comm'n of New York* (1980); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.* (1976).

For example, as a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." With respect to noncommercial speech, this Court has sustained content-based restrictions only in the most extraordinary circumstances. By contrast, regulation of commercial speech based on content is less problematic. In light of the greater potential for deception or confusion in the context of certain advertising messages, content-based restrictions on commercial speech may be permissible.

Because the degree of protection afforded by the First Amendment depends on whether the activity sought to be regulated constitutes commercial or noncommercial speech, we must first determine the proper classification of the mailings at issue here. Appellee contends that its proposed mailings constitute "fully protected" speech, so that § 3001(e)(2) amounts to an impermissible content-based restriction on such expression. Appellants argue, and the District Court held, that the proposed mailings are all commercial speech. The application of § 3001(e)(2) to appellee's proposed mailings must be examined carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed.

Most of appellee's mailings fall within the core notion of commercial speech — "speech which does `no more than propose a commercial transaction.'" *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.* Youngs' informational pamphlets, however, cannot be characterized merely as proposals to engage in commercial transactions. Their proper classification as commercial or noncommercial speech thus presents a closer question. The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. See *New York Times Co. v. Sullivan* (1964). Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech. Finally, the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech.

The combination of *all* these characteristics, however, provides strong support for the District Court's conclusion that the informational pamphlets are properly characterized as commercial speech. The mailings constitute commercial speech notwithstanding the fact that they contain discussions of important public issues such as venereal disease and family planning. We have made clear that advertising which "links a product to a current public debate" is not thereby entitled to the constitutional protection afforded noncommercial speech. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*. A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions. Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.

We conclude, therefore, that all of the mailings in this case are entitled to the qualified but nonetheless substantial protection accorded to commercial speech.

### III

"The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*. In *Central Hudson* we adopted a four-part analysis for assessing the validity of restrictions on commercial speech. First, we determine whether the expression is constitutionally protected. For commercial speech to receive such protection, "it at least must concern lawful activity and not be misleading." Second, we ask whether the governmental interest is substantial. If so, we must then determine whether the regulation directly advances the government interest asserted, and whether it is not more extensive than necessary to serve that interest. Applying this analysis, we conclude that § 3001(e)(2) is unconstitutional as applied to appellee's mailings.

We turn first to the protection afforded by the First Amendment. The State may deal effectively with false, deceptive, or misleading sales techniques. The State may also prohibit commercial speech related to illegal behavior. In this case, however, appellants have never claimed that Youngs' proposed mailings fall into any of these categories. To the contrary, advertising for contraceptives not only implicates "substantial individual and societal interests" in the free flow of commercial information, but also relates to activity which is protected from unwarranted state interference. Youngs' proposed commercial speech is therefore clearly protected by the First Amendment. Indeed, where — as in this case — a speaker desires to convey truthful information relevant to important social issues such as family planning and the prevention of venereal disease, we have previously found the First Amendment interest served by such speech paramount.

We must next determine whether the Government's interest in prohibiting the mailing of unsolicited contraceptive advertisements is a substantial one. The prohibition in § 3001(e)(2) originated in 1873 as part of the Comstock Act, a criminal statute designed "for the suppression of Trade in and Circulation of obscene Literature and Articles of immoral Use." Act of Mar. 3, 1873, ch. 258, § 2, 17 Stat. 599. Appellants do not purport to rely on justifications for the statute offered during the 19th century. Instead, they advance interests that concededly were not asserted when the prohibition was enacted into law. This reliance is permissible since the insufficiency of the original motivation does not diminish other interests that the restriction may now serve.

In particular, appellants assert that the statute (1) shields recipients of mail from materials that they are likely to find offensive and (2) aids parents' efforts to control the manner in which their children become informed about sensitive and important subjects such as birth control. The first of these interests carries little weight. In striking down a state prohibition of contraceptive advertisements in *Carey v. Population Services International* we stated that offensiveness was "classically not [a] justificatio[n] validating the suppression of expression protected by the First Amendment. At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." We specifically declined to

recognize a distinction between commercial and noncommercial speech that would render this interest a sufficient justification for a prohibition of commercial speech.

Recognizing that their reliance on this interest is "problematic," appellants attempt to avoid the clear import of *Carey* by emphasizing that § 3001(e)(2) is aimed at the mailing of materials to the home. We have, of course, recognized the important interest in allowing addressees to give notice to a mailer that they wish no further mailings which, in their sole discretion, they believe to be erotically arousing or sexually provocative. But we have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended. The First Amendment "does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech." Recipients of objectionable mailings, however, may "effectively avoid further bombardment of their sensibilities simply by averting their eyes.'" Consequently, the "short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned."

The second interest asserted by appellants — aiding parents' efforts to discuss birth control with their children — is undoubtedly substantial. "[P]arents have an important 'guiding role' to play in the upbringing of their children . . . which presumptively includes counseling them on important decisions." As a *means* of effectuating this interest, however, § 3001(e)(2) fails to withstand scrutiny.

To begin with, § 3001(e)(2) provides only the most limited incremental support for the interest asserted. We can reasonably assume that parents already exercise substantial control over the disposition of mail once it enters their mailboxes. Under 39 U. S. C. § 3008, parents can also exercise control over information that flows into their mailboxes. And parents must already cope with the multitude of external stimuli that color their children's perception of sensitive subjects. Under these circumstances, a ban on unsolicited advertisements serves only to assist those parents who desire to keep their children from confronting such mailings, who are otherwise unable to do so, and whose children have remained relatively free from such stimuli.

This marginal degree of protection is achieved by purging all mailboxes of unsolicited material that is entirely suitable for adults. We have previously made clear that a restriction of this scope is more extensive than the Constitution permits, for the government may not "reduce the adult population . . . to reading only what is fit for children." The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox. In *FCC v. Pacifica Foundation* (1978), this Court did recognize that the Government's interest in protecting the young justified special treatment of an afternoon broadcast heard by adults as well as children. At the same time, the majority "emphasize[d] the narrowness of our holding," explaining that broadcasting is "*uniquely* pervasive" and that it is "*uniquely* accessible to children, even those too young to read." (emphasis added). The receipt of mail is far less intrusive and uncontrollable. Our decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication.

Section 3001(e)(2) is also defective because it denies to parents truthful information bearing on their ability to discuss birth control and to make informed decisions in this area. Because the proscribed information "may bear on one of the most important decisions" parents have a right to make, the restriction of "the free flow of truthful information" constitutes a "basic" constitutional defect regardless of the strength of the government's interest.

#### IV

We thus conclude that the justifications offered by appellants are insufficient to warrant the sweeping prohibition on the mailing of unsolicited contraceptive advertisements. As applied to appellee's mailings, § 3001(e)(2) is unconstitutional. The judgment of the District Court is therefore

*Affirmed.*

JUSTICE BRENNAN TOOK NO PART IN THE DECISION OF THIS CASE.

JUSTICE REHNQUIST, WITH WHOM JUSTICE O'CONNOR JOINS, CONCURRING IN THE JUDGMENT.

I agree that the judgment should be affirmed, but my reasoning differs from that of the Court. The right to use the mails is undoubtedly protected by the First Amendment. But because the home mailbox has features which distinguish it from a public hall or public park, where it may be assumed that all who are present wish to hear the views of the particular speaker then on the rostrum, it cannot be totally assimilated for purposes of analysis with these traditional public forums. Several people within a family or living group may have free access to a mailbox, including minor children; and obviously not every piece of mail received has been either expressly or impliedly solicited. It is the unsolicited mass mailings sent by appellee designed to promote the use of condoms that gives rise to this litigation.

\*\*\* [Omitted discussion and application of *Central Hudson*].

Thus, under this Court's cases the intrusion generated by Youngs' proposed advertising is relatively small, and the restriction imposed by § 3001(e)(2) is relatively large. Although this restriction directly advances weighty governmental interests, it is somewhat more extensive than is necessary to serve those interests. On balance I conclude that this restriction on Youngs' commercial speech has not been adequately justified. Section 3001(e)(2) therefore violates the First Amendment as applied to Youngs and to material of the type Youngs has indicated that it plans to send, and I agree that the judgment of the District Court should be affirmed.

JUSTICE STEVENS, CONCURRING IN THE JUDGMENT.

Two aspects of the Court's opinion merit further comment: (1) its conclusion that all of the communications at issue are properly classified as "commercial speech"; and (2) its virtually complete rejection of offensiveness as a possibly legitimate justification for the suppression of speech. My views are somewhat different from the Court's on both of these matters. \*\*\*

## *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*

471 U.S. 626 (1985)

WHITE, J., DELIVERED THE OPINION OF THE COURT, IN WHICH BLACKMUN AND STEVENS, JJ., JOINED; IN PARTS I, II, III, AND IV OF WHICH BRENNAN AND MARSHALL, JJ., JOINED; AND IN PARTS I, II, V, AND VI OF WHICH BURGER, C. J., AND REHNQUIST AND O'CONNOR, JJ., JOINED. BRENNAN J., FILED AN OPINION CONCURRING IN PART, CONCURRING IN THE JUDGMENT IN PART, AND DISSENTING IN PART, IN WHICH MARSHALL, J., JOINED. O'CONNOR, J., FILED AN OPINION CONCURRING IN PART, CONCURRING IN THE JUDGMENT IN PART, AND DISSENTING IN PART, IN WHICH BURGER, C. J., AND REHNQUIST, J., JOINED. POWELL, J., TOOK NO PART IN THE DECISION OF THE CASE.

JUSTICE WHITE DELIVERED THE OPINION OF THE COURT.

Since the decision in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.* (1976), in which the Court held for the first time that the First Amendment precludes certain forms of regulation of purely commercial speech, we have on a number of occasions addressed the constitutionality of restraints on advertising and solicitation by attorneys. See *In re R. M. J.* (1982); *In re Primus* (1978); *Ohralik v. Ohio State Bar Assn.* (1978); *Bates v. State Bar of Arizona* (1977). This case presents additional unresolved questions regarding the regulation of commercial speech by attorneys: whether a State may discipline an attorney for soliciting business by running newspaper advertisements containing nondeceptive illustrations and legal advice, and whether a State may seek to prevent potential deception of the public by requiring attorneys to disclose in their advertising certain information regarding fee arrangements.

### I

Appellant is an attorney practicing in Columbus, Ohio. Late in 1981, he sought to augment his practice by advertising in local newspapers. His first effort was a modest one: he ran a small advertisement in the Columbus Citizen Journal advising its readers that his law firm would represent defendants in drunken driving cases and that his clients' "[f]ull legal fee [would be] refunded if [they were] convicted of DRUNK DRIVING." The advertisement appeared in the Journal for two days; on the second day, Charles Kettlewell, an attorney employed by the Office of Disciplinary Counsel of the Supreme Court of Ohio (appellee) telephoned appellant and informed him that the advertisement appeared to be an offer to represent criminal defendants on a contingent-fee basis, a practice prohibited by Disciplinary Rule 2-106(C) of the Ohio Code of Professional Responsibility. Appellant immediately withdrew the advertisement and in a letter to Kettlewell apologized for running it, also stating in the letter that he would decline to accept employment by persons responding to the ad.

Appellant's second effort was more ambitious. In the spring of 1982, appellant placed an advertisement in 36 Ohio newspapers publicizing his willingness to represent women who had suffered injuries resulting from their use of a contraceptive device known as the Dalkon Shield Intrauterine Device. The

advertisement featured a line drawing of the Dalkon Shield accompanied by the question, "DID YOU USE THIS IUD?" The advertisement then related the following information:

"The Dalkon Shield Interuterine [*sic*] Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients."

The ad concluded with the name of appellant's law firm, its address, and a phone number that the reader might call for "free information."

The advertisement was successful in attracting clients: appellant received well over 200 inquiries regarding the advertisement, and he initiated lawsuits on behalf of 106 of the women who contacted him as a result of the advertisement. The ad, however, also aroused the interest of the Office of Disciplinary Counsel. On July 29, 1982, the Office filed a complaint against appellant charging him with a number of disciplinary violations arising out of both the drunken driving and Dalkon Shield advertisements.

The complaint, as subsequently amended, alleged that the drunken driving ad violated Ohio Disciplinary Rule 2-101(A) in that it was "false, fraudulent, misleading, and deceptive to the public" because it offered representation on a contingent-fee basis in a criminal case — an offer that could not be carried out under Disciplinary Rule 2-106(C). With respect to the Dalkon Shield advertisement, the complaint alleged that in running the ad and accepting employment by women responding to it, appellant had violated the following Disciplinary Rules: DR 2-101(B), which prohibits the use of illustrations in advertisements run by attorneys, requires that ads by attorneys be "dignified," and limits the information that may be included in such ads to a list of 20 items;<sup>44</sup> DR 2-103(A), which prohibits an attorney from "recommend[ing] employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer"; and DR 2-104(A), which provides (with certain exceptions not applicable here) that "[a] lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice."

The complaint also alleged that the advertisement violated DR 2-101(B)(15), which provides that any advertisement that mentions contingent-fee rates must "disclos[e] whether percentages are computed before or after deduction of court costs and expenses," and that the ad's failure to inform clients that they would be liable for costs (as opposed to legal fees) even if their claims were unsuccessful rendered the advertisement "deceptive" in violation of DR 2-101(A). The complaint did not allege that the Dalkon Shield advertisement was false or deceptive in any respect other than its omission of information relating to the contingent-fee arrangement; indeed, the Office of Disciplinary Counsel stipulated that the information and advice regarding Dalkon Shield litigation

was not false, fraudulent, misleading, or deceptive and that the drawing was an accurate representation of the Dalkon Shield.

The charges against appellant were heard by a panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. Appellant's primary defense to the charges against him was that Ohio's rules restricting the content of advertising by attorneys were unconstitutional under this Court's decisions in *Bates v. State Bar of Arizona* (1977), and *In re R. M. J.* (1982). In support of his contention that the State had not provided justification for its rules sufficient to withstand the First Amendment scrutiny called for by those decisions, appellant proffered the testimony of expert witnesses that unfettered advertising by attorneys was economically beneficial and that appellant's advertising in particular was socially valuable in that it served to inform members of the public of their legal rights and of the potential health hazards associated with the Dalkon Shield. Appellant also put on the stand two of the women who had responded to his advertisements, both of whom testified that they would not have learned of their legal claims had it not been for appellant's advertisement.

The panel found that appellant's use of advertising had violated a number of Disciplinary Rules. The panel accepted the contention that the drunken driving advertisement was deceptive, but its reasoning differed from that of the Office of Disciplinary Counsel: the panel concluded that because the advertisement failed to mention the common practice of plea bargaining in drunken driving cases, it might be deceptive to potential clients who would be unaware of the likelihood that they would both be found guilty (of a lesser offense) *and* be liable for attorney's fees (because they had not been convicted of drunken driving). The panel also found that the use of an illustration in appellant's Dalkon Shield advertisement violated DR 2-101(B), that the ad's failure to disclose the client's potential liability for costs even if her suit were unsuccessful violated both DR 2-101(A) and DR 2-101 (B)(15), that the advertisement constituted self-recommendation in violation of DR 2-103(A), and that appellant's acceptance of offers of employment resulting from the advertisement violated DR 2-104(A).

The panel rejected appellant's arguments that Ohio's regulations regarding the content of attorney advertising were unconstitutional as applied to him. The panel noted that neither *Bates* nor *In re R. M. J.* had forbidden all regulation of attorney advertising and that both of those cases had involved advertising regulations substantially more restrictive than Ohio's. The panel also relied heavily on *Ohralik v. Ohio State Bar Assn.* (1978), in which this Court upheld Ohio's imposition of discipline on an attorney who had engaged in in-person solicitation. The panel apparently concluded that the interests served by the application of Ohio's rules to advertising that contained legal advice and solicited clients to pursue a particular legal claim were as substantial as the interests at stake in *Ohralik*. Accordingly, the panel rejected appellant's constitutional defenses and recommended that he be publicly reprimanded for his violations. The Board of Commissioners adopted the panel's findings in full, but recommended the sanction of indefinite suspension from the practice of law rather than the more lenient punishment proposed by the panel.

The Supreme Court of Ohio, in turn, adopted the Board's findings that appellant's advertisements had violated the Disciplinary Rules specified by the

hearing panel. The court also agreed with the Board that the application of Ohio's rules to appellant's advertisements did not offend the First Amendment. The court pointed out that *Bates* and *In re R. M. J.* permitted regulations designed to prevent the use of deceptive advertising and that *R. M. J.* had recognized that even non-deceptive advertising might be restricted if the restriction was narrowly designed to achieve a substantial state interest. The court held that disclosure requirements applicable to advertisements mentioning contingent-fee arrangements served the permissible goal of ensuring that potential clients were not misled regarding the terms of the arrangements. In addition, the court held, it was "allowable" to prevent attorneys from claiming expertise in particular fields of law in the absence of standards by which such claims might be assessed, and it was "reasonable" to preclude the use of illustrations in advertisements and to prevent attorneys from offering legal advice in their advertisements, although the court did not specifically identify the interests served by these restrictions. Having determined that appellant's advertisements violated Ohio's Disciplinary Rules and that the First Amendment did not forbid the application of those rules to appellant, the court concluded that appellant's conduct warranted a public reprimand.

Contending that Ohio's Disciplinary Rules violate the First Amendment insofar as they authorize the State to discipline him for the content of his Dalkon Shield advertisement, appellant filed this appeal. Appellant also claims that the manner in which he was disciplined for running his drunken driving advertisement violated his right to due process. We noted probable jurisdiction, and now affirm in part and reverse in part.

## II

There is no longer any room to doubt that what has come to be known as "commercial speech" is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded "noncommercial speech." *Bolger v. Youngs Drug Products Corp.* (1983); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York* (1980). More subject to doubt, perhaps, are the precise bounds of the category of expression that may be termed commercial speech, but it is clear enough that the speech at issue in this case — advertising pure and simple — falls within those bounds. Our commercial speech doctrine rests heavily on "the 'common-sense' distinction between speech proposing a commercial transaction . . . and other varieties of speech," and appellant's advertisements undeniably propose a commercial transaction. Whatever else the category of commercial speech may encompass, it must include appellant's advertisements.

Our general approach to restrictions on commercial speech is also by now well settled. The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, or that proposes an illegal transaction. Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest. *Central Hudson Gas & Electric*. Our application of these principles to the commercial speech of attorneys has led us to conclude that blanket bans on price advertising by attorneys and rules

preventing attorneys from using non-deceptive terminology to describe their fields of practice are impermissible, but that rules prohibiting in-person solicitation of clients by attorneys are, at least under some circumstances, permissible. To resolve this appeal, we must apply the teachings of these cases to three separate forms of regulation Ohio has imposed on advertising by its attorneys: prohibitions on soliciting legal business through advertisements containing advice and information regarding specific legal problems; restrictions on the use of illustrations in advertising by lawyers; and disclosure requirements relating to the terms of contingent fees.

### III

We turn first to the Ohio Supreme Court's finding that appellant's Dalkon Shield advertisement (and his acceptance of employment resulting from it) ran afoul of the rules against self-recommendation and accepting employment resulting from unsolicited legal advice. Because all advertising is at least implicitly a plea for its audience's custom, a broad reading of the rules applied by the Ohio court (and particularly the rule against self-recommendation) might suggest that they forbid all advertising by attorneys — a result obviously not in keeping with our decisions in *Bates* and *In re R. M. J.* But the Ohio court did not purport to give its rules such a broad reading: it held only that the rules forbade soliciting or accepting legal employment through advertisements containing information or advice regarding a specific legal problem.

The interest served by the application of the Ohio self-recommendation and solicitation rules to appellant's advertisement is not apparent from a reading of the opinions of the Ohio Supreme Court and its Board of Commissioners. The advertisement's information and advice concerning the Dalkon Shield were, as the Office of Disciplinary Counsel stipulated, neither false nor deceptive: in fact, they were entirely accurate. The advertisement did not promise readers that lawsuits alleging injuries caused by the Dalkon Shield would be successful, nor did it suggest that appellant had any special expertise in handling such lawsuits other than his employment in other such litigation. Rather, the advertisement reported the indisputable fact that the Dalkon Shield has spawned an impressive number of lawsuits and advised readers that appellant was currently handling such lawsuits and was willing to represent other women asserting similar claims. In addition, the advertisement advised women that they should not assume that their claims were time-barred — advice that seems completely unobjectionable in light of the trend in many States toward a "discovery rule" for determining when a cause of action for latent injury or disease accrues. The State's power to prohibit advertising that is "inherently misleading," thus cannot justify Ohio's decision to discipline appellant for running advertising geared to persons with a specific legal problem.

Because appellant's statements regarding the Dalkon Shield were not false or deceptive, our decisions impose on the State the burden of establishing that prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial governmental interest. The extensive citations in the opinion of the Board of Commissioners to our opinion in *Ohralik v. Ohio State Bar Assn.* (1978), suggest that the Board believed that the application of the rules to appellant's advertising served the same interests that this Court found sufficient to justify the ban on in-person solicitation at issue in *Ohralik*.

We cannot agree. Our decision in *Ohralik* was largely grounded on the substantial differences between face-to-face solicitation and the advertising we had held permissible in *Bates*. In-person solicitation by a lawyer, we concluded, was a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud. In addition, we noted that in-person solicitation presents unique regulatory difficulties because it is "not visible or otherwise open to public scrutiny." These unique features of in-person solicitation by lawyers, we held, justified a prophylactic rule prohibiting lawyers from engaging in such solicitation for pecuniary gain, but we were careful to point out that "in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services."

It is apparent that the concerns that moved the Court in *Ohralik* are not present here. Although some sensitive souls may have found appellant's advertisement in poor taste, it can hardly be said to have invaded the privacy of those who read it. More significantly, appellant's advertisement — and print advertising generally — poses much less risk of over-reaching or undue influence. Print advertising may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the personal presence of a trained advocate. In addition, a printed advertisement, unlike a personal encounter initiated by an attorney, is not likely to involve pressure on the potential client for an immediate yes-or-no answer to the offer of representation. Thus, a printed advertisement is a means of conveying information about legal services that is more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney. Accordingly, the substantial interests that justified the ban on in-person solicitation upheld in *Ohralik* cannot justify the discipline imposed on appellant for the content of his advertisement.

Nor does the traditional justification for restraints on solicitation — the fear that lawyers will "stir up litigation" — justify the restriction imposed in this case. In evaluating this proffered justification, it is important to think about what it might mean to say that the State has an interest in preventing lawyers from stirring up litigation. It is possible to describe litigation itself as an evil that the State is entitled to combat: after all, litigation consumes vast quantities of social resources to produce little of tangible value but much discord and unpleasantness. "[A]s a litigant," Judge Learned Hand once observed, "I should dread a lawsuit beyond almost anything else short of sickness and death." L. Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, in 3 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, LECTURES ON LEGAL TOPICS 89, 105 (1926).

But we cannot endorse the proposition that a lawsuit, as such, is an evil. Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. There is no cause for consternation when a person who believes in good faith and on the basis of accurate information regarding his legal rights that he has suffered a legally cognizable injury turns to the courts for a remedy: "we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." *Bates*. That our citizens have

access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride. The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights. Accordingly, it is not sufficient justification for the discipline imposed on appellant that his truthful and nondeceptive advertising had a tendency to or did in fact encourage others to file lawsuits.

The State does not, however, argue that the encouragement of litigation is inherently evil, nor does it assert an interest in discouraging the particular form of litigation that appellant's advertising solicited. Rather, the State's position is that although appellant's advertising may itself have been harmless — may even have had the salutary effect of informing some persons of rights of which they would otherwise have been unaware — the State's prohibition on the use of legal advice and information in advertising by attorneys is a prophylactic rule that is needed to ensure that attorneys, in an effort to secure legal business for themselves, do not use false or misleading advertising to stir up meritless litigation against innocent defendants. Advertising by attorneys, the State claims, presents regulatory difficulties that are different in kind from those presented by other forms of advertising. Whereas statements about most consumer products are subject to verification, the indeterminacy of statements about law makes it impractical if not impossible to weed out accurate statements from those that are false or misleading. A prophylactic rule is therefore essential if the State is to vindicate its substantial interest in ensuring that its citizens are not encouraged to engage in litigation by statements that are at best ambiguous and at worst outright false.

The State's argument that it may apply a prophylactic rule to punish appellant notwithstanding that his particular advertisement has none of the vices that allegedly justify the rule is in tension with our insistence that restrictions involving commercial speech that is not itself deceptive be narrowly crafted to serve the State's purposes. \*\*\*

We need not, however, address the theoretical question whether a prophylactic rule is ever permissible in this area, for we do not believe that the State has presented a convincing case for its argument that the rule before us is necessary to the achievement of a substantial governmental interest. The State's contention that the problem of distinguishing deceptive and nondeceptive legal advertising is different in kind from the problems presented by advertising generally is unpersuasive.

The State's argument proceeds from the premise that it is intrinsically difficult to distinguish advertisements containing legal advice that is false or deceptive from those that are truthful and helpful, much more so than is the case with other goods or services. This notion is belied by the facts before us: appellant's statements regarding Dalkon Shield litigation were in fact easily verifiable and completely accurate. Nor is it true that distinguishing deceptive from nondeceptive claims in advertising involving products other than legal services is a comparatively simple and straightforward process. A brief survey of the body of case law that has developed as a result of the Federal Trade Commission's efforts to carry out its mandate under § 5 of the Federal Trade Commission Act to eliminate "unfair or deceptive acts or practices in . . . commerce," 15 U. S. C. § 45(a)(1), reveals that distinguishing deceptive from

nondeceptive advertising in virtually any field of commerce may require resolution of exceedingly complex and technical factual issues and the consideration of nice questions of semantics. In short, assessment of the validity of legal advice and information contained in attorneys' advertising is not necessarily a matter of great complexity; nor is assessing the accuracy or capacity to deceive of other forms of advertising the simple process the State makes it out to be. The qualitative distinction the State has attempted to draw eludes us.

Were we to accept the State's argument in this case, we would have little basis for preventing the government from suppressing other forms of truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising. The First Amendment protections afforded commercial speech would mean little indeed if such arguments were allowed to prevail. Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful. The value of the information presented in appellant's advertising is no less than that contained in other forms of advertising — indeed, insofar as appellant's advertising tended to acquaint persons with their legal rights who might otherwise be shut off from effective access to the legal system, it was undoubtedly more valuable than many other forms of advertising. Prophylactic restraints that would be unacceptable as applied to commercial advertising generally are therefore equally unacceptable as applied to appellant's advertising. An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients.

#### IV

The application of DR 2-101(B)'s restriction on illustrations in advertising by lawyers to appellant's advertisement fails for much the same reasons as does the application of the self-recommendation and solicitation rules. The use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly. Accordingly, commercial illustrations are entitled to the First Amendment protections afforded verbal commercial speech: restrictions on the use of visual media of expression in advertising must survive scrutiny under the *Central Hudson* test. Because the illustration for which appellant was disciplined is an accurate representation of the Dalkon Shield and has no features that are likely to deceive, mislead, or confuse the reader, the burden is on the State to present a substantial governmental interest justifying the restriction as applied to appellant and to demonstrate that the restriction vindicates that interest through the least restrictive available means.

The text of DR 2-101(B) strongly suggests that the purpose of the restriction on the use of illustrations is to ensure that attorneys advertise "in a dignified manner." There is, of course, no suggestion that the illustration actually used by appellant was undignified; thus, it is difficult to see how the application of

the rule to appellant in this case directly advances the State's interest in preserving the dignity of attorneys. More fundamentally, although the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights. Even if that were the case, we are unpersuaded that undignified behavior would tend to recur so often as to warrant a prophylactic rule. As we held in *Carey v. Population Services International* (1977), the mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.

In its arguments before this Court, the State has asserted that the restriction on illustrations serves a somewhat different purpose, akin to that supposedly served by the prohibition on the offering of legal advice in advertising. The use of illustrations in advertising by attorneys, the State suggests, creates unacceptable risks that the public will be misled, manipulated, or confused. Abuses associated with the visual content of advertising are particularly difficult to police, because the advertiser is skilled in subtle uses of illustrations to play on the emotions of his audience and convey false impressions. Because illustrations may produce their effects by operating on a subconscious level, the State argues, it will be difficult for the State to point to any particular illustration and prove that it is misleading or manipulative. Thus, once again, the State's argument is that its purposes can only be served through a prophylactic rule.

We are not convinced. The State's arguments amount to little more than unsupported assertions: nowhere does the State cite any evidence or authority of any kind for its contention that the potential abuses associated with the use of illustrations in attorneys' advertising cannot be combated by any means short of a blanket ban. Moreover, none of the State's arguments establish that there are particular evils associated with the use of illustrations in attorneys' advertisements. Indeed, because it is probably rare that decisions regarding consumption of legal services are based on a consumer's assumptions about qualities of the product that can be represented visually, illustrations in lawyers' advertisements will probably be less likely to lend themselves to material misrepresentations than illustrations in other forms of advertising.

Thus, acceptance of the State's argument would be tantamount to adoption of the principle that a State may prohibit the use of pictures or illustrations in connection with advertising of any product or service simply on the strength of the general argument that the visual content of advertisements may, under some circumstances, be deceptive or manipulative. But as we stated above, broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force. We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burdensome that the State is entitled to forgo that task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations. The experience of the FTC is, again, instructive. Although

that agency has not found the elimination of deceptive uses of visual media in advertising to be a simple task, neither has it found the task an impossible one: in many instances, the agency has succeeded in identifying and suppressing visually deceptive advertising. Given the possibility of policing the use of illustrations in advertisements on a case-by-case basis, the prophylactic approach taken by Ohio cannot stand; hence, appellant may not be disciplined for his use of an accurate and nondeceptive illustration.

## V

Appellant contends that assessing the validity of the Ohio Supreme Court's decision to discipline him for his failure to include in the Dalkon Shield advertisement the information that clients might be liable for significant litigation costs even if their lawsuits were unsuccessful entails precisely the same inquiry as determining the validity of the restrictions on advertising content discussed above. In other words, he suggests that the State must establish either that the advertisement, absent the required disclosure, would be false or deceptive or that the disclosure requirement serves some substantial governmental interest other than preventing deception; moreover, he contends that the State must establish that the disclosure requirement directly advances the relevant governmental interest and that it constitutes the least restrictive means of doing so. Not surprisingly, appellant claims that the State has failed to muster substantial evidentiary support for any of the findings required to support the restriction.

Appellant, however, overlooks material differences between disclosure requirements and outright prohibitions on speech. In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present. We have, to be sure, held that in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech. *See, e.g., Wooley v. Maynard* (1977); *Miami Herald Publishing Co. v. Tornillo* (1974). Indeed, in *West Virginia State Bd. of Ed. v. Barnette* (1943), the Court went so far as to state that "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence."

But the interests at stake in this case are not of the same order as those discussed in *Wooley*, *Tornillo*, and *Barnette*. Ohio has not attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because

disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception."

We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.

The State's application to appellant of the requirement that an attorney advertising his availability on a contingent-fee basis disclose that clients will have to pay costs even if their lawsuits are unsuccessful (assuming that to be the case) easily passes muster under this standard. Appellant's advertisement informed the public that "if there is no recovery, no legal fees are owed by our clients." The advertisement makes no mention of the distinction between "legal fees" and "costs," and to a layman not aware of the meaning of these terms of art, the advertisement would suggest that employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge. The assumption that substantial numbers of potential clients would be so misled is hardly a speculative one: it is a commonplace that members of the public are often unaware of the technical meanings of such terms as "fees" and "costs" — terms that, in ordinary usage, might well be virtually interchangeable. When the possibility of deception is as self-evident as it is in this case, we need not require the State to "conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead." *FTC v. Colgate-Palmolive Co.* The State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed.

## VI

Finally, we address appellant's argument that he was denied procedural due process by the manner in which discipline was imposed on him in connection with his drunken driving advertisement. \*\*\*

## VII

The Supreme Court of Ohio issued a public reprimand incorporating by reference its opinion finding that appellant had violated Disciplinary Rules 2-101(A), 2-101(B), 2-101 (B)(15), 2-103(A), and 2-104(A). That judgment is affirmed to the extent that it is based on appellant's advertisement involving his terms of representation in drunken driving cases and on the omission of information regarding his contingent-fee arrangements in his Dalkon Shield advertisement. But insofar as the reprimand was based on appellant's use of an illustration in his advertisement in violation of DR 2-101(B) and his offer of legal advice in his advertisement in violation of DR 2-103(A) and 2-104(A), the judgment is reversed.

*It is so ordered.*

JUSTICE POWELL TOOK NO PART IN THE DECISION OF THIS CASE.

JUSTICE BRENNAN, WITH WHOM JUSTICE MARSHALL JOINS, CONCURRING IN PART, CONCURRING IN THE JUDGMENT IN PART, AND DISSENTING IN PART.

I fully agree with the Court that a State may not discipline attorneys who solicit business by publishing newspaper advertisements that contain "truthful and nondeceptive information and advice regarding the legal rights of potential clients" and "accurate and nondeceptive illustration[s]." I therefore join Part I-IV of the Court's opinion, and I join the Court's judgment set forth in Part VII to the extent it reverses the Supreme Court of Ohio's public reprimand of the appellant Philip Q. Zauderer for his violations of Disciplinary Rules 2-101(B), 2-103(A), and 2-104(A).

With some qualifications, I also agree with the conclusion in Part V of the Court's opinion that a State may impose commercial-advertising disclosure requirements that are "reasonably related to the State's interest in preventing deception of consumers." I do not agree, however, that the State of Ohio's vaguely expressed disclosure requirements fully satisfy this standard, and in any event I believe that Ohio's punishment of Zauderer for his alleged infractions of those requirements violated important due process and First Amendment guarantees. In addition, I believe the manner in which Ohio has punished Zauderer for publishing the "drunk driving" advertisement violated fundamental principles of procedural due process. I therefore concur in part and dissent in part from Part V of the Court's opinion, dissent from Part VI, and dissent from the judgment set forth in Part VII insofar as it affirms the Supreme Court of Ohio's public reprimand "based on appellant's advertisement involving his terms of representation in drunken driving cases and on the omission of information regarding his contingent-fee arrangements in his Dalkon Shield advertisement."

I

A

The Court concludes that the First Amendment's protection of commercial speech is satisfied so long as a disclosure requirement is "reasonably related" to preventing consumer deception, and it suggests that this standard "might" be violated if a disclosure requirement were "unjustified" or "unduly burdensome." I agree with the Court's somewhat amorphous "reasonable relationship" inquiry only on the understanding that it comports with the standards more precisely set forth in our previous commercial-speech cases. Under those standards, regulation of commercial speech — whether through an affirmative disclosure requirement or through outright suppression — is "reasonable" only to the extent that a State can demonstrate a legitimate and substantial interest to be achieved by the regulation. Moreover, the regulation must directly advance the state interest and "may extend only as far as the interest it serves." Where the State imposes regulations to guard against "the potential for deception and confusion" in commercial speech, those regulations "may be no broader than reasonably necessary to prevent the deception."

Because of the First Amendment values at stake, courts must exercise careful scrutiny in applying these standards. Thus a State may not rely on "highly

speculative" or "tenuous" arguments in carrying its burden of demonstrating the legitimacy of its commercial-speech regulations. Where a regulation is addressed to allegedly deceptive advertising, the State must instead demonstrate that the advertising either "is inherently likely to deceive" or must muster record evidence showing that "a particular form or method of advertising has in fact been deceptive," and it must similarly demonstrate that the regulations directly and proportionately remedy the deception. Where States have failed to make such showings, we have repeatedly struck down the challenged regulations.

As the Court acknowledges, it is "somewhat difficult" to apply these standards to Ohio's disclosure requirements "in light of the Ohio court's failure to specify precisely what disclosures were required." It is also somewhat difficult to determine precisely what disclosure requirements the Court approves today. The Supreme Court of Ohio appears to have imposed three overlapping requirements, each of which must be analyzed under the First Amendment standards set forth above. First, the court concluded that "a lawyer advertisement which refers to contingent fees" should indicate whether "additional costs . . . might be assessed the client." The report of the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court explained that such a requirement is necessary to guard against "the impression that if there were no recovery, the client would owe nothing." I agree with the Court's conclusion that, given the general public's unfamiliarity with the distinction between fees and costs, a State may require an advertising attorney to include a costs disclaimer so as to avoid the potential for misunderstanding — provided the required disclaimer is "no broader than reasonably necessary to prevent the deception."

Second, the report and opinion provide that an attorney advertising his availability on a contingent-fee basis must "specifically expres[s]" his rates. The Court's analysis of this requirement — which the Court characterizes as a "suggest[ion]" — is limited to the passing observation that the requirement does not "see[m] intrinsically burdensome." The question of burden, however, is irrelevant unless the State can first demonstrate that the rate-publication requirement directly and proportionately furthers a "substantial interest." Yet an attorney's failure to specify a particular percentage rate when advertising that he accepts cases on a contingent-fee basis can in no way be said to be "inherently likely to deceive," and the voluminous record in this case fails to reveal a single instance suggesting that such a failure has in actual experience proved deceptive. Nor has Ohio at any point identified any other "substantial interest" that would be served by such a requirement. Although a State might well be able to demonstrate that rate publication is necessary to prevent deception or to serve some other substantial interest, it must do so pursuant to the carefully structured commercial-speech standards in order to ensure the full evaluation of competing considerations and to guard against impermissible discrimination among different categories of commercial speech. Ohio has made no such demonstration here.

Third, the Supreme Court of Ohio agreed with the Board of Commissioners that Zauderer had acted unethically "by failing *fully* to disclose the terms of the contingent fee arrangement which was intended to be entered into at the time of

publishing the advertisement." The record indicates that Zauderer enters into a comprehensive contract with personal injury clients, one that spells out over several pages the various terms and qualifications of the contingent-fee relationship. If Ohio seriously means to require Zauderer "fully to disclose the[se] terms," this requirement would obviously be so "unduly burdensome" as to violate the First Amendment. Such a requirement, compelling the publication of detailed fee information that would fill far more space than the advertisement itself, would chill the publication of protected commercial speech and would be entirely out of proportion to the State's legitimate interest in preventing potential deception. Given the Court's explicit endorsement of Ohio's other disclosure provisions, I can only read the Court's telling silence respecting this apparent requirement as an implicit acknowledgment that it could not possibly pass constitutional muster.

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JUSTICE O'CONNOR, WITH WHOM THE CHIEF JUSTICE AND JUSTICE REHNQUIST JOIN, CONCURRING IN PART, CONCURRING IN THE JUDGMENT IN PART, AND DISSENTING IN PART.

I join Parts I, II, V, and VI of the Court's opinion, and its judgment except insofar as it reverses the reprimand based on appellant Zauderer's use of unsolicited legal advice in violation of DR 2-103(A) and 2-104(A). I agree that appellant was properly reprimanded for his drunken driving advertisement and for his omission of contingent fee information from his Dalkon Shield advertisement. I also concur in the Court's judgment in Part IV. At least in the context of print media, the task of monitoring illustrations in attorney advertisements is not so unmanageable as to justify Ohio's blanket ban. I dissent from Part III of the Court's opinion. In my view, the use of unsolicited legal advice to entice clients poses enough of a risk of overreaching and undue influence to warrant Ohio's rule. \*\*\*

\*\*\* Given the availability of alternative means to inform the public of legal rights, Ohio's rule against legal advice in advertisements is an appropriate means to assure the exercise of independent professional judgment by attorneys. A State might rightfully take pride that its citizens have access to its civil courts, while at the same time opposing the use of self-interested legal advice to solicit clients.

In the face of these substantial and legitimate state concerns, I cannot agree with the majority that Ohio DR 2-104(A) is unnecessary to the achievement of those interests. The Ohio rule may sweep in some advertisements containing helpful legal advice within its general prohibition. Nevertheless, I am not prepared to second-guess Ohio's longstanding and careful balancing of legitimate state interests merely because appellant here can invent a less restrictive rule. \*\*\* Because I would defer to the judgment of the States that have chosen to preclude use of unsolicited legal advice to entice clients, I respectfully dissent from Part III of the Court's opinion.

## *Florida Bar v. Went For It, Inc.*

515 US 618 (1995)

O'CONNOR, J., DELIVERED THE OPINION OF THE COURT, IN WHICH REHNQUIST, C. J., AND SCALIA, THOMAS, AND BREYER, JJ., JOINED. KENNEDY, J., FILED A DISSENTING OPINION, IN WHICH STEVENS, SOUTER, AND GINSBURG, JJ., JOINED.

JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Rules of the Florida Bar prohibit personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. This case asks us to consider whether such Rules violate the First and Fourteenth Amendments of the Constitution. We hold that in the circumstances presented here, they do not.

### I

In 1989, the Florida Bar (Bar) completed a 2-year study of the effects of lawyer advertising on public opinion. After conducting hearings, commissioning surveys, and reviewing extensive public commentary, the Bar determined that several changes to its advertising rules were in order. In late 1990, the Florida Supreme Court adopted the Bar's proposed amendments with some modifications. Two of these amendments are at issue in this case. Rule 4-7.4(b)(1) provides that "[a] lawyer shall not send, or knowingly permit to be sent, . . . a written communication to a prospective client for the purpose of obtaining professional employment if: (A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication." Rule 4-7.8(a) states that "[a] lawyer shall not accept referrals from a lawyer referral service unless the service: (1) engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer." Together, these Rules create a brief 30-day blackout period after an accident during which lawyers may not, directly or indirectly, single out accident victims or their relatives in order to solicit their business.

In March 1992, G. Stewart McHenry and his wholly owned lawyer referral service, Went For It, Inc., filed this action for declaratory and injunctive relief in the United States District Court for the Middle District of Florida challenging Rules 4-7.4(b)(1) and 4-7.8(a) as violative of the First and Fourteenth Amendments to the Constitution. McHenry alleged that he routinely sent targeted solicitations to accident victims or their survivors within 30 days after accidents and that he wished to continue doing so in the future. Went For It, Inc., represented that it wished to contact accident victims or their survivors within 30 days of accidents and to refer potential clients to participating Florida lawyers. In October 1992, McHenry was disbarred for reasons unrelated to this suit. Another Florida lawyer, John T. Blakely, was substituted in his stead.

The District Court referred the parties' competing summary judgment motions to a Magistrate Judge, who concluded that the Bar had substantial government

interests, predicated on a concern for professionalism, both in protecting the personal privacy and tranquility of recent accident victims and their relatives and in ensuring that these individuals do not fall prey to undue influence or overreaching. Citing the Bar's extensive study, the Magistrate Judge found that the Rules directly serve those interests and sweep no further than reasonably necessary. The Magistrate recommended that the District Court grant the Bar's motion for summary judgment on the ground that the Rules pass constitutional muster.

The District Court rejected the Magistrate Judge's report and recommendations and entered summary judgment for the plaintiffs, relying on *Bates v. State Bar of Ariz.* (1977), and subsequent cases. The Eleventh Circuit affirmed on similar grounds. The panel noted, in its conclusion, that it was "disturbed that *Bates* and its progeny require the decision" that it reached. We granted certiorari and now reverse.

## II A

Constitutional protection for attorney advertising, and for commercial speech generally, is of recent vintage. Until the mid-1970's, we adhered to the broad rule laid out in *Valentine v. Chrestensen* (1942), that, while the First Amendment guards against government restriction of speech in most contexts, "the Constitution imposes no such restraint on government as respects purely commercial advertising." In 1976, the Court changed course. In *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, we invalidated a state statute barring pharmacists from advertising prescription drug prices. \*\*\*

In *Bates v. State Bar of Arizona* the Court struck a ban on price advertising for what it deemed "routine" legal services: "the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like." Expressing confidence that legal advertising would only be practicable for such simple, standardized services, the Court rejected the State's proffered justifications for regulation.

Nearly two decades of cases have built upon the foundation laid by *Bates*. It is now well established that lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection. Such First Amendment protection, of course, is not absolute. We have always been careful to distinguish commercial speech from speech at the First Amendment's core. "[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression." \*\*\*

Mindful of these concerns, we engage in "intermediate" scrutiny of restrictions on commercial speech, analyzing them under the framework set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.* (1980). Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading. Commercial speech that falls into neither of those categories, like the advertising at issue here, may be regulated if the government satisfies a test consisting of three related prongs: First, the government must assert a substantial interest in support of its regulation;

second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be "narrowly drawn."

## B

"Unlike rational basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions." The Bar asserts that it has a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers. This interest obviously factors into the Bar's paramount (and repeatedly professed) objective of curbing activities that "negatively affect the administration of justice." Because direct-mail solicitations in the wake of accidents are perceived by the public as intrusive, the Bar argues, the reputation of the legal profession in the eyes of Floridians has suffered commensurately. The regulation, then, is an effort to protect the flagging reputations of Florida lawyers by preventing them from engaging in conduct that, the Bar maintains, "is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families."

We have little trouble crediting the Bar's interest as substantial. On various occasions we have accepted the proposition that "States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." Our precedents also leave no room for doubt that "the protection of potential clients' privacy is a substantial state interest." In other contexts, we have consistently recognized that "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." Indeed, we have noted that "a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions."

Under *Central Hudson*'s second prong, the State must demonstrate that the challenged regulation "advances the Government's interest in a direct and material way." \*\*\* In *Edenfield v. Fane* (1993), the Court invalidated a Florida ban on in-person solicitation by certified public accountants (CPA's). We observed that the State Board of Accountancy had "present[ed] no studies that suggest personal solicitation of prospective business clients by CPA's creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear." Moreover, "[t]he record [did] not disclose any anecdotal evidence, either from Florida or another State, that validate[d] the Board's suppositions." In fact, we concluded that the only evidence in the record tended to "contradict, rather than strengthen, the Board's submissions." Finding nothing in the record to substantiate the State's allegations of harm, we invalidated the regulation.

The direct-mail solicitation regulation before us does not suffer from such infirmities. The Bar submitted a 106 page summary of its 2-year study of lawyer advertising and solicitation to the District Court. That summary contains data—both statistical and anecdotal—supporting the Bar's contentions that the Florida public views direct-mail solicitations in the immediate wake of

accidents as an intrusion on privacy that reflects poorly upon the profession. As of June 1989, lawyers mailed 700,000 direct solicitations in Florida annually, 40% of which were aimed at accident victims or their survivors. A survey of Florida adults commissioned by the Bar indicated that Floridians "have negative feelings about those attorneys who use direct mail advertising." Fifty-four percent of the general population surveyed said that contacting persons concerning accidents or similar events is a violation of privacy. A random sampling of persons who received direct-mail advertising from lawyers in 1987 revealed that 45% believed that directmail solicitation is "designed to take advantage of gullible or unstable people"; 34% found such tactics "annoying or irritating"; 26% found it "an invasion of your privacy"; and 24% reported that it "made you angry." Significantly, 27% of direct-mail recipients reported that their regard for the legal profession and for the judicial process as a whole was "lower" as a result of receiving the direct mail.

The anecdotal record mustered by the Bar is noteworthy for its breadth and detail. With titles like "Scavenger Lawyers" (The Miami Herald, Sept. 29, 1987) and "Solicitors Out of Bounds" (St. Petersburg Times, Oct. 26, 1987), newspaper editorial pages in Florida have burgeoned with criticism of Florida lawyers who send targeted direct mail to victims shortly after accidents. The study summary also includes page upon page of excerpts from complaints of direct-mail recipients. For example, a Florida citizen described how he was "appalled and angered by the brazen attempt" of a law firm to solicit him by letter shortly after he was injured and his fiancée was killed in an auto accident. Another found it "despicable and inexcusable" that a Pensacola lawyer wrote to his mother three days after his father's funeral. Another described how she was "astounded" and then "very angry" when she received a solicitation following a minor accident. Still another described as "beyond comprehension" a letter his nephew's family received the day of the nephew's funeral. One citizen wrote, "I consider the unsolicited contact from you after my child's accident to be of the rankest form of ambulance chasing and in incredibly poor taste. . . . I cannot begin to express with my limited vocabulary the utter contempt in which I hold you and your kind."

In light of this showing—which respondents at no time refuted, save by the conclusory assertion that the Rule lacked "any factual basis," we conclude that the Bar has satisfied the second prong of the *Central Hudson* test. \*\*\* [W]e do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, see *Renton v. Playtime Theatres, Inc.* (1986); *Barnes v. Glen Theatre, Inc.* (1991) (Souter, J., concurring in judgment), or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense," *Burson v. Freeman* (1992). Nothing in *Edenfield*, a case in which the State offered no evidence or anecdotes in support of its restriction, requires more. After scouring the record, we are satisfied that the ban on directmail solicitation in the immediate aftermath of accidents, unlike the rule at issue in *Edenfield*, targets a concrete, nonspeculative harm. \*\*\*

Passing to *Central Hudson*'s third prong, we examine the relationship between the Bar's interests and the means chosen to serve them. See *Board of Trustees of State Univ. of N. Y. v. Fox*. With respect to this prong, the differences between commercial speech and noncommercial speech are manifest. In *Fox*, we made clear that the "least restrictive means" test has no role in the commercial speech context. "What our decisions require," instead, "is a 'fit' between the legislature's ends and the means chosen to accomplish those ends,' a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." Of course, we do not equate this test with the less rigorous obstacles of rational basis review; in *Cincinnati v. Discovery Network, Inc.* (1993), for example, we observed that the existence of "numerous and obvious less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."

Respondents levy a great deal of criticism, echoed in the dissent, at the scope of the Bar's restriction on targeted mail. "[B]y prohibiting written communications to all people, whatever their state of mind," respondents charge, the Rule "keeps useful information from those accident victims who are ready, willing and able to utilize a lawyer's advice." This criticism may be parsed into two components. First, the Rule does not distinguish between victims in terms of the severity of their injuries. According to respondents, the Rule is unconstitutionally overinclusive insofar as it bans targeted mailings even to citizens whose injuries or grief are relatively minor. Second, the Rule may prevent citizens from learning about their legal options, particularly at a time when other actors—opposing counsel and insurance adjusters—may be clamoring for victims' attentions. Any benefit arising from the Bar's regulation, respondents implicitly contend, is outweighed by these costs.

We are not persuaded by respondents' allegations of constitutional infirmity. We find little deficiency in the bar's failure to distinguish among injured Floridians by the severity of their pain or the intensity of their grief. Indeed, it is hard to imagine the contours of a regulation that might satisfy respondents on this score. Rather than drawing difficult lines on the basis that some injuries are "severe" and some situations appropriate (and others, presumably, inappropriate) for grief, anger, or emotion, the Bar has crafted a ban applicable to all postaccident or disaster solicitations for a brief 30-day period. Unlike respondents, we do not see "numerous and obvious less-burdensome alternatives" to Florida's short temporal ban. The Bar's rule is reasonably well tailored to its stated objective of eliminating targeted mailings whose type and timing are a source of distress to Floridians, distress that has caused many of them to lose respect for the legal profession.

Respondents' second point would have force if the Bar's Rule were not limited to a brief period and if there were not many other ways for injured Floridians to learn about the availability of legal representation during that time. Our lawyer advertising cases have afforded lawyers a great deal of leeway to devise innovative ways to attract new business. Florida permits lawyers to advertise on prime-time television and radio as well as in newspapers and other media. They

may rent space on billboards. They may send untargeted letters to the general population, or to discrete segments thereof. There are, of course, pages upon pages devoted to lawyers in the Yellow Pages of Florida telephone directories. These listings are organized alphabetically and by area of specialty. These ample alternative channels for receipt of information about the availability of legal representation during the 30-day period following accidents may explain why, despite the ample evidence, testimony, and commentary submitted by those favoring (as well as opposing) unrestricted direct-mail solicitation, respondents have not pointed to—and we have not independently found—a single example of an individual case in which immediate solicitation helped to avoid, or failure to solicit within 30 days brought about, the harms that concern the dissent. In fact, the record contains considerable empirical survey information suggesting that Floridians have little difficulty finding a lawyer when they need one. Finding no basis to question the commonsense conclusion that the many alternative channels for communicating necessary information about attorneys are sufficient, we see no defect in Florida's regulation.

### III

Speech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer. See, *e. g.*, *Gentile v. State Bar of Nevada* (1991); *In re Primus* (1978). This case, however, concerns pure commercial advertising, for which we have always reserved a lesser degree of protection under the First Amendment. Particularly because the standards and conduct of state-licensed lawyers have traditionally been subject to extensive regulation by the States, it is all the more appropriate that we limit our scrutiny of state regulations to a level commensurate with the "subordinate position" of commercial speech in the scale of First Amendment values.

We believe that the Bar's 30-day restriction on targeted direct-mail solicitation of accident victims and their relatives withstands scrutiny under the three-pronged *Central Hudson* test that we have devised for this context. The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered. The Bar's proffered study, unrebutted by respondents below, provides evidence indicating that the harms it targets are far from illusory. The palliative devised by the Bar to address these harms is narrow both in scope and in duration. The Constitution, in our view, requires nothing more.

The judgment of the Court of Appeals, accordingly, is  
*Reversed.*

JUSTICE KENNEDY, WITH WHOM JUSTICE STEVENS, JUSTICE SOUTER, AND JUSTICE GINSBURG JOIN, DISSENTING.

Attorneys who communicate their willingness to assist potential clients are engaged in speech protected by the First and Fourteenth Amendments. That principle has been understood since *Bates v. State Bar of Ariz.* (1977). The

Court today undercuts this guarantee in an important class of cases and unsettles leading First Amendment precedents, at the expense of those victims most in need of legal assistance. With all respect for the Court, in my view its solicitude for the privacy of victims and its concern for our profession are misplaced and self-defeating, even upon the Court's own premises.

I take it to be uncontroverted that when an accident results in death or injury, it is often urgent at once to investigate the occurrence, identify witnesses, and preserve evidence. Vital interests in speech and expression are, therefore, at stake when by law an attorney cannot direct a letter to the victim or the family explaining this simple fact and offering competent legal assistance. Meanwhile, represented and better informed parties, or parties who have been solicited in ways more sophisticated and indirect, may be at work. Indeed, these parties, either themselves or by their attorneys, investigators, and adjusters, are free to contact the unrepresented persons to gather evidence or offer settlement. This scheme makes little sense. As is often true when the law makes little sense, it is not first principles but their interpretation and application that have gone awry.

Although I agree with the Court that the case can be resolved by following the three-part inquiry we have identified to assess restrictions on commercial speech, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.* (1980), a preliminary observation is in order. Speech has the capacity to convey complex substance, yielding various insights and interpretations depending upon the identity of the listener or the reader and the context of its transmission. It would oversimplify to say that what we consider here is commercial speech and nothing more, for in many instances the banned communications may be vital to the recipients' right to petition the courts for redress of grievances. The complex nature of expression is one reason why even so-called commercial speech has become an essential part of the public discourse the First Amendment secures. If our commercial speech rules are to control this case, then, it is imperative to apply them with exacting care and fidelity to our precedents, for what is at stake is the suppression of information and knowledge that transcends the financial self-interests of the speaker.

## I

As the Court notes, the first of the *Central Hudson* factors to be considered is whether the interest the State pursues in enacting the speech restriction is a substantial one. The State says two different interests meet this standard. The first is the interest "in protecting the personal privacy and tranquility" of the victim and his or her family. As the Court notes, that interest has recognition in our decisions as a general matter; but it does not follow that the privacy interest in the cases the majority cites is applicable here.

\*\*\* But we do not allow restrictions on speech to be justified on the ground that the expression might offend the listener. \*\*\*

In the face of these difficulties of logic and precedent, the State and the opinion of the Court turn to a second interest: protecting the reputation and dignity of the legal profession. The argument is, it seems fair to say, that all are demeaned by the crass behavior of a few. The argument takes a further step in the *amicus* brief filed by the Association of Trial Lawyers of America. There it is said that disrespect for the profession from this sort of solicitation (but presumably from

no other sort of solicitation) results in lower jury verdicts. In a sense, of course, these arguments are circular. While disrespect will arise from an unethical or improper practice, the majority begs a most critical question by assuming that direct-mail solicitations constitute such a practice. The fact is, however, that direct solicitation may serve vital purposes and promote the administration of justice, and to the extent the bar seeks to protect lawyers' reputations by preventing them from engaging in speech some deem offensive, the State is doing nothing more (as *amicus* the Association of Trial Lawyers of America is at least candid enough to admit) than manipulating the public's opinion by suppressing speech that informs us how the legal system works. The disrespect argument thus proceeds from the very assumption it tries to prove, which is to say that solicitations within 30 days serve no legitimate purpose. This, of course, is censorship pure and simple; and censorship is antithetical to the first principles of free expression.

## II

Even were the interests asserted substantial, the regulation here fails the second part of the *Central Hudson* test, which requires that the dangers the State seeks to eliminate be real and that a speech restriction or ban advance that asserted state interest in a direct and material way. The burden of demonstrating the reality of the asserted harm rests on the State. Slight evidence in this regard does not mean there is sufficient evidence to support the claims. Here, what the State has offered falls well short of demonstrating that the harms it is trying to redress are real, let alone that the regulation directly and materially advances the State's interests. The parties and the Court have used the term "Summary of Record" to describe a document prepared by the Florida Bar (Bar), one of the adverse parties, and submitted to the District Court in this case. This document includes no actual surveys, few indications of sample size or selection procedures, no explanations of methodology, and no discussion of excluded results. There is no description of the statistical universe or scientific framework that permits any productive use of the information the so-called Summary of Record contains. The majority describes this anecdotal matter as "noteworthy for its breadth and detail," but when examined, it is noteworthy for its incompetence. The selective synopses of unvalidated studies deal, for the most part, with television advertising and phone book listings, and not direct-mail solicitations. \*\*\*

It is telling that the essential thrust of all the material adduced to justify the State's interest is devoted to the reputational concerns of the Bar. It is not at all clear that this regulation advances the interest of protecting persons who are suffering trauma and grief, and we are cited to no material in the record for that claim. Indeed, when asked at oral argument what a "typical injured plaintiff get[s] in the mail," the Bar's lawyer replied: "That's not in the record. . . and I don't know the answer to that question." Having declared that the privacy interest is one both substantial and served by the regulation, the Court ought not to be excused from justifying its conclusion.

## III

The insufficiency of the regulation to advance the State's interest is reinforced by the third inquiry necessary in this analysis. Were it appropriate to reach the third part of the *Central Hudson* test, it would be clear that the relationship

between the Bar's interests and the means chosen to serve them is not a reasonable fit. The Bar's rule creates a flat ban that prohibits far more speech than necessary to serve the purported state interest. Even assuming that interest were legitimate, there is a wild disproportion between the harm supposed and the speech ban enforced. It is a disproportion the Court does not bother to discuss, but our speech jurisprudence requires that it do so. *Central Hudson; Board of Trustees of State Univ. of N. Y. v. Fox* (1989).

To begin with, the ban applies with respect to all accidental injuries, whatever their gravity. The Court's purported justification for the excess of regulation in this respect is the difficulty of drawing lines between severe and less serious injuries, but making such distinctions is not important in this analysis. Even were it significant, the Court's assertion is unconvincing. After all, the criminal law routinely distinguishes degrees of bodily harm, and if that delineation is permissible and workable in the criminal context, it should not be "hard to imagine the contours of a regulation" that satisfies the reasonable fit requirement.

There is, moreover, simply no justification for assuming that in all or most cases an attorney's advice would be unwelcome or unnecessary when the survivors or the victim must at once begin assessing their legal and financial position in a rational manner. With regard to lesser injuries, there is little chance that for any period, much less 30 days, the victims will become distraught upon hearing from an attorney. It is, in fact, more likely a real risk that some victims might think no attorney will be interested enough to help them. It is at this precise time that sound legal advice may be necessary and most urgent.\*\*\*

#### IV

It is most ironic that, for the first time since *Bates v. State Bar of Arizona*, the Court now orders a major retreat from the constitutional guarantees for commercial speech in order to shield its own profession from public criticism. Obscuring the financial aspect of the legal profession from public discussion through direct-mail solicitation, at the expense of the least sophisticated members of society, is not a laudable constitutional goal. There is no authority for the proposition that the Constitution permits the State to promote the public image of the legal profession by suppressing information about the profession's business aspects. If public respect for the profession erodes because solicitation distorts the idea of the law as most lawyers see it, it must be remembered that real progress begins with more rational speech, not less. I agree that if this amounts to mere "sermonizing," the attempt may be futile. The guiding principle, however, is that full and rational discussion furthers sound regulation and necessary reform. The image of the profession cannot be enhanced without improving the substance of its practice. The objective of the profession is to ensure that "the ethical standards of lawyers are linked to the service and protection of clients."

Today's opinion is a serious departure, not only from our prior decisions involving attorney advertising, but also from the principles that govern the transmission of commercial speech. The Court's opinion reflects a new-found and illegitimate confidence that it, along with the Supreme Court of Florida, knows what is best for the Bar and its clients. Self-assurance has always been

the hallmark of a censor. That is why under the First Amendment the public, not the State, has the right and the power to decide what ideas and information are deserving of their adherence. "[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented." By validating Florida's rule, today's majority is complicit in the Bar's censorship. For these reasons, I dissent from the opinion of the Court and from its judgment.

## ***Lorillard Tobacco Co. v. Reilly***

533 U.S. 525 (2001)

O'CONNOR, J., DELIVERED THE OPINION OF THE COURT, PARTS I, II-C, AND II-D OF WHICH WERE UNANIMOUS; PARTS III-A, III-C, AND III-D OF WHICH WERE JOINED BY REHNQUIST, C. J., AND SCALIA, KENNEDY, SOUTER, AND THOMAS, JJ.; PART III-B-1 OF WHICH WAS JOINED BY REHNQUIST, C. J., AND STEVENS, SOUTER, GINSBURG, AND BREYER, JJ.; AND PARTS II-A, II-B, III-B-2, AND IV OF WHICH WERE JOINED BY REHNQUIST, C. J., AND SCALIA, KENNEDY, AND THOMAS, JJ. KENNEDY, J., FILED AN OPINION CONCURRING IN PART AND CONCURRING IN THE JUDGMENT, IN WHICH SCALIA, J., JOINED. THOMAS, J., FILED AN OPINION CONCURRING IN PART AND CONCURRING IN THE JUDGMENT. SOUTER, J., FILED AN OPINION CONCURRING IN PART AND DISSENTING IN PART. STEVENS, J., FILED AN OPINION CONCURRING IN PART, CONCURRING IN THE JUDGMENT IN PART, AND DISSENTING IN PART, IN WHICH GINSBURG AND BREYER, JJ., JOINED, AND IN PART I OF WHICH SOUTER, J., JOINED.

JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

In January 1999, the Attorney General of Massachusetts promulgated comprehensive regulations governing the advertising and sale of cigarettes, smokeless tobacco, and cigars. 940 Code of Mass. Regs. §§21.01-21.07, 22.01-22.09 (2000). Petitioners, a group of cigarette, smokeless tobacco, and cigar manufacturers and retailers, filed suit in Federal District Court claiming that the regulations violate federal law and the United States Constitution. In large measure, the District Court determined that the regulations are valid and enforceable. The United States Court of Appeals for the First Circuit affirmed in part and reversed in part, concluding that the regulations are not pre-empted by federal law and do not violate the First Amendment. The first question presented for our review is whether certain cigarette advertising regulations are pre-empted by the Federal Cigarette Labeling and Advertising Act (FCLAA), 79 Stat. 282, as amended, 15 U. S. C. §1331 *et seq.* The second question presented is whether certain regulations governing the advertising and sale of tobacco products violate the First Amendment.

### I

In November 1998, Massachusetts, along with over 40 other States, reached a landmark agreement with major manufacturers in the cigarette industry. The signatory States settled their claims against these companies in exchange for monetary payments and permanent injunctive relief. At the press conference covering Massachusetts' decision to sign the agreement, then-Attorney General Scott Harshbarger announced that as one of his last acts in office, he would create consumer protection regulations to restrict advertising and sales practices for tobacco products. He explained that the regulations were

necessary in order to "close holes" in the settlement agreement and "to stop Big Tobacco from recruiting new customers among the children of Massachusetts."

In January 1999, pursuant to his authority to prevent unfair or deceptive practices in trade, the Massachusetts Attorney General (Attorney General) promulgated regulations governing the sale and advertisement of cigarettes, smokeless tobacco, and cigars. The purpose of the cigarette and smokeless tobacco regulations is "to eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold and distributed in Massachusetts in order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age .... [and] in order to prevent access to such products by underage consumers." The similar purpose of the cigar regulations is "to eliminate deception and unfairness in the way cigars and little cigars are packaged, marketed, sold and distributed in Massachusetts [so that] ... consumers may be adequately informed about the health risks associated with cigar smoking, its addictive properties, and the false perception that cigars are a safe alternative to cigarettes ... [and so that] the incidence of cigar use by children under legal age is addressed ... in order to prevent access to such products by underage consumers." The regulations have a broader scope than the master settlement agreement, reaching advertising, sales practices, and members of the tobacco industry not covered by the agreement. The regulations place a variety of restrictions on outdoor advertising, point-of-sale advertising, retail sales transactions, transactions by mail, promotions, sampling of products, and labels for cigars.

The cigarette and smokeless tobacco regulations being challenged before this Court provide:

"(2) Retail Outlet Sales Practices. Except as otherwise provided in [§21.04(4)], it shall be an unfair or deceptive act or practice for any person who sells or distributes cigarettes or smokeless tobacco products through a retail outlet located within Massachusetts to engage in any of the following retail outlet sales practices:

.....

"(c) Using self-service displays of cigarettes or smokeless tobacco products;

"(d) Failing to place cigarettes and smokeless tobacco products out of the reach of all consumers, and in a location accessible only to outlet personnel."

"(5) Advertising Restrictions. Except as provided in [§21.04(6)], it shall be an unfair or deceptive act or practice for any manufacturer, distributor or retailer to engage in any of the following practices:

"(a) Outdoor advertising, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school;

"(b) Point-of-sale advertising of cigarettes or smokeless tobacco products any portion of which is placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school, and which is not an adult-only retail establishment."

The cigar regulations that are still at issue provide:

"(1) Retail Sales Practices. Except as otherwise provided in [§22.06(4)], it shall be an unfair or deceptive act or practice for any person who sells or distributes cigars or little cigars directly to consumers within Massachusetts to engage in any of the following practices:

"(a) sampling of cigars or little cigars or promotional give-aways of cigars or little cigars."

"(2) Retail Outlet Sales Practices. Except as otherwise provided in [§22.06(4)], it shall be an unfair or deceptive act or practice for any person who sells or distributes cigars or little cigars through a retail outlet located within Massachusetts to engage in any of the following retail outlet sales practices:

.....

"(c) Using self-service displays of cigars or little cigars;

"(d) Failing to place cigars and little cigars out of the reach of all consumers, and in a location accessible only to outlet personnel."

"(5) Advertising Restrictions. Except as provided in [§22.06(6)], it shall be an unfair or deceptive act or practice for any manufacturer, distributor or retailer to engage in any of the following practices:

"(a) Outdoor advertising of cigars or little cigars, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school;

"(b) Point-of-sale advertising of cigars or little cigars any portion of which is placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school, and which is not an adult-only retail establishment."

The term "advertisement" is defined as:

"any oral, written, graphic, or pictorial statement or representation, made by, or on behalf of, any person who manufactures, packages, imports for sale, distributes or sells within Massachusetts [tobacco products], the purpose or effect of which is to promote the use or sale of the product. Advertisement includes, without limitation, any picture, logo, symbol, motto, selling message, graphic display, visual image, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of [tobacco product]. This includes, without limitation, utilitarian items and permanent or semi-permanent fixtures with such indicia of product identification such as lighting fixtures, awnings, display cases, clocks and door mats, but does not include utilitarian items with a volume of 200 cubic inches or less."

Before the effective date of the regulations, February 1, 2000, members of the tobacco industry sued the Attorney General in the United States District Court for the District of Massachusetts. Four cigarette manufacturers (Lorillard Tobacco Company, Brown & Williamson Tobacco Corporation, R. J. Reynolds Tobacco Company, and Philip Morris Incorporated), a maker of smokeless tobacco products (U. S. Smokeless Tobacco Company), and several cigar manufacturers and retailers claimed that many of the regulations violate the Commerce Clause, the Supremacy Clause, the First and Fourteenth Amendments, and Rev. Stat. §1979, 42 U. S. C. §1983. The parties sought summary judgment.

In its first ruling, the District Court considered the Supremacy Clause claim\*\*\*

In a separate ruling, the District Court considered the claim that the Attorney General's regulations violate the First Amendment. Rejecting petitioners' argument that strict scrutiny should apply, the court applied the four-part test of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.* (1980), for commercial speech. The court reasoned that the Attorney General had provided an adequate basis for regulating cigars and smokeless tobacco as well as cigarettes because of the similarities among the products. The court held that the outdoor advertising regulations, which prohibit outdoor advertising within 1,000 feet of a school or playground, do not violate the First Amendment because they advance a substantial government interest and are narrowly

tailored to suppress no more speech than necessary. The court concluded that the sales practices regulations, which restrict the location and distribution of tobacco products, survive scrutiny because they do not implicate a significant speech interest. The court invalidated the point-of-sale advertising regulations, which require that indoor advertising be placed no lower than five feet from the floor, finding that the Attorney General had not provided sufficient justification for that restriction. The District Court's ruling with respect to the cigar warning requirements and the Commerce Clause is not before this Court.

The United States Court of Appeals for the First Circuit issued a stay pending appeal and affirmed in part and reversed in part the District Court's judgment.

\*\*\*

With respect to the First Amendment, the Court of Appeals applied the *Central Hudson* test. The court held that the outdoor advertising regulations do not violate the First Amendment. The court concluded that the restriction on outdoor advertising within 1,000 feet of a school or playground directly advances the State's substantial interest in preventing tobacco use by minors. The court also found that the outdoor advertising regulations restrict no more speech than necessary, reasoning that the distance chosen by the Attorney General is the sort of determination better suited for legislative and executive decisionmakers than courts. The Court of Appeals reversed the District Court's invalidation of the point-of-sale advertising regulations, again concluding that the Attorney General is better suited to determine what restrictions are necessary. The Court of Appeals also held that the sales practices regulations are valid under the First Amendment. The court found that the regulations directly advance the State's interest in preventing minors' access to tobacco products and that the regulations are narrowly tailored because retailers have a variety of other means to present the packaging of their products and to allow customers to examine the products. \*\*\*

The Court of Appeals stayed its mandate pending disposition of a petition for a writ of certiorari. The cigarette manufacturers and U. S. Smokeless Tobacco Company filed a petition, challenging the Court of Appeals' decision with respect to the outdoor and point-of-sale advertising regulations on pre-emption and First Amendment grounds, and the sales practices regulations on First Amendment grounds. The cigar companies filed a separate petition, again raising a First Amendment challenge to the outdoor advertising, point-of-sale advertising, and sales practices regulations. We granted both petitions to resolve the conflict among the Courts of Appeals with respect to whether the FCLAA pre-empts cigarette advertising regulations like those at issue here, and to decide the important First Amendment issues presented in these cases.

## II

[preemption discussion omitted]

## III

By its terms, the FCLAA's pre-emption provision only applies to cigarettes. Accordingly, we must evaluate the smokeless tobacco and cigar petitioners' First Amendment challenges to the State's outdoor and point-of-sale advertising regulations. The cigarette petitioners did not raise a pre-emption challenge to the sales practices regulations. Thus, we must analyze the cigarette as well as

the smokeless tobacco and cigar petitioners' claim that certain sales practices regulations for tobacco products violate the First Amendment.

A

For over 25 years, the Court has recognized that commercial speech does not fall outside the purview of the First Amendment. Instead, the Court has afforded commercial speech a measure of First Amendment protection " `commensurate' " with its position in relation to other constitutionally guaranteed expression. In recognition of the "distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech," *Central Hudson*, we developed a framework for analyzing regulations of commercial speech that is "substantially similar" to the test for time, place, and manner restrictions, *Board of Trustees of State Univ. of N. Y. v. Fox*. The analysis contains four elements:

"At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."

*Central Hudson*.

Petitioners urge us to reject the *Central Hudson* analysis and apply strict scrutiny. They are not the first litigants to do so. See, e.g., *Greater New Orleans Broadcasting Assn., Inc. v. United States* (1999). Admittedly, several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases. See, e.g., *Greater New Orleans*, (Thomas, J., concurring in judgment); *44 Liquormart, Inc. v. Rhode Island* (1996) (joint opinion of Stevens, Kennedy, and Ginsburg, JJ.), (Scalia, J. concurring in part and concurring in judgment), (Thomas, J., concurring in part and concurring in judgment). But here, as in *Greater New Orleans*, we see "no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision."

Only the last two steps of *Central Hudson*'s four-part analysis are at issue here. The Attorney General has assumed for purposes of summary judgment that petitioners' speech is entitled to First Amendment protection. With respect to the second step, none of the petitioners contests the importance of the State's interest in preventing the use of tobacco products by minors.

The third step of *Central Hudson* concerns the relationship between the harm that underlies the State's interest and the means identified by the State to advance that interest. It requires that

"the speech restriction directly and materially advanc[e] the asserted governmental interest. `This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' "

*Greater New Orleans.*

We do not, however, require that "empirical data come ... accompanied by a surfeit of background information... [W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'" *Florida Bar v. Went For It, Inc.*,

The last step of the *Central Hudson* analysis "complements" the third step, "asking whether the speech restriction is not more extensive than necessary to serve the interests that support it." We have made it clear that "the least restrictive means" is not the standard; instead, the case law requires a reasonable "fit between the legislature's ends and the means chosen to accomplish those ends, ... a means narrowly tailored to achieve the desired objective." Focusing on the third and fourth steps of the *Central Hudson* analysis, we first address the outdoor advertising and point-of-sale advertising regulations for smokeless tobacco and cigars. We then address the sales practices regulations for all tobacco products.

## B

The outdoor advertising regulations prohibit smokeless tobacco or cigar advertising within a 1,000-foot radius of a school or playground. The District Court and Court of Appeals concluded that the Attorney General had identified a real problem with underage use of tobacco products, that limiting youth exposure to advertising would combat that problem, and that the regulations burdened no more speech than necessary to accomplish the State's goal. The smokeless tobacco and cigar petitioners take issue with all of these conclusions.

### 1

The smokeless tobacco and cigar petitioners contend that the Attorney General's regulations do not satisfy *Central Hudson's* third step. They maintain that although the Attorney General may have identified a problem with underage cigarette smoking, he has not identified an equally severe problem with respect to underage use of smokeless tobacco or cigars. The smokeless tobacco petitioner emphasizes the "lack of parity" between cigarettes and smokeless tobacco. The cigar petitioners catalogue a list of differences between cigars and other tobacco products, including the characteristics of the products and marketing strategies. The petitioners finally contend that the Attorney General cannot prove that advertising has a causal link to tobacco use such that limiting advertising will materially alleviate any problem of underage use of their products.

In previous cases, we have acknowledged the theory that product advertising stimulates demand for products, while suppressed advertising may have the opposite effect. The Attorney General cites numerous studies to support this theory in the case of tobacco products.

The Attorney General relies in part on evidence gathered by the Food and Drug Administration (FDA) in its attempt to regulate the advertising of cigarettes and smokeless tobacco. The FDA promulgated the advertising regulations after finding that the period prior to adulthood is when an overwhelming majority of Americans first decide to use tobacco products, and that advertising plays a

crucial role in that decision. We later held that the FDA lacks statutory authority to regulate tobacco products. See *FDA v. Brown & Williamson Tobacco Corp.* (2000). Nevertheless, the Attorney General relies on the FDA's proceedings and other studies to support his decision that advertising affects demand for tobacco products.

In its rulemaking proceeding, the FDA considered several studies of tobacco advertising and trends in the use of various tobacco products. The Surgeon General's report and the Institute of Medicine's report found that "there is sufficient evidence to conclude that advertising and labeling play a significant and important contributory role in a young person's decision to use cigarettes or smokeless tobacco products."

For instance, children smoke fewer brands of cigarettes than adults, and those choices directly track the most heavily advertised brands, unlike adult choices, which are more dispersed and related to pricing. Another study revealed that 72% of 6 year olds and 52% of children ages 3 to 6 recognized "Joe Camel," the cartoon anthropomorphic symbol of R. J. Reynolds' Camel brand cigarettes. After the introduction of Joe Camel, Camel cigarettes' share of the youth market rose from 4% to 13%. The FDA also identified trends in tobacco consumption among certain populations, such as young women, that correlated to the introduction and marketing of products geared toward that population.

The FDA also made specific findings with respect to smokeless tobacco. The FDA concluded that "[t]he recent and very large increase in the use of smokeless tobacco products by young people and the addictive nature of these products has persuaded the agency that these products must be included in any regulatory approach that is designed to help prevent future generations of young people from becoming addicted to nicotine-containing tobacco products." Studies have analyzed smokeless tobacco use by young people, discussing trends based on gender, school grade, and locale.

Researchers tracked a dramatic shift in patterns of smokeless tobacco use from older to younger users over the past 30 years. In particular, the smokeless tobacco industry boosted sales tenfold in the 1970s and 1980s by targeting young males. Another study documented the targeting of youth through smokeless tobacco sales and advertising techniques.

The Attorney General presents different evidence with respect to cigars. There was no data on underage cigar use prior to 1996 because the behavior was considered "uncommon enough not to be worthy of examination." In 1995, the FDA decided not to include cigars in its attempted regulation of tobacco product advertising, explaining that "the agency does not currently have sufficient evidence that these products are drug delivery devices ... . FDA has focused its investigation of its authority over tobacco products on cigarettes and smokeless tobacco products, and not on pipe tobacco or cigars, because young people predominantly use cigarettes and smokeless tobacco products."

More recently, however, data on youth cigar use has emerged. The National Cancer Institute concluded in its 1998 Monograph that the rate of cigar use by minors is increasing and that, in some States, the cigar use rates are higher than the smokeless tobacco use rates for minors. In its 1999 Report to

Congress, the FTC concluded that "substantial numbers of adolescents are trying cigars."

Studies have also demonstrated a link between advertising and demand for cigars. After Congress recognized the power of images in advertising and banned cigarette advertising in electronic media, television advertising of small cigars "increased dramatically in 1972 and 1973," "filled the void left by cigarette advertisers," and "sales ... soared." In 1973, Congress extended the electronic media advertising ban for cigarettes to little cigars. In the 1990s, cigar advertising campaigns triggered a boost in sales.

Our review of the record reveals that the Attorney General has provided ample documentation of the problem with underage use of smokeless tobacco and cigars. In addition, we disagree with petitioners' claim that there is no evidence that preventing targeted campaigns and limiting youth exposure to advertising will decrease underage use of smokeless tobacco and cigars. On this record and in the posture of summary judgment, we are unable to conclude that the Attorney General's decision to regulate advertising of smokeless tobacco and cigars in an effort to combat the use of tobacco products by minors was based on mere "speculation [and] conjecture."

2

Whatever the strength of the Attorney General's evidence to justify the outdoor advertising regulations, however, we conclude that the regulations do not satisfy the fourth step of the *Central Hudson* analysis. The final step of the *Central Hudson* analysis, the "critical inquiry in this case," requires a reasonable fit between the means and ends of the regulatory scheme. The Attorney General's regulations do not meet this standard. The broad sweep of the regulations indicates that the Attorney General did not "carefully calculat[e] the costs and benefits associated with the burden on speech imposed" by the regulations.

The outdoor advertising regulations prohibit any smokeless tobacco or cigar advertising within 1,000 feet of schools or playgrounds. In the District Court, petitioners maintained that this prohibition would prevent advertising in 87% to 91% of Boston, Worcester, and Springfield, Massachusetts. The 87% to 91% figure appears to include not only the effect of the regulations, but also the limitations imposed by other generally applicable zoning restrictions. The Attorney General disputed petitioners' figures but "concede[d] that the reach of the regulations is substantial." Thus, the Court of Appeals concluded that the regulations prohibit advertising in a substantial portion of the major metropolitan areas of Massachusetts.

The substantial geographical reach of the Attorney General's outdoor advertising regulations is compounded by other factors. "Outdoor" advertising includes not only advertising located outside an establishment, but also advertising inside a store if that advertising is visible from outside the store. The regulations restrict advertisements of any size and the term advertisement also includes oral statements.

In some geographical areas, these regulations would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers. The breadth and scope of the

regulations, and the process by which the Attorney General adopted the regulations, do not demonstrate a careful calculation of the speech interests involved.

First, the Attorney General did not seem to consider the impact of the 1,000-foot restriction on commercial speech in major metropolitan areas. The Attorney General apparently selected the 1,000-foot distance based on the FDA's decision to impose an identical 1,000-foot restriction when it attempted to regulate cigarette and smokeless tobacco advertising. But the FDA's 1,000-foot regulation was not an adequate basis for the Attorney General to tailor the Massachusetts regulations. The degree to which speech is suppressed--or alternative avenues for speech remain available--under a particular regulatory scheme tends to be case specific. And a case specific analysis makes sense, for although a State or locality may have common interests and concerns about underage smoking and the effects of tobacco advertisements, the impact of a restriction on speech will undoubtedly vary from place to place. The FDA's regulations would have had widely disparate effects nationwide. Even in Massachusetts, the effect of the Attorney General's speech regulations will vary based on whether a locale is rural, suburban, or urban. The uniformly broad sweep of the geographical limitation demonstrates a lack of tailoring.

In addition, the range of communications restricted seems unduly broad. For instance, it is not clear from the regulatory scheme why a ban on oral communications is necessary to further the State's interest. Apparently that restriction means that a retailer is unable to answer inquiries about its tobacco products if that communication occurs outdoors. Similarly, a ban on all signs of any size seems ill suited to target the problem of highly visible billboards, as opposed to smaller signs. To the extent that studies have identified particular advertising and promotion practices that appeal to youth, tailoring would involve targeting those practices while permitting others. As crafted, the regulations make no distinction among practices on this basis.

The Court of Appeals recognized that the smokeless tobacco and cigar petitioners' concern about the amount of speech restricted was "valid," but reasoned that there was an "obvious connection to the state's interest in protecting minors." Even on the premise that Massachusetts has demonstrated a connection between the outdoor advertising regulations and its substantial interest in preventing underage tobacco use, the question of tailoring remains. The Court of Appeals failed to follow through with an analysis of the countervailing First Amendment interests.

The State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products. In a case involving indecent speech on the Internet we explained that "the governmental interest in protecting children from harmful materials ... does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno v. American Civil Liberties Union* (1997). See, e.g., *Bolger v. Youngs Drug Products Corp.* (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that

which would be suitable for a sandbox"); *Butler v. Michigan* (1957) ("The incidence of this enactment is to reduce the adult population ... to reading only what is fit for children"). As the State protects children from tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication.

In some instances, Massachusetts' outdoor advertising regulations would impose particularly onerous burdens on speech. For example, we disagree with the Court of Appeals' conclusion that because cigar manufacturers and retailers conduct a limited amount of advertising in comparison to other tobacco products, "the relative lack of cigar advertising also means that the burden imposed on cigar advertisers is correspondingly small." If some retailers have relatively small advertising budgets, and use few avenues of communication, then the Attorney General's outdoor advertising regulations potentially place a greater, not lesser, burden on those retailers' speech. Furthermore, to the extent that cigar products and cigar advertising differ from that of other tobacco products, that difference should inform the inquiry into what speech restrictions are necessary.

In addition, a retailer in Massachusetts may have no means of communicating to passersby on the street that it sells tobacco products because alternative forms of advertisement, like newspapers, do not allow that retailer to propose an instant transaction in the way that onsite advertising does. The ban on any indoor advertising that is visible from the outside also presents problems in establishments like convenience stores, which have unique security concerns that counsel in favor of full visibility of the store from the outside. It is these sorts of considerations that the Attorney General failed to incorporate into the regulatory scheme.

We conclude that the Attorney General has failed to show that the outdoor advertising regulations for smokeless tobacco and cigars are not more extensive than necessary to advance the State's substantial interest in preventing underage tobacco use. *Justice Stevens* urges that the Court remand the case for further development of the factual record. We believe that a remand is inappropriate in this case because the State had ample opportunity to develop a record with respect to tailoring (as it had to justify its decision to regulate advertising), and additional evidence would not alter the nature of the scheme before the Court.

A careful calculation of the costs of a speech regulation does not mean that a State must demonstrate that there is no incursion on legitimate speech interests, but a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products. After reviewing the outdoor advertising regulations, we find the calculation in this case insufficient for purposes of the First Amendment.

### C

Massachusetts has also restricted indoor, point-of-sale advertising for smokeless tobacco and cigars. Advertising cannot be "placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of" any school or playground. The District Court

invalidated these provisions, concluding that the Attorney General had not provided a sufficient basis for regulating indoor advertising. The Court of Appeals reversed. The court explained: "We do have some misgivings about the effectiveness of a restriction that is based on the assumption that minors under five feet tall will not, or will less frequently, raise their view above eye-level, but we find that such [a] determination falls within that range of reasonableness in which the Attorney General is best suited to pass judgment."

We conclude that the point-of-sale advertising regulations fail both the third and fourth steps of the *Central Hudson* analysis. A regulation cannot be sustained if it " `provides only ineffective or remote support for the government's purpose,' " or if there is "little chance" that the restriction will advance the State's goal. As outlined above, the State's goal is to prevent minors from using tobacco products and to curb demand for that activity by limiting youth exposure to advertising. The 5 foot rule does not seem to advance that goal. Not all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings.

By contrast to *Justice Stevens*, we do not believe this regulation can be construed as a mere regulation of conduct under *United States v. O'Brien* (1968). To qualify as a regulation of communicative action governed by the scrutiny outlined in *O'Brien*, the State's regulation must be unrelated to expression. Here, Massachusetts' height restriction is an attempt to regulate directly the communicative impact of indoor advertising.

Massachusetts may wish to target tobacco advertisements and displays that entice children, much like floor-level candy displays in a convenience store, but the blanket height restriction does not constitute a reasonable fit with that goal. The Court of Appeals recognized that the efficacy of the regulation was questionable, but decided that "[i]n any event, the burden on speech imposed by the provision is very limited." There is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification. We conclude that the restriction on the height of indoor advertising is invalid under *Central Hudson's* third and fourth prongs.

#### D

The Attorney General also promulgated a number of regulations that restrict sales practices by cigarette, smokeless tobacco, and cigar manufacturers and retailers. Among other restrictions, the regulations bar the use of self-service displays and require that tobacco products be placed out of the reach of all consumers in a location accessible only to salespersons. \*\*\* Two of the cigarette petitioners (Brown & Williamson Tobacco Corporation and Lorillard Tobacco Company), petitioner U. S. Smokeless Tobacco Company, and the cigar petitioners challenge the sales practices regulations on First Amendment grounds. The cigar petitioners additionally challenge a provision that prohibits sampling or promotional giveaways of cigars or little cigars.

The District Court concluded that these restrictions implicate no cognizable speech interest, but the Court of Appeals did not fully adopt that reasoning. The Court of Appeals recognized that self-service displays "often do have some communicative commercial function," but noted that the restriction in the regulations "is not on speech, but rather on the physical location of actual

tobacco products." The court reasoned that nothing in the regulations would prevent the display of empty tobacco product containers, so long as no actual tobacco product was displayed, much like movie jackets at a video store. With respect to cigar products, the court observed that retailers traditionally allow access to those products, so that the consumer may make a selection on the basis of a number of objective and subjective factors including the aroma and feel of the cigars. Even assuming a speech interest, however, the court concluded that the regulations were narrowly tailored to serve the State's substantial interest in preventing access to tobacco products by minors. The court also noted that the restrictions do not apply to adult-only establishments.

Petitioners devoted little of their briefing to the sales practices regulations, and our understanding of the regulations is accordingly limited by the parties' submissions. As we read the regulations, they basically require tobacco retailers to place tobacco products behind counters and require customers to have contact with a salesperson before they are able to handle a tobacco product.

The cigarette and smokeless tobacco petitioners contend that "the same First Amendment principles that require invalidation of the outdoor and indoor advertising restrictions require invalidation of the display regulations at issue in this case." The cigar petitioners contend that self-service displays for cigars cannot be prohibited because each brand of cigar is unique and customers traditionally have sought to handle and compare cigars at the time of purchase.

We reject these contentions. Assuming that petitioners have a cognizable speech interest in a particular means of displaying their products, these regulations withstand First Amendment scrutiny.

Massachusetts' sales practices provisions regulate conduct that may have a communicative component, but Massachusetts seeks to regulate the placement of tobacco products for reasons unrelated to the communication of ideas. We conclude that the State has demonstrated a substantial interest in preventing access to tobacco products by minors and has adopted an appropriately narrow means of advancing that interest. See *O'Brien*.

Unattended displays of tobacco products present an opportunity for access without the proper age verification required by law. Thus, the State prohibits self-service and other displays that would allow an individual to obtain tobacco products without direct contact with a salesperson. It is clear that the regulations leave open ample channels of communication. The regulations do not significantly impede adult access to tobacco products. Moreover, retailers have other means of exercising any cognizable speech interest in the presentation of their products. We presume that vendors may place empty tobacco packaging on open display, and display actual tobacco products so long as that display is only accessible to sales personnel. As for cigars, there is no indication in the regulations that a customer is unable to examine a cigar prior to purchase, so long as that examination takes place through a salesperson.

The cigar petitioners also list Massachusetts' prohibition on sampling and free giveaways among the regulations they challenge on First Amendment grounds. At no point in their briefs or at oral argument, however, did the cigar petitioners argue the merits of their First Amendment claim with respect to the sampling

and giveaway regulation. We decline to address an issue that was not sufficiently briefed and argued before this Court.

We conclude that the sales practices regulations withstand First Amendment scrutiny. The means chosen by the State are narrowly tailored to prevent access to tobacco products by minors, are unrelated to expression, and leave open alternative avenues for vendors to convey information about products and for would-be customers to inspect products before purchase.

#### IV

We have observed that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." From a policy perspective, it is understandable for the States to attempt to prevent minors from using tobacco products before they reach an age where they are capable of weighing for themselves the risks and potential benefits of tobacco use, and other adult activities. Federal law, however, places limits on policy choices available to the States.

In this case, Congress enacted a comprehensive scheme to address cigarette smoking and health in advertising and pre-empted state regulation of cigarette advertising that attempts to address that same concern, even with respect to youth. The First Amendment also constrains state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information.

To the extent that federal law and the First Amendment do not prohibit state action, States and localities remain free to combat the problem of underage tobacco use by appropriate means. The judgment of the United States Court of Appeals for the First Circuit is therefore affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE KENNEDY, WITH WHOM JUSTICE SCALIA JOINS, CONCURRING IN PART AND CONCURRING IN THE JUDGMENT.

The obvious overbreadth of the outdoor advertising restrictions suffices to invalidate them under the fourth part of the test in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.* (1980). As a result, in my view, there is no need to consider whether the restrictions satisfy the third part of the test, a proposition about which there is considerable doubt. Neither are we required to consider whether *Central Hudson* should be retained in the face of the substantial objections that can be made to it. My continuing concerns that the test gives insufficient protection to truthful, nonmisleading commercial speech require me to refrain from expressing agreement with the Court's application of the third part of *Central Hudson*. With the exception of Part III-B-1, then, I join the opinion of the Court.

JUSTICE THOMAS, CONCURRING IN PART AND CONCURRING IN THE JUDGMENT.

I join the opinion of the Court (with the exception of Part III-B-1) because I agree that the Massachusetts cigarette advertising regulations are preempted by the Federal Cigarette Labeling and Advertising Act. I also agree with the Court's disposition of the First Amendment challenges to the other regulations at issue here, and I share the Court's view that the regulations fail even the intermediate scrutiny of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.* (1980). At the same time, I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as "commercial." See *44 Liquormart, Inc. v. Rhode Island* (1996) (Thomas, J., concurring in part and concurring in judgment). I would subject all of the advertising restrictions to strict scrutiny and would hold that they violate the First Amendment.

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### III

Underlying many of the arguments of respondents and their *amici* is the idea that tobacco is in some sense *sui generis*--that it is so special, so unlike any other object of regulation, that application of normal First Amendment principles should be suspended. Smoking poses serious health risks, and advertising may induce children (who lack the judgment to make an intelligent decision about whether to smoke) to begin smoking, which can lead to addiction. The State's assessment of the urgency of the problem posed by tobacco is a policy judgment, and it is not this Court's place to second-guess it. Nevertheless, it seems appropriate to point out that to uphold the Massachusetts tobacco regulations would be to accept a line of reasoning that would permit restrictions on advertising for a host of other products.

Tobacco use is, we are told, "the single leading cause of preventable death in the United States." The *second* largest contributor to mortality rates in the United States is obesity. It is associated with increased incidence of diabetes, hypertension, and coronary artery disease and it represents a public health problem that is rapidly growing worse. Although the growth of obesity over the last few decades has had many causes, a significant factor has been the increased availability of large quantities of high-calorie, high-fat foods. Such foods, of course, have been aggressively marketed and promoted by fast food companies.

Respondents say that tobacco companies are covertly targeting children in their advertising. Fast food companies do so openly. Moreover, there is considerable evidence that they have been successful in changing children's eating behavior. The effect of advertising on children's eating habits is significant for two reasons. First, childhood obesity is a serious health problem in its own right. Second, eating preferences formed in childhood tend to persist in adulthood. So even though fast food is not addictive in the same way tobacco is, children's exposure to fast food advertising can have deleterious consequences that are difficult to reverse.

To take another example, the third largest cause of preventable deaths in the United States is alcohol. Alcohol use is associated with tens of thousands of

deaths each year from cancers and digestive diseases. And the victims of alcohol use are not limited to those who drink alcohol. In 1996, over 17,000 people were killed, and over 321,000 people were injured, in alcohol-related car accidents. Each year, alcohol is involved in several million violent crimes, including almost 200,000 sexual assaults. *Id.*, at 3-4.

Although every State prohibits the sale of alcohol to those under age 21, much alcohol advertising is viewed by children. Not surprisingly, there is considerable evidence that exposure to alcohol advertising is associated with underage drinking.

Like underage tobacco use, underage drinking has effects that cannot be undone later in life. Those who begin drinking early are much more likely to become dependent on alcohol. Indeed, the probability of lifetime alcohol dependence decreases approximately 14 percent with each additional year of age at which alcohol is first used. And obviously the effects of underage drinking are irreversible for the nearly 1,700 Americans killed each year by teenage drunk drivers. See National Highway Traffic Safety Administration, 1998 Youth Fatal Crash and Alcohol Facts.

Respondents have identified no principle of law or logic that would preclude the imposition of restrictions on fast food and alcohol advertising similar to those they seek to impose on tobacco advertising. In effect, they seek a "vice" exception to the First Amendment. No such exception exists. See *44 Liquormart*, (opinion of *Stevens, J.*, joined by *Kennedy, Thomas, and Ginsburg, JJ.*). If it did, it would have almost no limit, for "any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to 'vice activity.'" That is why "a 'vice' label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity."

No legislature has ever sought to restrict speech about an activity it regarded as harmless and inoffensive. Calls for limits on expression always are made when the specter of some threatened harm is looming. The identity of the harm may vary. People will be inspired by totalitarian dogmas and subvert the Republic. They will be inflamed by racial demagoguery and embrace hatred and bigotry. Or they will be enticed by cigarette advertisements and choose to smoke, risking disease. It is therefore no answer for the State to say that the makers of cigarettes are doing harm: perhaps they are. But in that respect they are no different from the purveyors of other harmful products, or the advocates of harmful ideas. When the State seeks to silence them, they are all entitled to the protection of the First Amendment.

JUSTICE STEVENS, WITH WHOM JUSTICE GINSBURG AND JUSTICE BREYER JOIN, AND WITH WHOM JUSTICE SOUTER JOINS AS TO PART I, CONCURRING IN PART, CONCURRING IN THE JUDGMENT IN PART, AND DISSENTING IN PART. [OMITTED]

## Notes

1. The *Central Hudson* four-part test remains the standard for assessing the constitutionality of “commercial speech.” As the Court notes in *Lorillard Tobacco*, there have been many suggestions that the test be reconsidered or rejected. One argument for a rejection of the test is that there is - - - or should be - - - no category of commercial speech in First Amendment doctrine.

2. The question of compelled commercial speech, especially with regard to labeling regulations is the subject of vigorous First Amendment litigation. In the tobacco context, some courts have considered whether the history of tobacco advertising as misleading or “potentially misleading” should be considered in evaluating mandated disclosures and applying *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* (1985), which has become best known for the portion of the opinion considering the mandated disclosure.

In *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012), the court applied *Zauderer* and upheld the labeling requirements. Contrarily, in *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205 (D.C. Cir. 2012), a sharply divided panel held that *Central Hudson*’s intermediate standard of review applied and that the graphic FDA-mandated warnings were not constitutional because the FDA did not provide substantial evidence that graphic warnings on cigarette advertising would directly advance its interest in reducing smoking rates to material degree.

However, the DC Circuit en banc explicitly overruled *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.* in *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. en banc 2014).

*American Meat Industry (AMI)* involved a First Amendment challenge to country-of-origin labels (COOL) on a variety of foods, including some meat products. The court found the more minimal standard of *Zauderer* applicable:

The starting point common to both parties is that *Zauderer* applies to government mandates requiring disclosure of “purely factual and uncontroversial information” appropriate to prevent deception in the regulated party’s commercial speech. The key question for us is whether the principles articulated in *Zauderer* apply more broadly to factual and uncontroversial disclosures required to serve other government interests. AMI also argues that even if *Zauderer* extends beyond correction of deception, the government has no interest in country-of-origin labeling substantial enough to sustain the challenged rules.

*Zauderer* itself does not give a clear answer. Some of its language suggests possible confinement to correcting deception. Having already described the disclosure mandated there as limited to “purely factual and uncontroversial information about the terms under which [the transaction was proposed],” the Court said, “we hold that an advertiser’s rights are adequately protected as long

as [such] disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.” (It made no finding that the advertiser's message was “more likely to deceive the public than to inform it,” which would constitutionally subject the message to an outright ban. See *Central Hudson*. \*\*\* The language with which *Zauderer* justified its approach, however, sweeps far more broadly than the interest in remedying deception. After recounting the elements of *Central Hudson*, *Zauderer* rejected that test as unnecessary in light of the “material differences between disclosure requirements and outright prohibitions on speech.” Later in the opinion, the Court observed that “the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed.” After noting that the disclosure took the form of “purely factual and uncontroversial information about the terms under which [the] services will be available,” the Court characterized the speaker's interest as “minimal”: “Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal.” All told, *Zauderer*'s characterization of the speaker's interest in opposing forced disclosure of such information as “minimal” seems inherently applicable beyond the problem of deception, as other circuits have found.

### III. The Ascendancy of Commercial Speech?

#### *Sorrell v. IMS Health Inc.*

564 U.S. \_\_\_ (2011)

KENNEDY, J., DELIVERED THE OPINION OF THE COURT, IN WHICH ROBERTS, C.J., AND SCALIA, THOMAS, ALITO, AND SOTOMAYOR, JJ., JOINED. BREYER, J., FILED A DISSENTING OPINION, IN WHICH GINSBURG AND KAGAN, JJ., JOINED.

JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

Vermont law restricts the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors. Vt. Stat. Ann., Tit. 18, § 4631 (Supp. 2010). Subject to certain exceptions, the information may not be sold, disclosed by pharmacies for marketing purposes, or used for marketing by pharmaceutical manufacturers. Vermont argues that its prohibitions safeguard medical privacy and diminish the likelihood that marketing will lead to prescription decisions not in the best interests of patients or the State. It can be assumed that these interests are significant. Speech in aid of pharmaceutical marketing, however, is a form of expression protected by the Free Speech Clause of the First Amendment. As a consequence, Vermont's statute must be subjected to heightened judicial scrutiny. The law cannot satisfy that standard.

I

A

Pharmaceutical manufacturers promote their drugs to doctors through a process called "detailing." This often involves a scheduled visit to a doctor's office to persuade the doctor to prescribe a particular pharmaceutical. Detailers bring drug samples as well as medical studies that explain the "details" and

potential advantages of various prescription drugs. Interested physicians listen, ask questions, and receive followup data. Salespersons can be more effective when they know the background and purchasing preferences of their clientele, and pharmaceutical salespersons are no exception. Knowledge of a physician's prescription practices—called "prescriber-identifying information"—enables a detailer better to ascertain which doctors are likely to be interested in a particular drug and how best to present a particular sales message. Detailing is an expensive undertaking, so pharmaceutical companies most often use it to promote high-profit brand-name drugs protected by patent. Once a brand-name drug's patent expires, less expensive bioequivalent generic alternatives are manufactured and sold.

Pharmacies, as a matter of business routine and federal law, receive prescriber-identifying information when processing prescriptions. Many pharmacies sell this information to "data miners," firms that analyze prescriber-identifying information and produce reports on prescriber behavior. Data miners lease these reports to pharmaceutical manufacturers subject to nondisclosure agreements. Detailers, who represent the manufacturers, then use the reports to refine their marketing tactics and increase sales.

In 2007, Vermont enacted the Prescription Confidentiality Law. The measure is also referred to as Act 80. It has several components. The central provision of the present case is § 4631(d).

"A health insurer, a self-insured employer, an electronic transmission intermediary, a pharmacy, or other similar entity shall not sell, license, or exchange for value regulated records containing prescriber-identifiable information, nor permit the use of regulated records containing prescriber-identifiable information for marketing or promoting a prescription drug, unless the prescriber consents. . . . Pharmaceutical manufacturers and pharmaceutical marketers shall not use prescriber-identifiable information for marketing or promoting a prescription drug unless the prescriber consents. . . ."

\*\*\* Act 80 was accompanied by legislative findings. Vermont found, for example, that the "goals of marketing programs are often in conflict with the goals of the state" and that the "marketplace for ideas on medicine safety and effectiveness is frequently one-sided in that brand-name companies invest in expensive pharmaceutical marketing campaigns to doctors." Detailing, in the legislature's view, caused doctors to make decisions based on "incomplete and biased information." Because they "are unable to take the time to research the quickly changing pharmaceutical market," Vermont doctors "rely on information provided by pharmaceutical representatives." The legislature further found that detailing increases the cost of health care and health insurance; encourages hasty and excessive reliance on brand-name drugs, before the profession has observed their effectiveness as compared with older and less expensive generic alternatives; and fosters disruptive and repeated marketing visits tantamount to harassment. The legislative findings further noted that use of prescriber-identifying information "increase[s] the effect of detailing programs" by allowing detailers to target their visits to particular doctors. Use of prescriber-identifying data also helps detailers shape their messages by "tailoring" their "presentations to individual prescriber styles, preferences, and attitudes."

## B

The present case involves two consolidated suits. One was brought by three Vermont data miners, the other by an association of pharmaceutical manufacturers that produce brand-name drugs. These entities are the respondents here. Contending that §4631(d) violates their First Amendment rights as incorporated by the Fourteenth Amendment, the respondents sought declaratory and injunctive relief against the petitioners, the Attorney General and other officials of the State of Vermont.

After a bench trial, the United States District Court for the District of Vermont denied relief. The District Court found that “[p]harmaceutical manufacturers are essentially the only paying customers of the data vendor industry” and that, because detailing unpatented generic drugs is not “cost-effective,” pharmaceutical sales representatives “detail only branded drugs.” As the District Court further concluded, “the Legislature’s determination that [prescriber- identifying] data is an effective marketing tool that enables detailers to increase sales of new drugs is supported in the record.” The United States Court of Appeals for the Second Circuit reversed and remanded. It held that §4631(d) violates the First Amendment by burdening the speech of pharmaceutical marketers and data miners without an adequate justification. Judge Livingston dissented.

The decision of the Second Circuit is in conflict with decisions of the United States Court of Appeals for the First Circuit concerning similar legislation enacted by Maine and New Hampshire. Recognizing a division of authority regarding the constitutionality of state statutes, this Court granted certiorari.

## II

The beginning point is the text of §4631(d). \*\*\* [T]he opening clause of §4631(d) prohibits pharmacies, health insurers, and similar entities from selling prescriber-identifying information, subject to the statutory exceptions set out at §4631(e). Under that reading, pharmacies may sell the information to private or academic researchers, see §4631(e)(1), but not, for example, to pharmaceutical marketers. There is no dispute as to the remainder of §4631(d). It prohibits pharmacies, health insurers, and similar entities from disclosing or otherwise allowing prescriber-identifying information to be used for marketing. And it bars pharmaceutical manufacturers and detailers from using the information for marketing. The questions now are whether §4631(d) must be tested by heightened judicial scrutiny and, if so, whether the State can justify the law.

### A

#### 1

On its face, Vermont's law enacts content-and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information. The provision first forbids sale subject to exceptions based in large part on the content of a purchaser's speech. For example, those who wish to engage in certain "educational communications," may purchase the information. The measure then bars any disclosure when recipient speakers will use the information for marketing. Finally, the provision's second sentence prohibits pharmaceutical manufacturers from using the information for marketing. The statute thus

disfavors marketing, that is, speech with a particular content. More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers. As a result of these content- and speaker-based rules, detailers cannot obtain prescriber-identifying information, even though the information may be purchased or acquired by other speakers with diverse purposes and viewpoints. Detailers are likewise barred from using the information for marketing, even though the information may be used by a wide range of other speakers. For example, it appears that Vermont could supply academic organizations with prescriber-identifying information to use in countering the messages of brand-name pharmaceutical manufacturers and in promoting the prescription of generic drugs. But § 4631(d) leaves detailers no means of purchasing, acquiring, or using prescriber-identifying information. The law on its face burdens disfavored speech by disfavored speakers.

Any doubt that § 4631(d) imposes an aimed, content-based burden on detailers is dispelled by the record and by formal legislative findings. As the District Court noted, "[p]harmaceutical manufacturers are essentially the only paying customers of the data vendor industry"; and the almost invariable rule is that detailing by pharmaceutical manufacturers is in support of brand-name drugs. Vermont's law thus has the effect of preventing detailers—and only detailers—from communicating with physicians in an effective and informative manner. Formal legislative findings accompanying § 4631(d) confirm that the law's express purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs. Just as the "inevitable effect of a statute on its face may render it unconstitutional," a statute's stated purposes may also be considered. Here, the Vermont Legislature explained that detailers, in particular those who promote brand-name drugs, convey messages that "are often in conflict with the goals of the state." The legislature designed §4631(d) to target those speakers and their messages for disfavored treatment. "In its practical operation," Vermont's law "goes even beyond mere content discrimination, to actual viewpoint discrimination." Given the legislature's expressed statement of purpose, it is apparent that §4631(d) imposes burdens that are based on the content of speech and that are aimed at a particular viewpoint.

Act 80 is designed to impose a specific, content-based burden on protected expression. It follows that heightened judicial scrutiny is warranted. The Court has recognized that the "distinction between laws burdening and laws banning speech is but a matter of degree" and that the "Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans. Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content.

The First Amendment requires heightened scrutiny whenever the government creates "a regulation of speech because of disagreement with the message it conveys. Commercial speech is no exception. A "consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." That reality has great relevance in the fields of medicine and public health, where information can save lives.

The State argues that heightened judicial scrutiny is unwarranted because its law is a mere commercial regulation. It is true that restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct. It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech. That is why a ban on race-based hiring may require employers to remove "White Applicants Only" signs, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*; why "an ordinance against outdoor fires" might forbid "burning a flag," *R.A.V.*; and why antitrust laws can prohibit "agreements in restraint of trade," *Giboney v. Empire Storage & Ice Co.*

But §4631(d) imposes more than an incidental burden on protected expression. Both on its face and in its practical operation, Vermont's law imposes a burden based on the content of speech and the identity of the speaker. While the burdened speech results from an economic motive, so too does a great deal of vital expression. Vermont's law does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers. The Constitution "does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York* (Holmes, J., dissenting). It does enact the First Amendment.

Vermont further argues that § 4631(d) regulates not speech but simply access to information. Prescriber-identifying information was generated in compliance with a legal mandate, the State argues, and so could be considered a kind of governmental information. \*\*\* [But] Vermont has imposed a restriction on access to information in private hands. \*\*\* An individual's right to speak is implicated when information he or she possesses is subjected to "restraints on the way in which the information might be used" or disseminated. \*\*\*

The State also contends that heightened judicial scrutiny is unwarranted in this case because sales, transfer, and use of prescriber-identifying information are conduct, not speech. \*\*\*

This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment. Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes.

The State asks for an exception to the rule that information is speech, but there is no need to consider that request in this case. The State has imposed content- and speaker-based restrictions on the availability and use of prescriber-identifying information. So long as they do not engage in marketing, many speakers can obtain and use the information. But detailers cannot. Vermont's statute could be compared with a law prohibiting trade magazines from purchasing or using ink. Like that hypothetical law, § 4631(d) imposes a speaker- and content-based burden on protected expression, and that circumstance is sufficient to justify application of heightened scrutiny. As a consequence, this case can be resolved even assuming, as the State argues, that prescriber-identifying information is a mere commodity.

B

In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory. The State argues that a different analysis applies here because, assuming §4631(d) burdens speech at all, it at most burdens only commercial speech. As in previous cases, however, the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied. For the same reason there is no need to determine whether all speech hampered by §4631(d) is commercial, as our cases have used that term.

Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment. To sustain the targeted, content-based burden §4631(d) imposes on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest. There must be a "fit between the legislature's ends and the means chosen to accomplish those ends." As in other contexts, these standards ensure not only that the State's interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message.

The State's asserted justifications for §4631(d) come under two general headings. First, the State contends that its law is necessary to protect medical privacy, including physician confidentiality, avoidance of harassment, and the integrity of the doctor-patient relationship. Second, the State argues that §4631(d) is integral to the achievement of policy objectives—namely, improved public health and reduced healthcare costs. Neither justification withstands scrutiny.

1

Vermont argues that its physicians have a "reasonable expectation" that their prescriber-identifying information "will not be used for purposes other than . . . filling and processing" prescriptions. It may be assumed that, for many reasons, physicians have an interest in keeping their prescription decisions confidential. But § 4631(d) is not drawn to serve that interest. Under Vermont's law, pharmacies may share prescriber-identifying information with anyone for any reason save one: They must not allow the information to be used for marketing. Exceptions further allow pharmacies to sell prescriber-identifying information for certain purposes, including "health care research." And the measure permits insurers, researchers, journalists, the State itself, and others to use the information. All but conceding that § 4631(d) does not in itself advance confidentiality interests, the State suggests that other laws might impose separate bars on the disclosure of prescriber-identifying information. But the potential effectiveness of other measures cannot justify the distinctive set of prohibitions and sanctions imposed by § 4631(d).

\*\*\* Vermont made prescriber-identifying information available to an almost limitless audience. The explicit structure of the statute allows the information to be studied and used by all but a narrow class of disfavored speakers. Given the information's widespread availability and many permissible uses, the State's asserted interest in physician confidentiality does not justify the burden that § 4631(d) places on protected expression.

The State points out that it allows doctors to forgo the advantages of § 4631(d) by consenting to the sale, disclosure, and use of their prescriber-identifying information. It is true that private decisionmaking can avoid governmental partiality and thus insulate privacy measures from First Amendment challenge. But that principle is inapposite here. Vermont has given its doctors a contrived choice: Either consent, which will allow your prescriber-identifying information to be disseminated and used without constraint; or, withhold consent, which will allow your information to be used by those speakers whose message the State supports. Section 4631(d) may offer a limited degree of privacy, but only on terms favorable to the speech the State prefers. This is not to say that all privacy measures must avoid content-based rules. Here, however, the State has conditioned privacy on acceptance of a content-based rule that is not drawn to serve the State's asserted interest. To obtain the limited privacy allowed by § 4631(d), Vermont physicians are forced to acquiesce in the State's goal of burdening disfavored speech by disfavored speakers.

\*\*\* Vermont's argument accordingly fails, even if the availability and scope of private election might be relevant in other contexts, as when the statute's design is unrelated to any purpose to advance a preferred message.

The State also contends that §4631(d) protects doctors from "harassing sales behaviors." \*\*\* Many are those who must endure speech they do not like, but that is a necessary cost of freedom. In any event the State offers no explanation why remedies other than content-based rules would be inadequate. Physicians can, and often do, simply decline to meet with detailers, including detailers who use prescriber-identifying information. Doctors who wish to forgo detailing altogether are free to give "No Solicitation" or "No Detailing" instructions to their office managers or to receptionists at their places of work. Personal privacy even in one's own home receives "ample protection" from the "resident's unquestioned right to refuse to engage in conversation with unwelcome visitors." A physician's office is no more private and is entitled to no greater protection.

Vermont argues that detailers' use of prescriber-identifying information undermines the doctor-patient relationship by allowing detailers to influence treatment decisions. According to the State, "unwanted pressure occurs" when doctors learn that their prescription decisions are being "monitored" by detailers. \*\*\* Speech remains protected even when it may "stir people to action," "move them to tears," or "inflict great pain." \*\*\* If pharmaceutical marketing affects treatment decisions, it does so because doctors find it persuasive. Absent circumstances far from those presented here, the fear that speech might persuade provides no lawful basis for quieting it. *Brandenburg v. Ohio*.

2

The State contends that § 4631(d) advances important public policy goals by lowering the costs of medical services and promoting public health. If prescriber-identifying information were available for use by detailers, the State contends, then detailing would be effective in promoting brand-name drugs that are more expensive and less safe than generic alternatives. \*\*\*

While Vermont's stated policy goals may be proper, § 4631(d) does not advance them in a permissible way. \*\*\* The State seeks to achieve its policy objectives

through the indirect means of restraining certain speech by certain speakers—that is, by diminishing detailers' ability to influence prescription decisions. Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the "fear that people would make bad decisions if given truthful information" cannot justify content-based burdens on speech. "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." These precepts apply with full force when the audience, in this case prescribing physicians, consists of "sophisticated and experienced" consumers.

As Vermont's legislative findings acknowledge, the premise of § 4631(d) is that the force of speech can justify the government's attempts to stifle it. Indeed the State defends the law by insisting that "pharmaceutical marketing has a strong influence on doctors' prescribing practices." This reasoning is incompatible with the First Amendment. In an attempt to reverse a disfavored trend in public opinion, a State could not ban campaigning with slogans, picketing with signs, or marching during the daytime. Likewise the State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles. That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.

\*\*\*

The State may not burden the speech of others in order to tilt public debate in a preferred direction. "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented."

It is true that content-based restrictions on protected expression are sometimes permissible, and that principle applies to commercial speech. Indeed the government's legitimate interest in protecting consumers from "commercial harms" explains "why commercial speech can be subject to greater governmental regulation than noncommercial speech." \*\*\*

The State nowhere contends that detailing is false or misleading within the meaning of this Court's First Amendment precedents. Nor does the State argue that the provision challenged here will prevent false or misleading speech. The State's interest in burdening the speech of detailers instead turns on nothing more than a difference of opinion.

The capacity of technology to find and publish personal information, including records required by the government, presents serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure. In considering how to protect those interests, however, the State cannot engage in content-based discrimination to advance its own side of a debate.

If Vermont's statute provided that prescriber-identifying information could not be sold or disclosed except in narrow circumstances then the State might have a stronger position. Here, however, the State gives possessors of the information broad discretion and wide latitude in disclosing the information, while at the

same time restricting the information's use by some speakers and for some purposes, even while the State itself can use the information to counter the speech it seeks to suppress. Privacy is a concept too integral to the person and a right too essential to freedom to allow its manipulation to support just those ideas the government prefers.

\*\*\* The State has burdened a form of protected expression that it found too persuasive. At the same time, the State has left unburdened those speakers whose messages are in accord with its own views. This the State cannot do.

The judgment of the Court of Appeals is *affirmed*.

JUSTICE BREYER, WITH WHOM JUSTICE GINSBURG AND JUSTICE KAGAN JOIN, DISSENTING.

The Vermont statute before us adversely affects expression in one, and only one, way. It deprives pharmaceutical and data-mining companies of data, collected pursuant to the government's regulatory mandate, that could help pharmaceutical companies create better sales messages. In my view, this effect on expression is inextricably related to a lawful governmental effort to regulate a commercial enterprise. The First Amendment does not require courts to apply a special "heightened" standard of review when reviewing such an effort. And, in any event, the statute meets the First Amendment standard this Court has previously applied when the government seeks to regulate commercial speech. For any or all of these reasons, the Court should uphold the statute as constitutional.

\*\*\*

#### A

Because many, perhaps most, activities of human beings living together in communities take place through speech, and because speech-related risks and offsetting justifications differ depending upon context, this Court has distinguished for First Amendment purposes among different contexts in which speech takes place. Thus, the First Amendment imposes tight constraints upon government efforts to restrict, *e.g.*, "core" political speech, while imposing looser constraints when the government seeks to restrict, *e.g.*, commercial speech, the speech of its own employees, or the regulation-related speech of a firm subject to a traditional regulatory program.

These test-related distinctions reflect the constitutional importance of maintaining a free marketplace of ideas, a marketplace that provides access to "social, political, esthetic, moral, and other ideas and experiences." Without such a marketplace, the public could not freely choose a government pledged to implement policies that reflect the people's informed will.

At the same time, our cases make clear that the First Amendment offers considerably less protection to the maintenance of a free marketplace for goods and services. And they also reflect the democratic importance of permitting an elected government to implement through effective programs policy choices for which the people's elected representatives have voted.

Thus this Court has recognized that commercial speech including advertising has an "informational function" and is not "valueless in the marketplace of ideas." *Central Hudson*. But at the same time it has applied a less than strict,

"intermediate" First Amendment test when the government directly restricts commercial speech. Under that test, government laws and regulations may significantly restrict speech, as long as they also "directly advance" a "substantial" government interest that could not "be served as well by a more limited restriction." *Central Hudson*. Moreover, the Court has found that "sales practices" that are "misleading, deceptive, or aggressive" lack the protection of even this "intermediate" standard. And the Court has emphasized the need, in applying an "intermediate" test, to maintain the "'commonsense' distinction between speech proposing a commercial transaction, *which occurs in an area traditionally subject to government regulation*, and other varieties of speech."

The Court has also normally applied a yet more lenient approach to ordinary commercial or regulatory legislation that affects speech in less direct ways. In doing so, the Court has taken account of the need in this area of law to defer significantly to legislative judgment—as the Court has done in cases involving the Commerce Clause or the Due Process Clause. \*\*\*

To apply a strict First Amendment standard virtually as a matter of course when a court reviews ordinary economic regulatory programs (even if that program has a modest impact upon a firm's ability to shape a commercial message) would work at cross-purposes with this more basic constitutional approach. Since ordinary regulatory programs can affect speech, particularly commercial speech, in myriad ways, to apply a "heightened" First Amendment standard of review whenever such a program burdens speech would transfer from legislatures to judges the primary power to weigh ends and to choose means, threatening to distort or undermine legitimate legislative objectives. To apply a "heightened" standard of review in such cases as a matter of course would risk what then-Justice Rehnquist, dissenting in *Central Hudson*, described as a "retur[n] to the bygone era of *Lochner v. New York*, in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies."

## B

There are several reasons why the Court should review Vermont's law "under the standard appropriate for the review of economic regulation," not "under a heightened standard appropriate for the review of First Amendment issues." For one thing, Vermont's statute neither forbids nor requires anyone to say anything, to engage in any form of symbolic speech, or to endorse any particular point of view, whether ideological or related to the sale of a product.

For another thing, the same First Amendment standards that apply to Vermont here would apply to similar regulatory actions taken by other States or by the Federal Government acting, for example, through Food and Drug Administration (FDA) regulation. \*\*\*

Further, the statute's requirements form part of a traditional, comprehensive regulatory regime. The pharmaceutical drug industry has been heavily regulated at least since 1906. Longstanding statutes and regulations require pharmaceutical companies to engage in complex drug testing to ensure that their drugs are both "safe" and "effective." Only then can the drugs be marketed, at which point drug companies are subject to the FDA's exhaustive regulation of

the content of drug labels and the manner in which drugs can be advertised and sold.

Finally, Vermont's statute is directed toward information that exists only by virtue of government regulation. Under federal law, certain drugs can be dispensed only by a pharmacist operating under the orders of a medical practitioner. Vermont regulates the qualifications, the fitness, and the practices of pharmacists themselves, and requires pharmacies to maintain a "patient record system" that, among other things, tracks who prescribed which drugs. But for these regulations, pharmacies would have no way to know who had told customers to buy which drugs (as is the case when a doctor tells a patient to take a daily dose of aspirin).

Regulators will often find it necessary to create tailored restrictions on the use of information subject to their regulatory jurisdiction. \*\*\*

Such regulatory actions are subject to judicial review, *e.g.*, for compliance with applicable statutes. And they would normally be subject to review under the Administrative Procedure Act to make certain they are not "arbitrary, capricious, [or] an abuse of discretion." In an appropriate case, such review might be informed by First Amendment considerations. But regulatory actions of the kind present here have not previously been thought to raise serious additional constitutional concerns under the First Amendment. \*\*\*

Thus, it is not surprising that, until today, this Court has *never* found that the *First Amendment* prohibits the government from restricting the use of information gathered pursuant to a regulatory mandate—whether the information rests in government files or has remained in the hands of the private firms that gathered it. Nor has this Court *ever* previously applied any form of "heightened" scrutiny in any even roughly similar case.

### C

Regulatory programs necessarily draw distinctions on the basis of content. Electricity regulators, for example, oversee company statements, pronouncements, and proposals, but only about electricity. The Federal Reserve Board regulates the content of statements, advertising, loan proposals, and interest rate disclosures, but only when made by financial institutions. And the FDA oversees the form and content of labeling, advertising, and sales proposals of drugs, but not of furniture. Given the ubiquity of content-based regulatory categories, why should the "content-based" nature of typical regulation require courts (other things being equal) to grant legislators and regulators *less* deference?

Nor, in the context of a regulatory program, is it unusual for particular rules to be "speaker-based," affecting only a class of entities, namely, the regulated firms. An energy regulator, for example, might require the manufacturers of home appliances to publicize ways to reduce energy consumption, while exempting producers of industrial equipment. Or a trade regulator might forbid a particular firm to make the true claim that its cosmetic product contains "cleansing grains that scrub away dirt and excess oil" unless it substantiates that claim with detailed backup testing, even though opponents of cosmetics use need not substantiate their claims. Or the FDA might control in detail just what a pharmaceutical firm can, and cannot, tell potential purchasers about its

products. Such a firm, for example, could not suggest to a potential purchaser (say, a doctor) that he or she might put a pharmaceutical drug to an "off label" use, even if the manufacturer, in good faith and with considerable evidence, believes the drug will help. All the while, a third party (say, a researcher) is free to tell the doctor not to use the drug for that purpose.

\*\*\*

This does not mean that economic regulation having some effect on speech is always lawful. Courts typically review the lawfulness of statutes for rationality and of regulations (if federal) to make certain they are not "arbitrary, capricious, [or] an abuse of discretion." And our valuable free-speech tradition may play an important role in such review. But courts do not normally view these matters as requiring "heightened" First Amendment scrutiny—and particularly not the unforgiving brand of "intermediate" scrutiny employed by the majority. Because the imposition of "heightened" scrutiny in such instances would significantly change the legislative/judicial balance, in a way that would significantly weaken the legislature's authority to regulate commerce and industry, I would not apply a "heightened" First Amendment standard of review in this case.

### III

Turning to the constitutional merits, I believe Vermont's statute survives application of *Central Hudson's* "intermediate" commercial speech standard as well as any more limited "economic regulation" test.

#### A

\*\*\* The upshot is that the only commercial-speech-related harm that the record shows this statute to have brought about is the one I have previously described: The withholding of information collected through a regulatory program, thereby preventing companies from shaping a commercial message they believe maximally effective. The absence of precedent suggesting that this kind of harm is serious reinforces the conclusion that the harm here is modest at most.

#### B

The legitimate state interests that the statute serves are "substantial." *Central Hudson*. \*\*\* [The statute's] objectives are important. And the interests they embody all are "neutral" in respect to speech.

The protection of public health falls within the traditional scope of a State's police powers. The fact that the Court normally exempts the regulation of "misleading" and "deceptive" information even from the rigors of its "intermediate" commercial speech scrutiny testifies to the importance of securing "unbiased information," as does the fact that the FDA sets forth as a federal regulatory goal the need to ensure a "fair balance" of information about marketed drugs. As major payers in the health care system, health care spending is also of crucial state interest. And this Court has affirmed the importance of maintaining "privacy" as an important public policy goal—even in respect to information already disclosed to the public for particular purposes (but not others).

At the same time, the record evidence is sufficient to permit a legislature to conclude that the statute "directly advances" each of these objectives. The statute helps to focus sales discussions on an individual drug's safety, effectiveness, and cost, perhaps compared to other drugs (including generics).

These drug-related facts have everything to do with general information that drug manufacturers likely possess. They have little, if anything, to do with the name or prior prescription practices of the particular doctor to whom a detailer is speaking. Shaping a detailing message based on an individual doctor's prior prescription habits may help sell more of a particular manufacturer's particular drugs. But it does so by diverting attention from scientific research about a drug's safety and effectiveness, as well as its cost. This diversion comes at the expense of public health and the State's fiscal interests.

Vermont compiled a substantial legislative record to corroborate this line of reasoning. \*\*\*

### C

The majority cannot point to any adequately supported, similarly effective "more limited restriction." *Central Hudson*. It says that doctors "can, and often do, simply decline to meet with detailers." This fact, while true, is beside the point. Closing the office door entirely has no similar tendency to lower costs (by focusing greater attention upon the comparative advantages and disadvantages of generic drug alternatives). And it would not protect the confidentiality of information already released to, say, data miners. In any event, physicians are unlikely to turn detailers away at the door, for those detailers, whether delivering a balanced or imbalanced message, are nonetheless providers of much useful information. Forcing doctors to choose between targeted detailing and no detailing at all could therefore jeopardize the State's interest in promoting public health.

\*\*\* Respondents' alternatives are no more helpful. Respondents suggest that "Vermont can simply inform physicians that pharmaceutical companies . . . use prescription history information to communicate with doctors." But how would that help serve the State's basic purposes? It would not create the "fair balance" of information in pharmaceutical marketing that the State, like the FDA, seeks. Respondents also suggest policies requiring use of generic drugs or educating doctors about their benefits. Such programs have been in effect for some time in Vermont or other States, without indication that they have prevented the imbalanced sales tactics at which Vermont's statute takes aim. And in any event, such laws do not help protect prescriber privacy.

Vermont has thus developed a record that sufficiently shows that its statute meaningfully furthers substantial state interests. Neither the majority nor respondents suggests any equally effective "more limited" restriction. And the First Amendment harm that Vermont's statute works is, at most, modest. I consequently conclude that, even if we apply an "intermediate" test such as that in *Central Hudson*, this statute is constitutional.

### IV

What about the statute's third restriction, providing that "[p]harmaceutical manufacturers and pharmaceutical marketers" may not "use prescriber-identifiable information for marketing or promoting a prescription drug unless the prescriber consents"? In principle, I should not reach this question. That is because respondent pharmaceutical manufacturers, marketers, and data miners seek a declaratory judgment and injunction prohibiting the enforcement of this statute. And they have neither shown nor claimed that they could obtain

significant amounts of “prescriber-identifiable information” if the first two prohibitions are valid. If, as I believe, the first two statutory prohibitions (related to selling and disclosing the information) are valid, then the dispute about the validity of the third provision is not “real and substantial” or “definite and concrete.” (Article III does not permit courts to entertain such disputes).

The Court, however, strikes down all three provisions, and so I add that I disagree with the majority as to the constitutionality of the third restriction as well—basically for the reasons I have already set out. The prohibition against pharmaceutical firms using this prescriber-identifying information works no more than modest First Amendment harm; the prohibition is justified by the need to ensure unbiased sales presentations, prevent unnecessarily high drug costs, and protect the privacy of prescribing physicians. There is no obvious equally effective, more limited alternative.

## V

In sum, I believe that the statute before us satisfies the “intermediate” standards this Court has applied to restrictions on commercial speech. *A fortiori* it satisfies less demanding standards that are more appropriately applied in this kind of commercial regulatory case—a case where the government seeks typical regulatory ends (lower drug prices, more balanced sales messages) through the use of ordinary regulatory means (limiting the commercial use of data gathered pursuant to a regulatory mandate). The speech-related consequences here are indirect, incidental, and entirely commercial.

The Court reaches its conclusion through the use of important First Amendment categories—“content-based,” “speaker-based,” and “neutral”—but without taking full account of the regulatory context, the nature of the speech effects, the values these First Amendment categories seek to promote, and prior precedent. At best the Court opens a Pandora’s Box of First Amendment challenges to many ordinary regulatory practices that may only incidentally affect a commercial message. At worst, it reawakens *Lochner’s* pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue. See *Central Hudson* (Rehnquist, J., dissenting).

Regardless, whether we apply an ordinary commercial speech standard or a less demanding standard, I believe Vermont’s law is consistent with the First Amendment. And with respect, I dissent.

## Notes

1. Do you agree with the 6-3 decision in *Sorrell v. IMS Health*? Is there a limiting principle or does it have the potential, as the dissenting opinion argues, to open a “Pandora’s Box” of regulation?
2. Consider the Third Circuit’s opinion in *King v. Governor of the State of New Jersey*, 767 F.3d 216, (3d Cir. 2014), upholding a New Jersey statute, A3371, that prohibits licensed counselors from engaging

in “sexual orientation change efforts” (SOCE), also often called sexual conversion therapy, with a client under the age of 18.

The court found *Sorrell v. IMS Health* inapplicable:

We reject Plaintiffs' argument that A3371 should be subject to strict scrutiny because it discriminates on the basis of content and viewpoint. First, although we agree with Plaintiffs that A3371 discriminates on the basis of content, it does so in a way that does not trigger strict scrutiny. Ordinarily, content-based regulations are highly disfavored and subjected to strict scrutiny. See *Sorrell v. IMS Health, Inc.*, (2011). And this is generally true even when the law in question regulates unprotected or lesser protected speech. See *R.A.V. v. City of St. Paul* (1992). Nonetheless, within these unprotected or lesser protected categories of speech, the Supreme Court has held that a statute does *not* trigger strict scrutiny “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.” By way of illustration, the Court [in *R.A.V.*] explained:

[A] State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there. But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion.

A3371 fits comfortably within this category of permissible content discrimination. As with the content-based regulations identified by *R.A.V.* as permissible, “the basis for [A3371's] content discrimination consists entirely of the very reason” professional speech is a category of lesser-protected speech. The New Jersey legislature has targeted SOCE counseling for prohibition because it was presented with evidence that this particular form of counseling is ineffective and potentially harmful to clients. Thus, the reason professional speech receives diminished protection under the First Amendment—*i.e.*, because of the State's longstanding authority to protect its citizens from ineffective or harmful professional practices—is precisely the reason New Jersey targeted SOCE counseling with A3371. Therefore, we conclude that A3371 does not trigger strict scrutiny by discriminating on the basis of content in an impermissible manner.

Could the Court have accepted a similar argument in *Sorrell v. IMS Health* itself?

3. In many of the commercial speech cases, especially those concerning advertisements directed at children, the Court cites cases involving sexual speech. The next Chapter turns to the subject of sexual speech under the First Amendment.

# Chapter Ten: SEXUAL SPEECH

This chapter begins by exploring the categorical exclusion of obscenity from protected speech and the struggle for a definition of obscenity. It then considers the problem of privacy and the doctrine of secondary effects. The issue of child protection regarding obscenity, regulated media, and the internet is the subject of the third section. The final section considers attempts to extend obscenity doctrine to other types of speech.

## Chapter Outline

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Note: Prurient Interest

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Notes

### **IV. Children, Regulated Media, and the Internet Age**

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### **V. The Limits of Obscenity and the Categorical Approach?**

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## I. Defining Obscenity

### *Rosen v. United States*

161 U.S. 29 (1896)

MR. JUSTICE HARLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff in error was indicted under section 3893 of the Revised Statutes, providing that 'every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, . . . and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where or how, or of whom, or by what means, any of the hereinbefore mentioned matters, articles, or things may be obtained or made, . . . are hereby declared to be nonmailable matter, and shall not be conveyed in the mails, nor delivered from any post office nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails, for the purpose of circulating, or disposing of, or of aiding in the circulation or disposition of the same, shall be deemed guilty of a misdemeanor, and shall for each and every offense be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the court. . . . [ellipses in original]

The defendant pleaded not guilty, and the trial was entered upon without objection in any form to the indictment as not sufficiently informing the defendant of the nature of the charge against him.

A verdict of guilty having been returned, the accused moved for a new trial, upon the ground, among others, that the indictment was fatally defective in matters of substance. That motion was denied.

The defendant thereupon moved in arrest of judgment, upon the ground that the indictment did not charge that he knew at the time what were the contents of the paper deposited in the mail, and alleged to be lewd, obscene, and lascivious. This motion was also denied, and the accused was sentenced to imprisonment at hard labor during a period of 13 months, and to pay a fine of one dollar.

The paper 'Broadway,' referred to in the indictment, was produced in evidence, first, by the United States, and afterwards by the accused. The copy read in evidence by the government was the one which, it was admitted at the trial, the defendant had caused to be deposited in the mail. The pictures of females appearing in that copy were, by direction of the defendant, partially covered with lamp black, that could be easily erased with a piece of bread. The object of sending them out in that condition was, of course, to excite a curiosity to know what was thus concealed. The accused read in evidence a copy that he

characterized as a 'clean' one, and in which the pictures of females, in different attitudes of indecency, were not obscured by lamp black.

\*\*\* The indictment charged that the accused, on the 24th day of April, 1893, within the Southern district of New York, 'did unlawfully, willfully, and knowingly deposit and cause to be deposited in the post office of the city of New York, for mailing and delivery by the post-office establishment of the United States, a certain obscene, lewd, and lascivious paper, which said paper then and there, on the first page thereof, was entitled 'Tenderloin Number, Broadway,' and on the same page were printed the words and figures following, that is to say: 'Volume II, number 27; trade-mark, 1892; by Lew Rosen; New York, Saturday, April 15, 1893; ten cents a copy, \$4.00 a year in advance;' and thereupon, on the same page, is the picture of a cab, horse, driver, and the figure of a female, together (underneath the said picture) with the word 'Tenderloineuse'; and the said paper consists of twelve pages, minute description of which, with the pictures therein and thereon, would be offensive to the court, and improper to spread upon the records of the court, because of their obscene, lewd, and indecent matters; and the said paper, on the said twenty-fourth day of April, in the year one thousand eight hundred and ninety-three, was inclosed in a wrapper, and addressed as follows, that is to say: 'Mr. Geo. Edwards, P. O. box 510, Summit, N. J.,'—against the peace of the United States and their dignity, and contrary to the statute of the United States in such case made and provided.'

\*\*\* It is also assigned for error that the court left it to the jury to say whether the paper in question was obscene, when it was for the court, as a matter of law, to determine that question. If the court had instructed the jury as matter of law that the paper described in the indictment was obscene, lewd, and lascivious, no error would have been committed; for the paper itself was in evidence, it was of the class excluded from the mails, and there was no dispute as to its contents. It has long been the settled doctrine of this court that the evidence before the jury, if clear and uncontradicted upon any issue made by the parties, presented a question of law in respect of which the court could, without usurping the functions of the jury, instruct them as to the principles applicable to the case made by such evidence. Even if we should hold that the court ought to have instructed the jury, as matter of law, that the paper was, within the meaning of the statute, obscene, lewd, and lascivious, it would not follow that the judgment should, for that reason, be reversed, because it is clear that no injury came to the defendant by submitting the question of the character of the paper to the jury. But it is proper to add that it was competent for the court below, in its discretion, and even if it had been inclined to regard the paper as obscene, lewd, and lascivious, to submit to the jury the general question of the nature of the paper, accompanied by instructions indicating the principles or rules by which they should be guided in determining what was an obscene, lewd, or lascivious paper within the contemplation of the statute under which the indictment was framed. That was what the court did when it charged the jury that 'the test of obscenity is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influence, and into whose hands a publication of this sort may fall.' 'Would it,' the court said, 'suggest or convey lewd thoughts and lascivious thoughts to the young and inexperienced?' In view of the character of the paper, as an

inspection of it will instantly disclose, the test prescribed for the jury was quite as liberal as the defendant had any right to demand.

Other questions are discussed in the elaborate brief filed for the defendant. Some of them do not require notice; other were not sufficiently saved by exceptions, at the proper time, and will not therefore be considered or determined.

We find no error of law in the record, and the judgment is affirmed.

MR. JUSTICE WHITE, WITH WHOM CONCURRED MR. JUSTICE SHIRAS, DISSENTING.  
[opinion omitted]

## Notes

1. Adoption of the “test” for obscenity in the jury instructions as derived from *Regina v. Hicklin*, [1868] LR 3 QB 360, which the Court does not cite. Chief Justice Cockburn in *Hicklin* stated:

the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. Now, with regard to this work, it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character.

2. In both *Regina v. Hicklin* and *Rosen v. United States*, the central issues are centered on the defendant’s requisite knowledge regarding the obscenity rather than the definition of obscenity itself.

3. Obscenity laws often criminalized the burgeoning birth control, reproductive rights, and women’s movements. Perhaps most famously, “An Act for the Suppression of Trade in, and Circulation of Obscene Literature and Articles of Immoral Use,” known as The Comstock Act, 42 Cong. Ch. 258, 17 Stat. 598 (1873) (repealed 1909), prohibited any person from selling or distributing in U.S. mail articles used “for the prevention of conception, or for causing unlawful abortion” and defined sending information concerning these practices as “obscene.” While the bill originally contained a physician-exemption, the Act as passed deleted this exemption. State and local legislatures passed their own Comstock acts, not requiring use of the mails. The Comstock acts took their name from Anthony Comstock, an anti-vice crusader supported by millionaires such as J.P. Morgan and Samuel Colgate. Comstock began an anti-saloon movement in Brooklyn, later created and led the infamous New York Society for the Suppression of Vice, and was appointed a special postal inspector.

## *Roth v. United States*

[consolidated with *Alberts v. California*]  
354 U.S. 476 (1957)

BRENNAN, J., DELIVERED THE OPINION OF THE COURT, IN WHICH FRANKFURTER, BURTON, CLARK, WHITTAKER, J.J., JOINED. WARREN, C.J., FILED A CONCURRING OPINION. HARLAN, J., FILED A DISSENTING OPINION. DOUGLAS, J., FILED A DISSENTING OPINION IN WHICH BLACK, J., JOINED.

JUSTICE BRENNAN DELIVERED THE OPINION OF THE COURT.

The constitutionality of a criminal obscenity statute is the question in each of these cases. In *Roth*, the primary constitutional question is whether the federal obscenity statute violates the provision of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." In *Alberts*, the primary constitutional question is whether the obscenity provisions of the California Penal Code invade the freedoms of speech and press as they may be incorporated in the liberty protected from state action by the Due Process Clause of the Fourteenth Amendment.

Other constitutional questions are: whether these statutes violate due process, because too vague to support conviction for crime; whether power to punish speech and press offensive to decency and morality is in the States alone, so that the federal obscenity statute violates the Ninth and Tenth Amendments (raised in *Roth*); and whether Congress, by enacting the federal obscenity statute, under the power delegated by Art. I, § 8, cl. 7, to establish post offices and post roads, pre-empted the regulation of the subject matter (raised in *Alberts*).

Roth conducted a business in New York in the publication and sale of books, photographs and magazines. He used circulars and advertising matter to solicit sales. He was convicted by a jury in the District Court for the Southern District of New York upon 4 counts of a 26-count indictment charging him with mailing obscene circulars and advertising, and an obscene book, in violation of the federal obscenity statute. His conviction was affirmed by the Court of Appeals for the Second Circuit. We granted certiorari.

Alberts conducted a mail-order business from Los Angeles. He was convicted by the Judge of the Municipal Court of the Beverly Hills Judicial District (having waived a jury trial) under a misdemeanor complaint which charged him with lewdly keeping for sale obscene and indecent books, and with writing, composing and publishing an obscene advertisement of them, in violation of the California Penal Code. The conviction was affirmed by the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles. We noted probable jurisdiction.

The dispositive question is whether obscenity is utterance within the area of protected speech and press. Although this is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.

The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes. As early as 1712, Massachusetts made it criminal to publish "any filthy, obscene, or profane song, pamphlet, libel or mock sermon" in imitation or mimicking of religious services. Acts and Laws of the Province of Mass. Bay, c. CV, § 8 (1712), Mass. Bay Colony Charters & Laws 399 (1814). Thus, profanity and obscenity were related offenses.

In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. *Beauharnais v. Illinois* (1952). At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press.

The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. This objective was made explicit as early as 1774 in a letter of the Continental Congress to the inhabitants of Quebec:

"The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs." 1 Journals of the Continental Congress 108 (1774).

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this Court in *Chaplinsky v. New Hampshire* (1942):

". . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *These include the lewd and obscene . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .*" (Emphasis added.)

We hold that obscenity is not within the area of constitutionally protected speech or press.

It is strenuously urged that these obscenity statutes offend the constitutional guaranties because they punish incitation to impure sexual *thoughts*, not shown to be related to any overt antisocial conduct which is or may be incited in the persons stimulated to such *thoughts*. In *Roth*, the trial judge instructed the jury: "The words 'obscene, lewd and lascivious' as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful *thoughts*." (Emphasis added.) \*\*\*

However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, *e. g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern. As to all such problems, this Court said in *Thornhill v. Alabama* (1940):

"The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for *information and education with respect to the significant issues of the times*. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace *all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period*." (Emphasis added.)

The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.

The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. *Regina v. Hicklin*, [1868] L. R. 3 Q. B. 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity.

Both trial courts below sufficiently followed the proper standard. Both courts used the proper definition of obscenity. In addition, in the *Alberts* case, in ruling on a motion to dismiss, the trial judge indicated that, as the trier of facts, he was judging each item as a whole as it would affect the normal person, and in *Roth*, the trial judge instructed the jury as follows:

". . . The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved. . . .

"The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards. . . .

"In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children."

It is argued that the statutes do not provide reasonably ascertainable standards of guilt and therefore violate the constitutional requirements of due process. \*\*\* The thrust of the argument is that these words are not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere.

Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. ". . . [T]he Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . ." \*\*\*

In summary, then, we hold that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited.

Roth's argument that the federal obscenity statute unconstitutionally encroaches upon the powers reserved by the Ninth and Tenth Amendments to the States and to the people to punish speech and press where offensive to decency and morality is hinged upon his contention that obscenity is expression not excepted from the sweep of the provision of the First Amendment that "*Congress shall make no law . . . abridging the freedom of speech, or of the press . . .*" (Emphasis added.) That argument falls in light of our holding that obscenity is not expression protected by the First Amendment. We therefore hold that the federal obscenity statute punishing the use of the mails for

obscene material is a proper exercise of the postal power delegated to Congress by Art. I, § 8, cl. 7. \*\*\*

[Alberts' argument that because his was a mail-order business, the California statute is repugnant to Art. I, § 8, cl. 7, under which the Congress allegedly pre-empted the regulatory field by enacting the federal obscenity statute punishing the mailing or advertising by mail of obscene material was rejected].

The judgments are

*Affirmed.*

CHIEF JUSTICE WARREN, CONCURRING IN THE RESULT.

I agree with the result reached by the Court in these cases, but, because we are operating in a field of expression and because broad language used here may eventually be applied to the arts and sciences and freedom of communication generally, I would limit our decision to the facts before us and to the validity of the statutes in question as applied.

\*\*\* That there is a social problem presented by obscenity is attested by the expression of the legislatures of the forty-eight States as well as the Congress. To recognize the existence of a problem, however, does not require that we sustain any and all measures adopted to meet that problem. The history of the application of laws designed to suppress the obscene demonstrates convincingly that the power of government can be invoked under them against great art or literature, scientific treatises, or works exciting social controversy. Mistakes of the past prove that there is a strong countervailing interest to be considered in the freedoms guaranteed by the First and Fourteenth Amendments.

The line dividing the salacious or pornographic from literature or science is not straight and unwavering. Present laws depend largely upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached. But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.

\*\*\* The defendants in both these cases were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide.

I agree with the Court's decision in its rejection of the other contentions raised by these defendants.

JUSTICE HARLAN, CONCURRING IN THE RESULT IN NO. 61, AND DISSENTING IN NO. 582.

I regret not to be able to join the Court's opinion. I cannot do so because I find lurking beneath its disarming generalizations a number of problems which not only leave me with serious misgivings as to the future effect of today's decisions, but which also, in my view, call for different results in these two cases.

I.

My basic difficulties with the Court's opinion are threefold. First, the opinion paints with such a broad brush that I fear it may result in a loosening of the tight reins which state and federal courts should hold upon the enforcement of obscenity statutes. Second, the Court fails to discriminate between the different factors which, in my opinion, are involved in the constitutional adjudication of state and federal obscenity cases. Third, relevant distinctions between the two obscenity statutes here involved, and the Court's own definition of "obscenity," are ignored.

In final analysis, the problem presented by these cases is how far, and on what terms, the state and federal governments have power to punish individuals for disseminating books considered to be undesirable because of their nature or supposed deleterious effect upon human conduct. Proceeding from the premise that "no issue is presented in either case, concerning the obscenity of the material involved," the Court finds the "dispositive question" to be "whether obscenity is utterance within the area of protected speech and press," and then holds that "obscenity" is not so protected because it is "utterly without redeeming social importance." This sweeping formula appears to me to beg the very question before us. The Court seems to assume that "obscenity" is a peculiar *genus* of "speech and press," which is as distinct, recognizable, and classifiable as poison ivy is among other plants. On this basis the *constitutional* question before us simply becomes, as the Court says, whether "obscenity," as an abstraction, is protected by the First and Fourteenth Amendments, and the question whether a *particular* book may be suppressed becomes a mere matter of classification, of "fact," to be entrusted to a fact-finder and insulated from independent constitutional judgment. But surely the problem cannot be solved in such a generalized fashion. Every communication has an individuality and "value" of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an *individual* matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressable within constitutional standards. Since those standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves.

I do not think that reviewing courts can escape this responsibility by saying that the trier of the facts, be it a jury or a judge, has labeled the questioned matter as "obscene," for, if "obscenity" is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind. Many juries might find that Joyce's "Ulysses" or Bocaccio's "Decameron" was obscene, and yet the conviction of a defendant for selling either book would raise, for me, the gravest constitutional problems, for no such verdict could

convince me, without more, that these books are "utterly without redeeming social importance." In short, I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based. I am very much afraid that the broad manner in which the Court has decided these cases will tend to obscure the peculiar responsibilities resting on state and federal courts in this field and encourage them to rely on easy labeling and jury verdicts as a substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.

My second reason for dissatisfaction with the Court's opinion is that the broad strides with which the Court has proceeded has led it to brush aside with perfunctory ease the vital constitutional considerations which, in my opinion, differentiate these two cases. It does not seem to matter to the Court that in one case we balance the power of a State in this field against the restrictions of the Fourteenth Amendment, and in the other the power of the Federal Government against the limitations of the First Amendment. I deal with this subject more particularly later.

Thirdly, the Court has not been bothered by the fact that the two cases involve different statutes. In California the book must have a "tendency to deprave or corrupt its readers"; under the federal statute it must tend "to stir sexual impulses and lead to sexually impure thoughts." The two statutes do not seem to me to present the same problems. Yet the Court compounds confusion when it superimposes on these two statutory definitions a third, drawn from the American Law Institute's Model Penal Code, Tentative Draft No. 6: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest." The bland assurance that this definition is the same as the ones with which we deal flies in the face of the authors' express rejection of the "deprave and corrupt" and "sexual thoughts" tests:

"Obscenity [in the Tentative Draft] is defined in terms of material which appeals predominantly to prurient interest in sexual matters and which goes beyond customary freedom of expression in these matters. We reject the prevailing test of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising, and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties. We likewise reject the common definition of obscene as that which 'tends to corrupt or debase.' If this means anything different from tendency to arouse lustful thought and desire, it suggests that change of character or actual misbehavior follows from contact with obscenity. Evidence of such consequences is lacking . . . . On the other hand, 'appeal to prurient interest' refers to qualities of the material itself: the capacity to attract individuals eager for a forbidden look . . . ."

As this passage makes clear, there is a significant distinction between the definitions used in the prosecutions before us, and the American Law Institute formula. If, therefore, the latter is the correct standard, as my Brother Brennan elsewhere intimates, then these convictions should surely be reversed. Instead, the Court merely assimilates the various tests into one indiscriminate potpourri.

I now pass to the consideration of the two cases before us.

## II

[concur in the judgment of the Court in No. 61, *Alberts v. California.*]

## III

[dissent in No. 582, *Roth v. United States*]

\*\*\* The substantive powers of the two governments, in many instances, are distinct. And in every case where we are called upon to balance the interest in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal. Since under our constitutional scheme the two are not necessarily equivalent, the balancing process must needs often produce different results. Whether a particular limitation on speech or press is to be upheld because it subserves a paramount governmental interest must, to a large extent, I think, depend on whether that government has, under the Constitution, a direct substantive interest, that is, the power to act, in the particular area involved."

\*\*\* It is no answer to say, as the Court does, that obscenity is not protected speech. The point is that this statute, as here construed, defines obscenity so widely that it encompasses matters which might very well be protected speech. I do not think that the federal statute can be constitutionally construed to reach other than what the Government has termed as "hard-core" pornography. Nor do I think the statute can fairly be read as directed only at *persons* who are engaged in the business of catering to the prurient minded, even though their wares fall short of hard-core pornography. Such a statute would raise constitutional questions of a different order. That being so, and since in my opinion the material here involved cannot be said to be hard-core pornography, I would reverse this case with instructions to dismiss the indictment.

JUSTICE DOUGLAS, WITH WHOM JUSTICE BLACK CONCURS, DISSENTING.

When we sustain these convictions, we make the legality of a publication turn on the purity of thought which a book or tract instills in the mind of the reader. I do not think we can approve that standard and be faithful to the command of the First Amendment, which by its terms is a restraint on Congress and which by the Fourteenth is a restraint on the States.

In the *Roth* case the trial judge charged the jury that the statutory words "obscene, lewd and lascivious" describe "that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts." He stated that the term "filthy" in the statute pertains "to that sort of treatment of sexual matters in such a vulgar and indecent way, so that it tends to arouse a feeling of disgust and revulsion." He went on to say that the material "must be calculated to corrupt and debauch the minds and morals" of "the average person in the community," not those of any particular class. "You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards."

The trial judge who, sitting without a jury, heard the *Alberts* case and the appellate court that sustained the judgment of conviction, took California's

definition of "obscenity" \*\*\* that a book is obscene "if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire."

By these standards punishment is inflicted for thoughts provoked, not for overt acts nor antisocial conduct. This test cannot be squared with our decisions under the First Amendment. Even the ill-starred *Dennis* case conceded that speech to be punishable must have some relation to action which could be penalized by government. *Dennis v. United States* (1951). This issue cannot be avoided by saying that obscenity is not protected by the First Amendment. The question remains, what is the constitutional test of obscenity?

The tests by which these convictions were obtained require only the arousing of sexual thoughts. Yet the arousing of sexual thoughts and desires happens every day in normal life in dozens of ways. Nearly 30 years ago a questionnaire sent to college and normal school women graduates asked what things were most stimulating sexually. Of 409 replies, 9 said "music"; 18 said "pictures"; 29 said "dancing"; 40 said "drama"; 95 said "books"; and 218 said "man." Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 73.

The test of obscenity the Court endorses today gives the censor free range over a vast domain. To allow the State to step in and punish mere speech or publication that the judge or the jury thinks has an *undesirable* impact on thoughts but that is not shown to be a part of unlawful action is drastically to curtail the First Amendment. \*\*\*

The standard of what offends "the common conscience of the community" conflicts, in my judgment, with the command of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Certainly that standard would not be an acceptable one if religion, economics, politics or philosophy were involved. How does it become a constitutional standard when literature treating with sex is concerned?

Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment. Under that test, juries can censor, suppress, and punish what they don't like, provided the matter relates to "sexual impurity" or has a tendency "to excite lustful thoughts." This is community censorship in one of its worst forms. It creates a regime where in the battle between the literati and the Philistines, the Philistines are certain to win. If experience in this field teaches anything, it is that "censorship of obscenity has almost always been both irrational and indiscriminate." The test adopted here accentuates that trend.

I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct.

I can understand (and at times even sympathize) with programs of civic groups and church groups to protect and defend the existing moral standards of the community. I can understand the motives of the Anthony Comstocks who would impose Victorian standards on the community. When speech alone is

involved, I do not think that government, consistently with the First Amendment, can become the sponsor of any of these movements. I do not think that government, consistently with the First Amendment, can throw its weight behind one school or another. Government should be concerned with antisocial conduct, not with utterances. Thus, if the First Amendment guarantee of freedom of speech and press is to mean anything in this field, it must allow protests even against the moral code that the standard of the day sets for the community. In other words, literature should not be suppressed merely because it offends the moral code of the censor.

The legality of a publication in this country should never be allowed to turn either on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the community conscience. By either test the role of the censor is exalted, and society's values in literary freedom are sacrificed.

The Court today suggests a third standard. It defines obscene material as that "which deals with sex in a manner appealing to prurient interest." Like the standards applied by the trial judges below, that standard does not require any nexus between the literature which is prohibited and action which the legislature can regulate or prohibit. Under the First Amendment, that standard is no more valid than those which the courts below adopted.

\*\*\* Unlike the law of libel, wrongfully relied on in *Beauharnais*, there is no special historical evidence that literature dealing with sex was intended to be treated in a special manner by those who drafted the First Amendment. In fact, the first reported court decision in this country involving obscene literature was in 1821. I reject too the implication that problems of freedom of speech and of the press are to be resolved by weighing against the values of free expression, the judgment of the Court that a particular form of that expression has "no redeeming social importance." The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence. The First Amendment puts free speech in the preferred position.

Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it. As a people, we cannot afford to relax that standard. For the test that suppresses a cheap tract today can suppress a literary gem tomorrow. All it need do is to incite a lascivious thought or arouse a lustful desire. The list of books that judges or juries can place in that category is endless.

I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field.

*Jacobellis v. Ohio*  
378 U.S. 184 (1964)

BRENNAN DELIVERED THE JUDGMENT OF THE COURT IN AN OPINION IN WHICH GOLDBERG, J., JOINED. BLACK, J., FILED A CONCURRING OPINION IN WHICH DOUGLAS, J., JOINED. STEWART, J., FILED A CONCURRING OPINION. GOLDBERG, J., FILED A CONCURRING OPINION. WHITE, J., FILED A CONCURRING OPINION. WARREN, C.J., FILED A DISSENTING OPINION, IN WHICH CLARK, J., JOINED. HARLAN, J., FILED A DISSENTING OPINION.

JUSTICE BRENNAN ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED AN OPINION IN WHICH JUSTICE GOLDBERG JOINS.

Appellant, Nico Jacobellis, manager of a motion picture theater in Cleveland Heights, Ohio, was convicted on two counts of possessing and exhibiting an obscene film in violation of Ohio Revised Code (1963 Supp.) § 2905.34.1 He was fined \$500 on the first count and \$2,000 on the second, and was sentenced to the workhouse if the fines were not paid. His conviction, by a court of three judges upon waiver of trial by jury, was affirmed by an intermediate appellate court, and by the Supreme Court of Ohio. We noted probable jurisdiction of the appeal, and subsequently restored the case to the calendar for reargument. The dispositive question is whether the state courts properly found that the motion picture involved, a French film called 'Les Amants' ('The Lovers'), was obscene and hence not entitled to the protection for free expression that is guaranteed by the First and Fourteenth Amendments. We conclude that the film is not obscene and that the judgment must accordingly be reversed. \*\*\*

JUSTICE STEWART, CONCURRING.

It is possible to read the Court's opinion in *Roth v. United States* in a variety of ways. In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable. I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts* that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

THE CHIEF JUSTICE, WITH WHOM MR. JUSTICE CLARK JOINS, DISSENTING.

In this and other cases in this area of the law, which are coming to us in ever-increasing numbers, we are faced with the resolution of rights basic both to individuals and to society as a whole. Specifically, we are called upon to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments. Although the Federal Government and virtually every State has had laws proscribing obscenity since the Union was formed, and although this Court has

recently decided that obscenity is not within the protection of the First Amendment, neither courts nor legislatures have been able to evolve a truly satisfactory definition of obscenity. In other areas of the law, terms like "negligence," although in common use for centuries, have been difficult to define except in the most general manner. Yet the courts have been able to function in such areas with a reasonable degree of efficiency. The obscenity problem, however, is aggravated by the fact that it involves the area of public expression, an area in which a broad range of freedom is vital to our society and is constitutionally protected.

\*\*\* For all the sound and fury that the *Roth* test has generated, it has not been proved unsound, and I believe that we should try to live with it—at least until a more satisfactory definition is evolved. No government—be it federal, state, or local—should be forced to choose between repressing all material, including that within the realm of decency, and allowing unrestrained license to publish any material, no matter how vile. There must be a rule of reason in this as in other areas of the law and we have attempted in the *Roth* case to provide such a rule.

\*\*\* We are told that only 'hard core pornography' should be denied the protection of the First Amendment. But who can define 'hard core pornography' with any greater clarity than 'obscenity'? And even if we were to retreat to that position, we would soon be faced with the need to define that term just as we now are faced with the need to define 'obscenity.' Meanwhile, those who profit from the commercial exploitation of obscenity would continue to ply their trade unmolested.

\*\*\* In light of the foregoing, I would reiterate my acceptance of the rule of the *Roth* case: Material is obscene and not constitutionally protected against regulation and proscription if 'to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' I would commit the enforcement of this rule to the appropriate state and federal courts, and I would accept their judgments made pursuant to the *Roth* rule, limiting myself to a consideration only of whether there is sufficient evidence in the record upon which a finding of obscenity could be made. If there is no evidence in the record upon which such a finding could be made, obviously the material involved cannot be held obscene. But since a mere modicum of evidence may satisfy a 'no evidence' standard, I am unwilling to give the important constitutional right of free expression such limited protection. However, protection of society's right to maintain its moral fiber and the effective administration of justice require that this Court not establish itself as an ultimate censor, in each case reading the entire record, viewing the accused material, and making an independent de novo judgment on the question of obscenity. Therefore, once a finding of obscenity has been made below under a proper application of the *Roth* test, I would apply a 'sufficient evidence' standard of review—requiring something more than merely any evidence but something less than 'substantial evidence on the record (including the allegedly obscene material) as a whole.' This is the only reasonable way I can see to obviate the necessity of this Court's sitting as the Super Censor of all the obscenity purveyed throughout the Nation.

JUSTICE HARLAN, DISSENTING.

I experience no greater ease than do other members of the Court in attempting to verbalize generally the respective constitutional tests, for in truth the matter in the last analysis depends on how particular challenged material happens to strike the minds of jurors or judges and ultimately those of a majority of the members of this Court. The application of any general constitutional tests must thus necessarily be pricked out on a case-by-case basis, but as a point of departure I would apply to the Federal Government the *Roth* standards \*\*\*. As to the States, I would make the federal test one of rationality. I would not prohibit them from banning any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material.

On this basis, having viewed the motion picture in question, I think the State acted within permissible limits in condemning the film and would affirm the judgment of the Ohio Supreme Court.

## *Miller v. California* 413 U.S.15 (1973)

BURGER, C.J., DELIVERED THE OPINION OF THE COURT IN WHICH WHITE, BLACKMUN, POWELL, AND REHNQUIST, J.J. JOINED. DOUGLAS, J., FILED A DISSENTING OPINION. BRENNAN, J., FILED A DISSENTING OPINION, IN WHICH STEWART AND MARSHALL, J.J., JOINED.

CHIEF JUSTICE BURGER DELIVERED THE OPINION OF THE COURT.

This is one of a group of "obscenity-pornography" cases being reviewed by the Court in a re-examination of standards enunciated in earlier cases involving what Mr. Justice Harlan called "the intractable obscenity problem."

Appellant conducted a mass mailing campaign to advertise the sale of illustrated books, euphemistically called "adult" material. After a jury trial, he was convicted of violating California Penal Code § 311.2 (a), a misdemeanor, by knowingly distributing obscene matter, and the Appellate Department, Superior Court of California, County of Orange, summarily affirmed the judgment without opinion. Appellant's conviction was specifically based on his conduct in causing five unsolicited advertising brochures to be sent through the mail in an envelope addressed to a restaurant in Newport Beach, California. The envelope was opened by the manager of the restaurant and his mother. They had not requested the brochures; they complained to the police.

The brochures advertise four books entitled "Intercourse," "Man-Woman," "Sex Orgies Illustrated," and "An Illustrated History of Pornography," and a film entitled "Marital Intercourse." While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed.

I

This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment as applicable to the States through the Fourteenth Amendment.

The dissent of Justice Brennan reviews the background of the obscenity problem, but since the Court now undertakes to formulate standards more concrete than those in the past, it is useful for us to focus on two of the landmark cases in the somewhat tortured history of the Court's obscenity decisions. In *Roth v. United States* (1957), the Court sustained a conviction under a federal statute punishing the mailing of "obscene, lewd, lascivious or filthy . . ." materials. The key to that holding was the Court's rejection of the claim that obscene materials were protected by the First Amendment. \*\*\*

Nine years later, in *Memoirs v. Massachusetts* (1966), the Court veered sharply away from the *Roth* concept and, with only three Justices in the plurality opinion, articulated a new test of obscenity. The plurality held that under the *Roth* definition

"as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

The sharpness of the break with *Roth*, represented by the third element of the *Memoirs* test and emphasized by Justice White's dissent, was further underscored when the *Memoirs* plurality went on to state:

"The Supreme Judicial Court erred in holding that a book need not be 'unqualifiedly worthless before it can be deemed obscene.' A book cannot be proscribed unless it is found to be *utterly* without redeeming social value." (emphasis in original).

While *Roth* presumed "obscenity" to be "utterly without redeeming social importance," *Memoirs* required that to prove obscenity it must be affirmatively established that the material is "*utterly* without redeeming social value." Thus, even as they repeated the words of *Roth*, the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative, *i. e.*, that the material was "*utterly* without redeeming social value"—a burden virtually impossible to discharge under our criminal standards of proof. Such considerations caused Justice Harlan [dissenting] to wonder if the "*utterly* without redeeming social value" test had any meaning at all.

Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what

constitutes obscene, pornographic material subject to regulation under the States' police power. This is not remarkable, for in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression. This is an area in which there are few eternal verities.

The case we now review was tried on the theory that the California Penal Code §311 approximately incorporates the three-stage *Memoirs* test. But now the *Memoirs* test has been abandoned as unworkable by its author, and no Member of the Court today supports the *Memoirs* formulation.

## II

This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the "utterly without redeeming social value" test of *Memoirs v. Massachusetts*; that concept has never commanded the adherence of more than three Justices at one time. If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary.

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion:

- (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
- (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. At a minimum, prurient, patently offensive depiction or description of sexual conduct must

have serious literary, artistic, political, or scientific value to merit First Amendment protection. For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.

Justice Brennan, author of the opinions of the Court, or the plurality opinions, in *Roth v. United States*; *Jacobellis v. Ohio*; *Ginzburg v. United States* (1966), *Mishkin v. New York* (1966); and *Memoirs v. Massachusetts* has abandoned his former position and now maintains that no formulation of this Court, the Congress, or the States can adequately distinguish obscene material unprotected by the First Amendment from protected expression. Paradoxically, Justice Brennan indicates that suppression of unprotected obscene material is permissible to avoid exposure to unconsenting adults, as in this case, and to juveniles, although he gives no indication of how the division between protected and nonprotected materials may be drawn with greater precision for these purposes than for regulation of commercial exposure to consenting adults only. Nor does he indicate where in the Constitution he finds the authority to distinguish between a willing "adult" one month past the state law age of majority and a willing "juvenile" one month younger.

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. If the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or the Congress to regulate, then "hard core" pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike, as, indeed, Justice Douglas contends. In this belief, however, Justice Douglas now stands alone.

\*\*\* It is certainly true that the absence, since *Roth*, of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts. But today, for the first time since *Roth* was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate "hard core" pornography from expression protected by the First Amendment. \*\*\*

This may not be an easy road, free from difficulty. But no amount of "fatigue" should lead us to adopt a convenient "institutional" rationale—an absolutist, "anything goes" view of the First Amendment—because it will lighten our burdens. " \*\*\* Nor should we remedy "tension between state and federal courts" by arbitrarily depriving the States of a power reserved to them under the Constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day. \*\*\*

### III

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether "the average person, applying contemporary community standards" would consider certain materials "prurient," it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a *national* "community standard" would be an exercise in futility.

As noted before, this case was tried on the theory that the California obscenity statute sought to incorporate the tripartite test of *Memoirs*. This, a "national" standard of First Amendment protection enumerated by a plurality of this Court, was correctly regarded at the time of trial as limiting state prosecution under the controlling case law. The jury, however, was explicitly instructed that, in determining whether the "dominant theme of the material as a whole . . . appeals to the prurient interest" and in determining whether the material "goes substantially beyond customary limits of candor and affronts contemporary community standards of decency," it was to apply "contemporary community standards of the State of California."

During the trial, both the prosecution and the defense assumed that the relevant "community standards" in making the factual determination of obscenity were those of the State of California, not some hypothetical standard of the entire United States of America. Defense counsel at trial never objected to the testimony of the State's expert on community standards or to the instructions of the trial judge on "statewide" standards. On appeal to the Appellate Department, Superior Court of California, County of Orange, appellant for the first time contended that application of state, rather than national, standards violated the First and Fourteenth Amendments.

We conclude that neither the State's alleged failure to offer evidence of "national standards," nor the trial court's charge that the jury consider state community standards, were constitutional errors. Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable "national standards" when attempting to determine whether certain materials are obscene as a matter of fact. \*\*\*

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. As the Court made clear in *Mishkin v. New York* (1966) the primary concern with requiring a jury to apply the standard of "the average person, applying contemporary community standards"

is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one. *See Roth v. United States* Cf. the now discredited test in *Regina v. Hicklin* [1868]. We hold that the requirement that the jury evaluate the materials with reference to "contemporary standards of the State of California" serves this protective purpose and is constitutionally adequate.

#### IV

The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. \*\*\* The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. "The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people," *Roth v. United States*. But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.

There is no evidence, empirical or historical, that the stern 19th century American censorship of public distribution and display of material relating to sex in any way limited or affected expression of serious literary, artistic, political, or scientific ideas. On the contrary, it is beyond any question that the era following Thomas Jefferson to Theodore Roosevelt was an "extraordinarily vigorous period," not just in economics and politics, but in *belles lettres* and in "the outlying fields of social and political philosophies." We do not see the harsh hand of censorship of ideas—good or bad, sound or unsound—and "repression" of political liberty lurking in every state regulation of commercial exploitation of human interest in sex.

\*\*\* One can concede that the "sexual revolution" of recent years may have had useful byproducts in striking layers of prudery from a subject long irrationally kept from needed ventilation. But it does not follow that no regulation of patently offensive "hard core" materials is needed or permissible; civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine.

In sum, we (a) reaffirm the *Roth* holding that obscene material is not protected by the First Amendment; (b) hold that such material can be regulated by the States, subject to the specific safeguards enunciated above, without a showing that the material is "*utterly* without redeeming social value"; and (c) hold that obscenity is to be determined by applying "contemporary community standards," not "national standards." The judgment of the Appellate Department of the Superior Court, Orange County, California, is vacated and the case remanded to that court for further proceedings not inconsistent with the First Amendment standards established by this opinion.

*Vacated and remanded.*

I

\*\*\*Today the Court retreats from the earlier formulations of the constitutional test and undertakes to make new definitions. This effort, like the earlier ones, is earnest and well intentioned. The difficulty is that we do not deal with constitutional terms, since "obscenity" is not mentioned in the Constitution or Bill of Rights. And the First Amendment makes no such exception from "the press" which it undertakes to protect nor, as I have said on other occasions, is an exception necessarily implied, for there was no recognized exception to the free press at the time the Bill of Rights was adopted which treated "obscene" publications differently from other types of papers, magazines, and books. So there are no constitutional guidelines for deciding what is and what is not "obscene." The Court is at large because we deal with tastes and standards of literature. What shocks me may be sustenance for my neighbor. What causes one person to boil up in rage over one pamphlet or movie may reflect only his neurosis, not shared by others. We deal here with a regime of censorship which, if adopted, should be done by constitutional amendment after full debate by the people.

Obscenity cases usually generate tremendous emotional outbursts. They have no business being in the courts. If a constitutional amendment authorized censorship, the censor would probably be an administrative agency. Then criminal prosecutions could follow as, if, and when publishers defied the censor and sold their literature. Under that regime a publisher would know when he was on dangerous ground. Under the present regime— whether the old standards or the new ones are used—the criminal law becomes a trap. A brand new test would put a publisher behind bars under a new law improvised by the courts after the publication. \*\*\*

II

[omitted]

III

While the right to know is the corollary of the right to speak or publish, no one can be forced by government to listen to disclosure that he finds offensive. \*\*\* There is no "captive audience" problem in these obscenity cases. No one is being compelled to look or to listen. Those who enter newsstands or bookstalls may be offended by what they see. But they are not compelled by the State to frequent those places; and it is only state or governmental action against which the First Amendment, applicable to the States by virtue of the Fourteenth, raises a ban.

The idea that the First Amendment permits government to ban publications that are "offensive" to some people puts an ominous gloss on freedom of the press. That test would make it possible to ban any paper or any journal or magazine in some benighted place. The First Amendment was designed "to invite dispute," to induce "a condition of unrest," to "create dissatisfaction with conditions as they are," and even to stir "people to anger." *Terminiello v. Chicago* (1949). The idea that the First Amendment permits punishment for ideas that are "offensive" to the particular judge or jury sitting in judgment is astounding. No greater leveler of speech or literature has ever been designed. To give the power to the censor, as we do today, is to make a sharp and radical break with

the traditions of a free society. The First Amendment was not fashioned as a vehicle for dispensing tranquilizers to the people. Its prime function was to keep debate open to "offensive" as well as to "staid" people. The tendency throughout history has been to subdue the individual and to exalt the power of government. The use of the standard "offensive" gives authority to government that cuts the very vitals out of the First Amendment. As is intimated by the Court's opinion, the materials before us may be garbage. But so is much of what is said in political campaigns, in the daily press, on TV, or over the radio. By reason of the First Amendment—and solely because of it—speakers and publishers have not been threatened or subdued because their thoughts and ideas may be "offensive" to some.

\*\*\* We deal with highly emotional, not rational, questions. To many the Song of Solomon is obscene. I do not think we, the judges, were ever given the constitutional power to make definitions of obscenity. If it is to be defined, let the people debate and decide by a constitutional amendment what they want to ban as obscene and what standards they want the legislatures and the courts to apply. Perhaps the people will decide that the path towards a mature, integrated society requires that all ideas competing for acceptance must have no censor. Perhaps they will decide otherwise. Whatever the choice, the courts will have some guidelines. Now we have none except our own predilections.

JUSTICE BRENNAN, WITH WHOM JUSTICE STEWART AND JUSTICE MARSHALL JOIN, DISSENTING. [OMITTED]

### **Note: Prurient Interest**

In *Mishkin v. New York*, 383 U.S. 502 (1966), the Court clarified that the "prurient" interest requirement articulated in *Roth* (and adopted in *Miller*) need not be applicable to the average person. The materials in *Mishkin* were fifty "cheaply prepared paperbound 'pulp'" that portrayed "sexuality in many guises" including "relatively normal heterosexual relations" as well as "such deviations as sado-masochism, fetishism, and homosexuality" with covers featuring "drawings of scantily clad women being whipped, beaten, tortured, or abused."

Justice Brennan's opinion for the Court stated:

Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The reference to the "average" or "normal" person in *Roth* does not foreclose this holding. In regard to the prurient-appeal requirement, the concept of the "average" or "normal" person was employed in *Roth* to serve the essentially negative purpose of expressing our rejection of that aspect of the *Hicklin* test, *Regina v. Hicklin* (1868) that made the impact on the most susceptible person determinative. We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the

sexual interests of its intended and probable recipient group; and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most-susceptible-person facet of the *Hicklin* test.

No substantial claim is made that the books depicting sexually deviant practices are devoid of prurient appeal to sexually deviant groups. The evidence fully establishes that these books were specifically conceived and marketed for such groups. Appellant instructed his authors and artists to prepare the books expressly to induce their purchase by persons who would probably be sexually stimulated by them. It was for this reason that appellant "wanted an emphasis on beatings and fetishism and clothing - irregular clothing, and that sort of thing, and again sex scenes between women; always sex scenes had to be very strong." And to be certain that authors fulfilled his purpose, appellant furnished them with such source materials as CAPRIO, VARIATIONS IN SEXUAL BEHAVIOR, and KRAFFT-EBING, PSYCHOPATHIA SEXUALIS.

Do you think you could explain to a jury - - - or a judge - - - the definition of "prurient interest"?

## II. Privacy and Pornography

The next two cases - - - *Stanley v. Georgia* and *Paris Adult Theatre I v. Slaton* - - - do not rely on *Miller v. California*, but their formulations survive. (*Paris Adult Theater* was rendered the same day as *Miller v. California*).

### *Stanley v. Georgia*

394 U.S. 557 (1969)

MARSHALL, J., DELIVERED THE OPINION OF THE COURT IN WHICH WARREN, C.J., AND DOUGLAS, HARLAN, AND FORTAS, JOINED. STEWART, J., FILED A CONCURRING OPINION IN WHICH BRENNAN AND WHITE, J.J., JOINED. BLACK, J., FILED A CONCURRING OPINION.

JUSTICE MARSHALL DELIVERED THE OPINION OF THE COURT.

An investigation of appellant's alleged bookmaking activities led to the issuance of a search warrant for appellant's home. Under authority of this warrant, federal and state agents secured entrance. They found very little evidence of bookmaking activity, but while looking through a desk drawer in an upstairs bedroom, one of the federal agents, accompanied by a state officer, found three reels of eight-millimeter film. Using a projector and screen found in an upstairs living room, they viewed the films. The state officer concluded that they were obscene and seized them. Since a further examination of the bedroom indicated that appellant occupied it, he was charged with possession of obscene matter and placed under arrest. He was later indicted for "knowingly hav[ing] possession of . . . obscene matter" in violation of Georgia law. Appellant was

tried before a jury and convicted. The Supreme Court of Georgia affirmed. We noted probable jurisdiction of an appeal brought under 28 U. S. C. § 1257.

Appellant raises several challenges to the validity of his conviction. We find it necessary to consider only one. Appellant argues here, and argued below, that the Georgia obscenity statute, insofar as it punishes mere private possession of obscene matter, violates the First Amendment, as made applicable to the States by the Fourteenth Amendment. For reasons set forth below, we agree that the mere private possession of obscene matter cannot constitutionally be made a crime.

\*\*\* It is true that *Roth* does declare, seemingly without qualification, that obscenity is not protected by the First Amendment. That statement has been repeated in various forms in subsequent cases. However, neither *Roth* nor any subsequent decision of this Court dealt with the precise problem involved in the present case. Roth was convicted of mailing obscene circulars and advertising, and an obscene book, in violation of a federal obscenity statute. The defendant in a companion case, *Alberts v. California* (1957) was convicted of "lewdly keeping for sale obscene and indecent books, and [of] writing, composing and publishing an obscene advertisement of them . . . ." None of the statements cited by the Court in *Roth* for the proposition that "this Court has always assumed that obscenity is not protected by the freedoms of speech and press" were made in the context of a statute punishing mere private possession of obscene material; the cases cited deal for the most part with use of the mails to distribute objectionable material or with some form of public distribution or dissemination. Moreover, none of this Court's decisions subsequent to *Roth* involved prosecution for private possession of obscene materials. Those cases dealt with the power of the State and Federal Governments to prohibit or regulate certain public actions taken or intended to be taken with respect to obscene matter. Indeed, with one exception, we have been unable to discover any case in which the issue in the present case has been fully considered.

In this context, we do not believe that this case can be decided simply by citing *Roth*. *Roth* and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections. Neither *Roth* nor any other decision of this Court reaches that far. \*\*\* *Roth* and the cases following it discerned such an "important interest" in the regulation of commercial distribution of obscene material. That holding cannot foreclose an examination of the constitutional implications of a statute forbidding mere private possession of such material.

It is now well established that the Constitution protects the right to receive information and ideas. "This freedom [of speech and press] . . . necessarily protects the right to receive . . . ." *Martin v. City of Struthers* (1943); see *Griswold v. Connecticut* (1965); *Lamont v. Postmaster General* (1965) (Brennan, J., concurring); cf. *Pierce v. Society of Sisters* (1925). This right to receive information and ideas, regardless of their social worth, see *Winters v. New York*, (1948), is fundamental to our free society. Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right takes on an added dimension. For

also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man."

*Olmstead v. United States* (1928) (Brandeis, J., dissenting).

These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess. Georgia justifies this assertion by arguing that the films in the present case are obscene. But we think that mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment. \*\*\* Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all. See *Winters v. New York*. Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.

Perhaps recognizing this, Georgia asserts that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion. But more important, if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law . . . ." *Whitney v. California* (1927) (Brandeis, J., concurring). Given the present state of knowledge, the State may no more prohibit mere possession of

obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.

It is true that in *Roth* this Court rejected the necessity of proving that exposure to obscene material would create a clear and present danger of antisocial conduct or would probably induce its recipients to such conduct. But that case dealt with public distribution of obscene materials and such distribution is subject to different objections. For example, there is always the danger that obscene material might fall into the hands of children, see *Ginsberg v. New York*, or that it might intrude upon the sensibilities or privacy of the general public. See *Redrup v. New York* (1967). No such dangers are present in this case.

Finally, we are faced with the argument that prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution. That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws. See *Smith v. California* (1959).

We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. *Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home. Accordingly, the judgment of the court below is reversed and the case is remanded for proceedings not inconsistent with this opinion.

*It is so ordered.*

JUSTICE BLACK, CONCURRING. [OMITTED]

JUSTICE STEWART, WITH WHOM JUSTICE BRENNAN AND JUSTICE WHITE JOIN, CONCURRING IN THE RESULT.

Before the commencement of the trial in this case, the appellant filed a motion to suppress the films as evidence upon the ground that they had been seized in violation of the Fourth and Fourteenth Amendments. The motion was denied, and the films were admitted in evidence at the trial. In affirming the appellant's conviction, the Georgia Supreme Court specifically determined that the films had been lawfully seized. The appellant correctly contends that this determination was clearly wrong under established principles of constitutional law. But the Court today disregards this preliminary issue in its hurry to move on to newer constitutional frontiers. I cannot so readily overlook the serious inroads upon Fourth Amendment guarantees countenanced in this case by the Georgia courts.

\*\*\* Because the films were seized in violation of the Fourth and Fourteenth Amendments, they were inadmissible in evidence at the appellant's trial. *Mapp v. Ohio*. Accordingly, the judgment of conviction must be reversed.

## ***Paris Adult Theatre I v. Slaton***

413 U.S. 49 (1973)

BURGER, C.J., DELIVERED THE OPINION OF THE COURT, IN WHICH WHITE, BLACKMUN, POWELL, AND REHNQUIST, JJ., JOINED. DOUGLAS, J., FILED A DISSENTING OPINION. BRENNAN, J., FILED A DISSENTING OPINION, IN WHICH STEWART AND MARSHALL, JJ., JOINED.

CHIEF JUSTICE BURGER DELIVERED THE OPINION OF THE COURT.

Petitioners are two Atlanta, Georgia, movie theaters and their owners and managers, operating in the style of "adult" theaters. On December 28, 1970, respondents, the local state district attorney and the solicitor for the local state trial court, filed civil complaints in that court alleging that petitioners were exhibiting to the public for paid admission two allegedly obscene films, contrary to Georgia Code Ann. § 26-2101. The two films in question, "Magic Mirror" and "It All Comes Out in the End," depict sexual conduct characterized by the Georgia Supreme Court as "hard core pornography" leaving "little to the imagination."

Respondents' complaints, made on behalf of the State of Georgia, demanded that the two films be declared obscene and that petitioners be enjoined from exhibiting the films. The exhibition of the films was not enjoined, but a temporary injunction was granted *ex parte* by the local trial court, restraining petitioners from destroying the films or removing them from the jurisdiction. Petitioners were further ordered to have one print each of the films in court on January 13, 1971, together with the proper viewing equipment.

On January 13, 1971, 15 days after the proceedings began, the films were produced by petitioners at a jury-waived trial. Certain photographs, also produced at trial, were stipulated to portray the single entrance to both Paris Adult Theatre I and Paris Adult Theatre II as it appeared at the time of the complaints. These photographs show a conventional, inoffensive theater entrance, without any pictures, but with signs indicating that the theaters exhibit "Atlanta's Finest Mature Feature Films." On the door itself is a sign saying: "Adult Theatre—You must be 21 and able to prove it. If viewing the nude body offends you, Please Do Not Enter."

The two films were exhibited to the trial court. The only other state evidence was testimony by criminal investigators that they had paid admission to see the films and that nothing on the outside of the theater indicated the full nature of what was shown. In particular, nothing indicated that the films depicted—as they did—scenes of simulated fellatio, cunnilingus, and group sex intercourse. There was no evidence presented that minors had ever entered the theaters. Nor was there evidence presented that petitioners had a systematic policy of barring minors, apart from posting signs at the entrance. On April 12, 1971, the trial

judge dismissed respondents' complaints. He assumed "that obscenity is established," but stated:

"It appears to the Court that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible."

On appeal, the Georgia Supreme Court unanimously reversed. It assumed that the adult theaters in question barred minors and gave a full warning to the general public of the nature of the films shown, but held that the films were without protection under the First Amendment. Citing the opinion of this Court in *United States v. Reidel* (1971), the Georgia court stated that "the sale and delivery of obscene material to willing adults is not protected under the first amendment." The Georgia court also held *Stanley v. Georgia* (1969), to be inapposite since it did not deal with "the commercial distribution of pornography, but with the right of Stanley to possess, in the privacy of his home, pornographic films." After viewing the films, the Georgia Supreme Court held that their exhibition should have been enjoined, stating:

"The films in this case leave little to the imagination. It is plain what they purport to depict, that is, conduct of the most salacious character. We hold that these films are also hard core pornography, and the showing of such films should have been enjoined since their exhibition is not protected by the first amendment."

## I

It should be clear from the outset that we do not undertake to tell the States what they must do, but rather to define the area in which they may chart their own course in dealing with obscene material. This Court has consistently held that obscene material is not protected by the First Amendment as a limitation on the state police power by virtue of the Fourteenth Amendment. \*\*\*

In the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question."

## II

We categorically disapprove the theory, apparently adopted by the trial judge, that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only. This holding was properly rejected by the Georgia Supreme Court. Although we have often pointedly recognized the high importance of the state interest in regulating the exposure of obscene materials to juveniles and unconsenting adults, see *Miller v. California*; *Stanley v. Georgia*; *Redrup v. New York* (1967), this Court has never declared these to be the only legitimate state interests permitting regulation of obscene material. The States have a long recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions. \*\*\*

In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to

enforce effective safeguards against exposure to juveniles and to passerby. Rights and interests "other than those of the advocates are involved." These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself. The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime. Quite apart from sex crimes, however, there remains one problem of large proportions aptly described by Professor Bickel:

"It concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future. A man may be entitled to read an obscene book in his room, or expose himself indecently there . . . . We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places—discreet, if you will, but accessible to all—with others who share his tastes, *then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies.* Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not."

22 THE PUBLIC INTEREST 25-26 (Winter 1971).(Emphasis added.)

As Mr. Chief Justice Warren stated, there is a "right of the Nation and of the States to maintain a decent society, *Jacobellis v. Ohio* (1964) (dissenting opinion).

But, it is argued, there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society. It is urged on behalf of the petitioners that, absent such a demonstration, any kind of state regulation is "impermissible." We reject this argument. It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself. \*\*\*

From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. The same is true of the federal securities and antitrust laws and a host of federal regulations. On the basis of these assumptions both Congress and state legislatures have, for example, drastically restricted associational rights by adopting antitrust laws, and have strictly regulated public expression by issuers of and dealers in securities, profit sharing "coupons," and "trading stamps," commanding what they must and must not publish and announce. Understandably those who entertain an absolutist view of the First Amendment find it uncomfortable to explain why rights of association, speech, and press should be severely restrained in the marketplace of goods and money, but not in the marketplace of pornography.

Likewise, when legislatures and administrators act to protect the physical environment from pollution and to preserve our resources of forests, streams, and parks, they must act on such imponderables as the impact of a new highway near or through an existing park or wilderness area. \*\*\* The fact that a congressional directive reflects unprovable assumptions about what is good for

the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional.

\*\*\* The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

It is asserted, however, that standards for evaluating state commercial regulations are inapposite in the present context, as state regulation of access by consenting adults to obscene material violates the constitutionally protected right to privacy enjoyed by petitioners' customers. Even assuming that petitioners have vicarious standing to assert potential customers' rights, it is unavailing to compare a theater open to the public for a fee, with the private home of *Stanley v. Georgia* and the marital bedroom of *Griswold v. Connecticut*. This Court, has, on numerous occasions, refused to hold that commercial ventures such as a motion-picture house are "private" for the purpose of civil rights litigation and civil rights statutes. See *Heart of Atlanta Motel, Inc. v. United States* (1964). The Civil Rights Act of 1964 specifically defines motion-picture houses and theaters as places of "public accommodation" covered by the Act as operations affecting commerce. 78 Stat. 243, 42 U. S. C. §§ 2000a (b) (3), (c).

Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" *Palko v. Connecticut* (1937)." *Roe v. Wade* (1973). This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing. *Cf. Eisenstadt v. Baird* (1972); *Stanley v. Georgia*; *Loving v. Virginia* (1967); *Griswold v. Connecticut*; *Prince v. Massachusetts* (1944); *Skinner v. Oklahoma* (1942); *Pierce v. Society of Sisters* (1925); *Meyer v. Nebraska* (1923). Nothing, however, in this Court's decisions intimates that there is any "fundamental" privacy right "implicit in the concept of ordered liberty" to watch obscene movies in places of public accommodation.

If obscene material unprotected by the First Amendment in itself carried with it a "penumbra" of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the "privacy of the home," which was hardly more than a reaffirmation that "a man's home is his castle." *Cf. Stanley v. Georgia*. Moreover, we have declined to equate the privacy of the home relied on in *Stanley* with a "zone" of "privacy" that follows a distributor or a consumer of obscene materials wherever he goes. The idea of a "privacy" right and a place of public accommodation are, in this context, mutually exclusive. Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a "live" theater stage, any more than a "live" performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue.

It is also argued that the State has no legitimate interest in "control [of] the moral content of a person's thoughts," *Stanley v. Georgia*, and we need not quarrel with this. But we reject the claim that the State of Georgia is here attempting to control the minds or thoughts of those who patronize theaters. Preventing unlimited display or distribution of obscene material, which by definition lacks any serious literary, artistic, political, or scientific value as communication, *Miller v. California*, is distinct from a control of reason and the intellect. Where communication of ideas, protected by the First Amendment, is not involved, or the particular privacy of the home protected by *Stanley*, or any of the other "areas or zones" of constitutionally protected privacy, the mere fact that, as a consequence, some human "utterances" or "thoughts" may be incidentally affected does not bar the State from acting to protect legitimate state interests. The fantasies of a drug addict are his own and beyond the reach of government, but government regulation of drug sales is not prohibited by the Constitution.

Finally, petitioners argue that conduct which directly involves "consenting adults" only has, for that sole reason, a special claim to constitutional protection. Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation is a step we are unable to take. Commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open to the adult public falls within a State's broad power to regulate commerce and protect the public environment. The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as "wrong" or "sinful." The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the States' "right ... to maintain a decent society." *Jacobellis v. Ohio* (dissenting opinion).

\*\*\* In light of these holdings, nothing precludes the State of Georgia from the regulation of the allegedly obscene material exhibited in Paris Adult Theatre I or II, provided that the applicable Georgia law, as written or authoritatively interpreted by the Georgia courts, meets the First Amendment standards set forth in *Miller v. California*. The judgment is vacated and the case remanded to the Georgia Supreme Court for further proceedings not inconsistent with this opinion and *Miller v. California*.

*Vacated and remanded.*

JUSTICE DOUGLAS, DISSENTING.

\*\*\* When man was first in the jungle he took care of himself. When he entered a societal group, controls were necessarily imposed. But our society—unlike most in the world—presupposes that freedom and liberty are in a frame of reference that makes the individual, not government, the keeper of his tastes, beliefs, and ideas. That is the philosophy of the First Amendment; and it is the article of faith that sets us apart from most nations in the world.

JUSTICE BRENNAN, WITH WHOM JUSTICE STEWART AND JUSTICE MARSHALL JOIN, DISSENTING.

This case requires the Court to confront once again the vexing problem of reconciling state efforts to suppress sexually oriented expression with the protections of the First Amendment, as applied to the States through the Fourteenth Amendment. No other aspect of the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated such disharmony of views, and remained so resistant to the formulation of stable and manageable standards. I am convinced that the approach initiated 16 years ago in *Roth v. United States* (1957), and culminating in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure from that approach. \*\*\*

### Note

1. In addition to retreating from any broad interpretation of *Stanley v. Georgia* in *Paris Adult Theatre I*, the Court also exempted “child pornography” from *Stanley*’s protection of the home in *Osborne v. Ohio*, 495 U.S. 103 (1990).

The threshold question in this case is whether Ohio may constitutionally proscribe the possession and viewing of child pornography or whether, as Osborne argues, our decision in *Stanley v. Georgia* (1969), compels the contrary result. In *Stanley*, we struck down a Georgia law outlawing the private possession of obscene material. We recognized that the statute impinged upon Stanley's right to receive information in the privacy of his home, and we found Georgia's justifications for its law inadequate.

*Stanley* should not be read too broadly. We have previously noted that *Stanley* was a narrow holding, see *United States v. 12 200-ft. Reels of Film* (1973), and, since the decision in that case, the value of permitting child pornography has been characterized as “exceedingly modest, if not *de minimis*.” *New York v. Ferber* (1982). But assuming, for the sake of argument, that Osborne has a First Amendment interest in viewing and possessing child pornography, we nonetheless find this case distinct from *Stanley* because the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in *Stanley*. Every court to address the issue has so concluded.

Why should “child pornography” have different constitutional status? Child pornography is further discussed in a following subsection.

### III. Secondary Effects

#### *Erie v. Pap's A. M.*

529 U.S. 277 (2000)

O'CONNOR, J., ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED THE OPINION OF THE COURT WITH RESPECT TO PARTS I AND II, IN WHICH REHNQUIST, C. J., AND KENNEDY, SOUTER, AND BREYER, JJ., JOINED, AND AN OPINION WITH RESPECT TO PARTS III AND IV, IN WHICH REHNQUIST, C. J., AND KENNEDY, AND BREYER, JJ., JOINED. SCALIA, J., FILED AN OPINION CONCURRING IN THE JUDGMENT, IN WHICH THOMAS, J., JOINED. SOUTER, J., FILED AN OPINION CONCURRING IN PART AND DISSENTING IN PART. STEVENS, J., FILED A DISSENTING OPINION, IN WHICH GINSBURG, J., JOINED.

JUSTICE O'CONNOR ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED THE OPINION OF THE COURT WITH RESPECT TO PARTS I AND II, AND AN OPINION WITH RESPECT TO PARTS III AND IV, IN WHICH THE CHIEF JUSTICE, JUSTICE KENNEDY, AND JUSTICE BREYER JOIN.

The city of Erie, Pennsylvania, enacted an ordinance banning public nudity. Respondent Pap's A. M. (hereinafter Pap's), which operated a nude dancing establishment in Erie, challenged the constitutionality of the ordinance and sought a permanent injunction against its enforcement. The Pennsylvania Supreme Court, although noting that this Court in *Barnes v. Glen Theatre, Inc.*, (1991), had upheld an Indiana ordinance that was "strikingly similar" to Erie's, found that the public nudity sections of the ordinance violated respondent's right to freedom of expression under the United States Constitution. This case raises the question whether the Pennsylvania Supreme Court properly evaluated the ordinance's constitutionality under the First Amendment. We hold that Erie's ordinance is a content-neutral regulation that satisfies the four-part test of *United States v. O'Brien* (1968). Accordingly, we reverse the decision of the Pennsylvania Supreme Court and remand for the consideration of any remaining issues.

#### I

On September 28, 1994, the city council for the city of Erie, Pennsylvania, enacted Ordinance 75-1994, a public indecency ordinance that makes it a summary offense to knowingly or intentionally appear in public in a "state of nudity." Respondent Pap's, a Pennsylvania corporation, operated an establishment in Erie known as "Kandyland" that featured totally nude erotic dancing performed by women. To comply with the ordinance, these dancers must wear, at a minimum, "pasties" and a "G-string." On October 14, 1994, two days after the ordinance went into effect, Pap's filed a complaint against the city of Erie, the mayor of the city, and members of the city council, seeking declaratory relief and a permanent injunction against the enforcement of the ordinance.

The Court of Common Pleas of Erie County granted the permanent injunction and struck down the ordinance as unconstitutional. On cross appeals, the Commonwealth Court reversed the trial court's order.

The Pennsylvania Supreme Court granted review and reversed, concluding that the public nudity provisions of the ordinance violated respondent's rights to

freedom of expression as protected by the First and Fourteenth Amendments. The Pennsylvania court first inquired whether nude dancing constitutes expressive conduct that is within the protection of the First Amendment. The court noted that the act of being nude, in and of itself, is not entitled to First Amendment protection because it conveys no message. Nude dancing, however, is expressive conduct that is entitled to some quantum of protection under the First Amendment, a view that the Pennsylvania Supreme Court noted was endorsed by eight Members of this Court in *Barnes*.

The Pennsylvania court next inquired whether the government interest in enacting the ordinance was content neutral, explaining that regulations that are unrelated to the suppression of expression are not subject to strict scrutiny but to the less stringent standard of *United States v. O'Brien*. To answer the question whether the ordinance is content based, the court turned to our decision in *Barnes*. Although the Pennsylvania court noted that the Indiana statute at issue in *Barnes* "is strikingly similar to the Ordinance we are examining," it concluded that "[u]nfortunately for our purposes, the *Barnes* Court splintered and produced four separate, non-harmonious opinions." After canvassing these separate opinions, the Pennsylvania court concluded that, although it is permissible to find precedential effect in a fragmented decision, to do so a majority of the Court must have been in agreement on the concept that is deemed to be the holding. The Pennsylvania court noted that "aside from the agreement by a majority of the *Barnes* Court that nude dancing is entitled to some First Amendment protection, we can find no point on which a majority of the *Barnes* Court agreed." Accordingly, the court concluded that "no clear precedent arises out of *Barnes* on the issue of whether the [Erie] ordinance . . . passes muster under the First Amendment."

Having determined that there was no United States Supreme Court precedent on point, the Pennsylvania court conducted an independent examination of the ordinance to ascertain whether it was related to the suppression of expression. The court concluded that although one of the purposes of the ordinance was to combat negative secondary effects, "[i]nextricably bound up with this stated purpose is an unmentioned purpose . . . to impact negatively on the erotic message of the dance." As such, the court determined the ordinance was content based and subject to strict scrutiny. The ordinance failed the narrow tailoring requirement of strict scrutiny because the court found that imposing criminal and civil sanctions on those who commit sex crimes would be a far narrower means of combating secondary effects than the requirement that dancers wear pasties and G-strings.

\*\*\* The city of Erie petitioned for a writ of certiorari, which we granted. Shortly thereafter, Pap's filed a motion to dismiss the case as moot, noting that Kandyland was no longer operating as a nude dancing club, and Pap's was not operating a nude dancing club at any other location. We denied the motion.

## II

As a preliminary matter, we must address the justiciability question. \*\*\*

In any event, this is not a run of the mill voluntary cessation case. Here it is the plaintiff who, having prevailed below, now seeks to have the case declared moot. And it is the city of Erie that seeks to invoke the federal judicial power to obtain

this Court's review of the Pennsylvania Supreme Court decision. \*\*\* Our interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness here. Although the issue is close, we conclude that the case is not moot, and we turn to the merits.

### III

Being "in a state of nudity" is not an inherently expressive condition. As we explained in *Barnes*, however, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection. See *Barnes v. Glen Theatre, Inc.* (plurality opinion).

To determine what level of scrutiny applies to the ordinance at issue here, we must decide "whether the State's regulation is related to the suppression of expression." *Texas v. Johnson* (1989); see also *United States v. O'Brien*. If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the "less stringent" standard from *O'Brien* for evaluating restrictions on symbolic speech. If the government interest is related to the content of the expression, however, then the regulation falls outside the scope of the *O'Brien* test and must be justified under a more demanding standard. *Texas v. Johnson*.

In *Barnes*, we analyzed an almost identical statute, holding that Indiana's public nudity ban did not violate the First Amendment, although no five Members of the Court agreed on a single rationale for that conclusion. We now clarify that government restrictions on public nudity such as the ordinance at issue here should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech.

The city of Erie argues that the ordinance is a content neutral restriction that is reviewable under *O'Brien* because the ordinance bans conduct, not speech; specifically, public nudity. Respondent counters that the ordinance targets nude dancing and, as such, is aimed specifically at suppressing expression, making the ordinance a content-based restriction that must be subjected to strict scrutiny.

The ordinance here, like the statute in *Barnes*, is on its face a general prohibition on public nudity. By its terms, the ordinance regulates conduct alone. It does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity. And like the statute in *Barnes*, the Erie ordinance replaces and updates provisions of an "Indecency and Immorality" ordinance that has been on the books since 1866, predating the prevalence of nude dancing establishments such as Kandyland.

Respondent and Justice Stevens contend nonetheless that the ordinance is related to the suppression of expression because language in the ordinance's preamble suggests that its actual purpose is to prohibit erotic dancing of the type performed at Kandyland. That is not how the Pennsylvania Supreme Court interpreted that language, however. In the preamble to the ordinance, the city council stated that it was adopting the regulation

"for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects."

The Pennsylvania Supreme Court construed this language to mean that one purpose of the ordinance was "to combat negative secondary effects."

As Justice Souter noted in *Barnes*, "on its face, the governmental interest in combating prostitution and other criminal activity is not at all inherently related to expression." (opinion concurring in judgment). In that sense, this case is similar to *O'Brien*. O'Brien burned his draft registration card as a public statement of his antiwar views, and he was convicted under a statute making it a crime to knowingly mutilate or destroy such a card. This Court rejected his claim that the statute violated his First Amendment rights, reasoning that the law punished him for the "noncommunicative impact of his conduct, and for nothing else." In other words, the Government regulation prohibiting the destruction of draft cards was aimed at maintaining the integrity of the Selective Service System and not at suppressing the message of draft resistance that O'Brien sought to convey by burning his draft card. So too here, the ordinance prohibiting public nudity is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments like Kandyland and not at suppressing the erotic message conveyed by this type of nude dancing. Put another way, the ordinance does not attempt to regulate the primary effects of the expression, *i. e.*, the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare, which we have previously recognized are "caused by the presence of even one such" establishment. *Renton v. Playtime Theatres, Inc.* (1986).

Although the Pennsylvania Supreme Court acknowledged that one goal of the ordinance was to combat the negative secondary effects associated with nude dancing establishments, the court concluded that the ordinance was nevertheless content based, relying on Justice White's position in dissent in *Barnes* for the proposition that a ban of this type *necessarily* has the purpose of suppressing the erotic message of the dance. Because the Pennsylvania court agreed with Justice White's approach, it concluded that the ordinance must have another, "unmentioned" purpose related to the suppression of expression. That is, the Pennsylvania court adopted the dissent's view in *Barnes* that "[s]ince the State permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory prohibition." A majority of the Court rejected that view in *Barnes*, and we do so again here.

Respondent's argument that the ordinance is "aimed" at suppressing expression through a ban on nude dancing—an argument that respondent supports by pointing to statements by the city attorney that the public nudity ban was not intended to apply to "legitimate" theater productions—is really an argument that the city council also had an illicit motive in enacting the ordinance. As we

have said before, however, this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive. \*\*\*

Justice Stevens argues that the ordinance enacts a complete ban on expression. We respectfully disagree with that characterization. The public nudity ban certainly has the effect of limiting one particular means of expressing the kind of erotic message being disseminated at Kandyland. But simply to define what is being banned as the "message" is to assume the conclusion. We did not analyze the regulation in *O'Brien* as having enacted a total ban on expression. Instead, the Court recognized that the regulation against destroying one's draft card was justified by the Government's interest in preventing the harmful "secondary effects" of that conduct (disruption to the Selective Service System), even though that regulation may have some incidental effect on the expressive element of the conduct. Because this justification was unrelated to the suppression of O'Brien's antiwar message, the regulation was content neutral. Although there may be cases in which banning the means of expression so interferes with the message that it essentially bans the message, that is not the case here.

Even if we had not already rejected the view that a ban on public nudity is necessarily related to the suppression of the erotic message of nude dancing, we would do so now because the premise of such a view is flawed. The State's interest in preventing harmful secondary effects is not related to the suppression of expression. In trying to control the secondary effects of nude dancing, the ordinance seeks to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood. In *Clark v. Community for Creative Non-Violence* (1984), we held that a National Park Service regulation prohibiting camping in certain parks did not violate the First Amendment when applied to prohibit demonstrators from sleeping in Lafayette Park and the Mall in Washington, D. C., in connection with a demonstration intended to call attention to the plight of the homeless. Assuming, *arguendo*, that sleeping can be expressive conduct, the Court concluded that the Government interest in conserving park property was unrelated to the demonstrators' message about homelessness. So, while the demonstrators were allowed to erect "symbolic tent cities," they were not allowed to sleep overnight in those tents. Even though the regulation may have directly limited the expressive element involved in actually sleeping in the park, the regulation was nonetheless content neutral.

Similarly, even if Erie's public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings. Any effect on the overall expression is *de minimis*. And as Justice Stevens eloquently stated for the plurality in *Young v. American Mini Theatres, Inc.* (1976), "even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate," and "few of us would march our sons and daughters off to war to preserve the citizen's right to see" specified anatomical areas exhibited at establishments like

Kandyland. If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based.

This case is, in fact, similar to *O'Brien, Community for Creative Non-Violence, and Ward [ v/ Rock Against Racism (1989)]*. The justification for the government regulation in each case prevents harmful "secondary" effects that are unrelated to the suppression of expression. While the doctrinal theories behind "incidental burdens" and "secondary effects" are, of course, not identical, there is nothing objectionable about a city passing a general ordinance to ban public nudity (even though such a ban may place incidental burdens on some protected speech) and at the same time recognizing that one specific occurrence of public nudity— nude erotic dancing—is particularly problematic because it produces harmful secondary effects.

Justice Stevens claims that today we "[f]or the first time" extend *Renton*'s secondary effects doctrine to justify restrictions other than the location of a commercial enterprise. Our reliance on *Renton* to justify other restrictions is not new, however. In *Ward*, the Court relied on *Renton* to evaluate restrictions on sound amplification at an outdoor bandshell, rejecting the dissent's contention that *Renton* was inapplicable. Moreover, Erie's ordinance does not effect a "total ban" on protected expression.

In *Renton*, the regulation explicitly treated "adult" movie theaters differently from other theaters, and defined "adult" theaters solely by reference to the content of their movies. We nonetheless treated the zoning regulation as content neutral because the ordinance was aimed at the secondary effects of adult theaters, a justification unrelated to the content of the adult movies themselves. Here, Erie's ordinance is on its face a content-neutral restriction on conduct. Even if the city thought that nude dancing at clubs like Kandyland constituted a particularly problematic instance of public nudity, the regulation is still properly evaluated as a content-neutral restriction because the interest in combating the secondary effects associated with those clubs is unrelated to the suppression of the erotic message conveyed by nude dancing.

We conclude that Erie's asserted interest in combating the negative secondary effects associated with adult entertainment establishments like Kandyland is unrelated to the suppression of the erotic message conveyed by nude dancing. The ordinance prohibiting public nudity is therefore valid if it satisfies the four-factor test from *O'Brien* for evaluating restrictions on symbolic speech.

#### IV

Applying that standard here, we conclude that Erie's ordinance is justified under *O'Brien*. The first factor of the *O'Brien* test is whether the government regulation is within the constitutional power of the government to enact. Here, Erie's efforts to protect public health and safety are clearly within the city's police powers. The second factor is whether the regulation furthers an important or substantial government interest. The asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important. And in terms of demonstrating that such secondary effects pose a threat, the city need not "conduct new studies or produce evidence independent of that already

generated by other cities" to demonstrate the problem of secondary effects, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." Because the nude dancing at Kandyland is of the same character as the adult entertainment at issue in *Renton*; *Young v. American Mini Theatres, Inc.* (1976); and *California v. LaRue* (1972), it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. In fact, Erie expressly relied on *Barnes* and its discussion of secondary effects, including its reference to *Renton* and *American Mini Theatres*. Even in cases addressing regulations that strike closer to the core of First Amendment values, we have accepted a state or local government's reasonable belief that the experience of other jurisdictions is relevant to the problem it is addressing. Regardless of whether Justice Souter now wishes to disavow his opinion in *Barnes* on this point (opinion concurring in part and dissenting in part), the evidentiary standard described in *Renton* controls here, and Erie meets that standard.

In any event, Erie also relied on its own findings. The preamble to the ordinance states that "the Council of the City of Erie *has, at various times over more than a century, expressed its findings* that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity." The city council members, familiar with commercial downtown Erie, are the individuals who would likely have had firsthand knowledge of what took place at and around nude dancing establishments in Erie, and can make particularized, expert judgments about the resulting harmful secondary effects. Analogizing to the administrative agency context, it is well established that, as long as a party has an opportunity to respond, an administrative agency may take official notice of such "legislative facts" within its special knowledge, and is not confined to the evidence in the record in reaching its expert judgment. Here, Kandyland has had ample opportunity to contest the council's findings about secondary effects—before the council itself, throughout the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the council's evidentiary proof was lacking. In the absence of any reason to doubt it, the city's expert judgment should be credited. And the study relied on by *amicus curiae* does not cast any legitimate doubt on the Erie city council's judgment about Erie.

Finally, it is worth repeating that Erie's ordinance is on its face a content-neutral restriction that regulates conduct, not First Amendment expression. And the government should have sufficient leeway to justify such a law based on secondary effects. On this point, *O'Brien* is especially instructive. The Court there did not require evidence that the integrity of the Selective Service System would be jeopardized by the knowing destruction or mutilation of draft cards.

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Justice Souter, however, would require Erie to develop a specific evidentiary record supporting its ordinance (opinion concurring in part and dissenting in part). \*\*\* In any event, Justice Souter conflates two distinct concepts under *O'Brien*: whether there is a substantial government interest and whether the regulation furthers that interest. As to the government interest, *i. e.*, whether the threatened harm is real, the city council relied on this Court's opinions detailing the harmful secondary effects caused by establishments like Kandyland, as well as on its own experiences in Erie. Justice Souter attempts to denigrate the city council's conclusion that the threatened harm was real, arguing that we cannot accept Erie's findings because the subject of nude dancing is "fraught with some emotionalism." Yet surely the subject of drafting our citizens into the military is "fraught" with more emotionalism than the subject of regulating nude dancing. \*\*\*

As to the second point—whether the regulation furthers the government interest—it is evident that, since crime and other public health and safety problems are caused by the presence of nude dancing establishments like Kandyland, a ban on such nude dancing would further Erie's interest in preventing such secondary effects. To be sure, requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects, but *O'Brien* requires only that the regulation further the interest in combating such effects. Even though the dissent questions the wisdom of Erie's chosen remedy (opinion of Stevens, J.), the "city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems," *Renton v. Playtime Theatres, Inc.* (quoting *American Mini Theatres* (plurality opinion)). It also may be true that a pasties and G-string requirement would not be as effective as, for example, a requirement that the dancers be fully clothed, but the city must balance its efforts to address the problem with the requirement that the restriction be no greater than necessary to further the city's interest.

The ordinance also satisfies *O'Brien*'s third factor, that the government interest is unrelated to the suppression of free expression. The fourth and final *O'Brien* factor—that the restriction is no greater than is essential to the furtherance of the government interest—is satisfied as well. The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis*. The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message. See *Barnes v. Glen Theatre, Inc.* (plurality opinion of Rehnquist, C. J., joined by O'Connor and Kennedy, JJ.); (Souter, J., concurring in judgment). Justice Souter points out that zoning is an alternative means of addressing this problem. It is far from clear, however, that zoning imposes less of a burden on expression than the minimal requirement implemented here. In any event, since this is a content-neutral restriction, least restrictive means analysis is not required.

We hold, therefore, that Erie's ordinance is a content neutral regulation that is valid under *O'Brien*. Accordingly, the judgment of the Pennsylvania Supreme Court is reversed, and the case is remanded for further proceedings.

*It is so ordered.*

JUSTICE SCALIA, WITH WHOM JUSTICE THOMAS JOINS, CONCURRING IN THE JUDGMENT.

I

In my view, the case before us here is moot. \*\*\*

II

For the reasons set forth above, I would dismiss this case for want of jurisdiction. Because the Court resolves the threshold mootness question differently and proceeds to address the merits, I will do so briefly as well. I agree that the decision of the Pennsylvania Supreme Court must be reversed, but disagree with the mode of analysis the Court has applied.

The city of Erie self-consciously modeled its ordinance on the public nudity statute we upheld against constitutional challenge in *Barnes v. Glen Theatre, Inc.* (1991), calculating (one would have supposed reasonably) that the courts of Pennsylvania would consider themselves bound by our judgment on a question of federal constitutional law. In *Barnes*, I voted to uphold the challenged Indiana statute "not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all." (opinion concurring in judgment). Erie's ordinance, too, by its terms prohibits not merely nude dancing, but the act—irrespective of whether it is engaged in for expressive purposes—of going nude in public. The facts that a preamble to the ordinance explains that its purpose, in part, is to "limi[t] a recent increase in nude live entertainment," that city council members in supporting the ordinance commented to that effect, and that the ordinance includes in the definition of nudity the exposure of devices simulating that condition, neither make the law any less general in its reach nor demonstrate that what the municipal authorities *really* find objectionable is expression rather than public nakedness. As far as appears (and as seems overwhelmingly likely), the preamble, the councilmembers' comments, and the chosen definition of the prohibited conduct simply reflect the fact that Erie had recently been having a public nudity problem not with streakers, sunbathers, or hot dog vendors, see *Barnes* (Scalia, J., concurring in judgment), but with lap dancers.

There is no basis for the contention that the ordinance does not apply to nudity in theatrical productions such as *Equus* or *Hair*. Its text contains no such limitation. It was stipulated in the trial court that no effort was made to enforce the ordinance against a production of *Equus* involving nudity that was being staged in Erie at the time the ordinance became effective. Notwithstanding Justice Stevens' assertion to the contrary, however, neither in the stipulation, nor elsewhere in the record, does it appear that the city was aware of the nudity—and before this Court counsel for the city attributed nonenforcement not to a general exception for theatrical productions, but to the fact that no one had complained. One instance of nonenforcement—against a play already in production that prosecutorial discretion might reasonably have "grandfathered"—does not render this ordinance discriminatory on its face. To be sure, in the trial court counsel for the city said that "[t]o the extent that the expressive activity that is contained in [such] productions rises to a higher level of protected expression, they would not be [covered],"—but he rested this

assertion upon the provision in the preamble that expressed respect for "fundamental Constitutional guarantees of free speech and free expression," and the provision of Paragraph 6 of the ordinance that provided for severability of unconstitutional provisions. What he was saying there (in order to fend off the overbreadth challenge of respondent, who was in no doubt that the ordinance *did* cover theatrical productions) was essentially what he said at oral argument before this Court: that the ordinance would not be enforceable against theatrical productions if the Constitution forbade it. Surely that limitation does not cause the ordinance to be not generally applicable, in the relevant sense of being *targeted* against expressive conduct.

Moreover, even were I to conclude that the city of Erie had specifically singled out the activity of nude dancing, I still would not find that this regulation violated the First Amendment unless I could be persuaded (as on this record I cannot) that it was the communicative character of nude dancing that prompted the ban. When conduct other than speech itself is regulated, it is my view that the First Amendment is violated only "[w]here the government prohibits conduct precisely because of its communicative attributes." *Barnes* (emphasis deleted). Here, even if one hypothesizes that the city's object was to suppress only nude dancing, that would not establish an intent to suppress what (if anything) nude dancing communicates. I do not feel the need, as the Court does, to identify some "secondary effects" associated with nude dancing that the city could properly seek to eliminate. (I am highly skeptical, to tell the truth, that the addition of pasties and G-strings will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease.) The traditional power of government to foster good morals (*bonos mores*), and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing *itself* is immoral, have not been repealed by the First Amendment.

JUSTICE SOUTER, CONCURRING IN PART AND DISSENTING IN PART.

I join Parts I and II of the Court's opinion and agree with the analytical approach that the plurality employs in deciding this case. Erie's stated interest in combating the secondary effects associated with nude dancing establishments is an interest unrelated to the suppression of expression under *United States v. O'Brien* (1968), and the city's regulation is thus properly considered under the *O'Brien* standards. I do not believe, however, that the current record allows us to say that the city has made a sufficient evidentiary showing to sustain its regulation, and I would therefore vacate the decision of the Pennsylvania Supreme Court and remand the case for further proceedings.

## I

In several recent cases, we have confronted the need for factual justifications to satisfy intermediate scrutiny under the First Amendment. Those cases do not identify with any specificity a particular quantum of evidence, nor do I seek to do so in this brief concurrence. What the cases do make plain, however, is that application of an intermediate scrutiny test to a government's asserted rationale for regulation of expressive activity demands some factual justification to connect that rationale with the regulation in issue.

\*\*\* The focus on evidence appearing in the record is consistent with the approach earlier applied in *Young v. American Mini Theatres, Inc.* (1976) and *Renton v. Playtime Theatres, Inc.* (1986). In *Young*, Detroit adopted a zoning ordinance requiring dispersal of adult theaters through the city and prohibiting them within 500 feet of a residential area. Urban planners and real estate experts attested to the harms created by clusters of such theaters, and we found that "[t]he record discloses a factual basis" supporting the efficacy of Detroit's chosen remedy. In *Renton*, the city similarly enacted a zoning ordinance requiring specified distances between adult theaters and residential zones, churches, parks, or schools. The city "held public hearings, reviewed the experiences of Seattle and other cities, and received a report from the City Attorney's Office advising as to developments in other cities." We found that Renton's failure to conduct its own studies before enacting the ordinance was not fatal; "[t]he First Amendment does not require a city . . . to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."

The upshot of these cases is that intermediate scrutiny requires a regulating government to make some demonstration of an evidentiary basis for the harm it claims to flow from the expressive activity, and for the alleviation expected from the restriction imposed. That evidentiary basis may be borrowed from the records made by other governments if the experience elsewhere is germane to the measure under consideration and actually relied upon. I will assume, further, that the reliance may be shown by legislative invocation of a judicial opinion that accepted an evidentiary foundation as sufficient for a similar regulation. What is clear is that the evidence of reliance must be a matter of demonstrated fact, not speculative supposition.

By these standards, the record before us today is deficient in its failure to reveal any evidence on which Erie may have relied, either for the seriousness of the threatened harm or for the efficacy of its chosen remedy. The plurality does the best it can with the materials to hand, but the pickings are slim. The plurality quotes the ordinance's preamble asserting that over the course of more than a century the city council had expressed "findings" of detrimental secondary effects flowing from lewd and immoral profitmaking activity in public places. But however accurate the recital may be and however honestly the councilors may have held those conclusions to be true over the years, the recitation does not get beyond conclusions on a subject usually fraught with some emotionalism. The plurality recognizes this, of course, but seeks to ratchet up the value of mere conclusions by analogizing them to the legislative facts within an administrative agency's special knowledge, on which action is adequately premised in the absence of evidentiary challenge. The analogy is not obvious; agencies are part of the executive branch and we defer to them in part to allow them the freedom necessary to reconcile competing policies. See *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.* (1984). \*\*\* As to current fact, the city council's closest approach to an evidentiary record on secondary effects and their causes was the statement of one councilor, during the debate over the ordinance, who spoke of increases in sex crimes in a way that might be construed as a reference to secondary effects. But that reference came at the end of a litany of concerns ("free condoms in schools, drive-by shootings,

abortions, suicide machines," and declining student achievement test scores) that do not seem to be secondary effects of nude dancing. Nor does the invocation of *Barnes v. Glen Theatre, Inc.* (1991), in one paragraph of the preamble to Erie's ordinance suffice. The plurality opinion in *Barnes* made no mention of evidentiary showings at all, and though my separate opinion did make a pass at the issue, I did not demand reliance on germane evidentiary demonstrations, whether specific to the statute in question or developed elsewhere. To invoke *Barnes*, therefore, does not indicate that the issue of evidence has been addressed.

There is one point, however, on which an evidentiary record is not quite so hard to find, but it hurts, not helps, the city. The final *O'Brien* requirement is that the incidental speech restriction be shown to be no greater than essential to achieve the government's legitimate purpose. To deal with this issue, we have to ask what basis there is to think that the city would be unsuccessful in countering any secondary effects by the significantly lesser restriction of zoning to control the location of nude dancing, thus allowing for efficient law enforcement, restricting effects on property values, and limiting exposure of the public. The record shows that for 23 years there has been a zoning ordinance on the books to regulate the location of establishments like Kandyland, but the city has not enforced it. One councilor remarked that "I think there's one of the problems. The ordinances are on the books and not enforced. Now this takes place. You really didn't need any other ordinances." Another commented, "I felt very, very strongly, and I feel just as strongly right now, that this is a zoning matter." Even on the plurality's view of the evidentiary burden, this hurdle to the application of *O'Brien* requires an evidentiary response.

\*\*\* Careful readers, and not just those on the Erie City Council, will of course realize that my partial dissent rests on a demand for an evidentiary basis that I failed to make when I concurred in *Barnes*. I should have demanded the evidence then, too, and my mistake calls to mind Justice Jackson's foolproof explanation of a lapse of his own, when he quoted Samuel Johnson, "Ignorance, sir, ignorance." *McGrath v. Kristensen* (1950) (concurring opinion). I may not be less ignorant of nude dancing than I was nine years ago, but after many subsequent occasions to think further about the needs of the First Amendment, I have come to believe that a government must toe the mark more carefully than I first insisted. I hope it is enlightenment on my part, and acceptable even if a little late.

## II

The record before us now does not permit the conclusion that Erie's ordinance is reasonably designed to mitigate real harms. This does not mean that the required showing cannot be made, only that, on this record, Erie has not made it. I would remand to give it the opportunity to do so. Accordingly, although I join with the plurality in adopting the *O'Brien* test, I respectfully dissent from the Court's disposition of the case.

JUSTICE STEVENS, WITH WHOM JUSTICE GINSBURG JOINS, DISSENTING.

Far more important than the question whether nude dancing is entitled to the protection of the First Amendment are the dramatic changes in legal doctrine

that the Court endorses today. Until now, the "secondary effects" of commercial enterprises featuring indecent entertainment have justified only the regulation of their location. For the first time, the Court has now held that such effects may justify the total suppression of protected speech. Indeed, the plurality opinion concludes that admittedly trivial advancements of a State's interests may provide the basis for censorship. The Court's commendable attempt to replace the fractured decision in *Barnes v. Glen Theatre, Inc.* (1991), with a single coherent rationale is strikingly unsuccessful; it is supported neither by precedent nor by persuasive reasoning.

## I

As the preamble to Ordinance No. 75-1994 candidly acknowledges, the council of the city of Erie enacted the restriction at issue "for the purpose of limiting a recent increase in nude live entertainment within the City." Prior to the enactment of the ordinance, the dancers at Kandyland performed in the nude. As the Court recognizes, after its enactment they can perform precisely the same dances if they wear "pasties and G-strings." In both instances, the erotic messages conveyed by the dancers to a willing audience are a form of expression protected by the First Amendment. Despite the similarity between the messages conveyed by the two forms of dance, they are not identical.

If we accept Chief Judge Posner's evaluation of this art form, see *Miller v. South Bend*, 904 F. 2d 1081 (7<sup>th</sup> Cir. 1990) (en banc), the difference between the two messages is significant. The plurality assumes, however, that the difference in the content of the message resulting from the mandated costume change is "*de minimis*." Although I suspect that the patrons of Kandyland are more likely to share Chief Judge Posner's view than the plurality's, for present purposes I shall accept the assumption that the difference in the message is small. The crucial point to remember, however, is that whether one views the difference as large or small, nude dancing still receives First Amendment protection, even if that protection lies only in the "outer ambit" of that Amendment. Erie's ordinance, therefore, burdens a message protected by the First Amendment. If one assumes that the same erotic message is conveyed by nude dancers as by those wearing miniscule costumes, one means of expressing that message is banned; if one assumes that the messages are different, one of those messages is banned. In either event, the ordinance is a total ban.

The plurality relies on the so-called "secondary effects" test to defend the ordinance. The present use of that rationale, however, finds no support whatsoever in our precedents. Never before have we approved the use of that doctrine to justify a total ban on protected First Amendment expression. On the contrary, we have been quite clear that the doctrine would not support that end.

\*\*\* The reason we have limited our secondary effects cases to zoning and declined to extend their reasoning to total bans is clear and straightforward: A dispersal that simply limits the places where speech may occur is a minimal imposition, whereas a total ban is the most exacting of restrictions. The State's interest in fighting presumed secondary effects is sufficiently strong to justify the former, but far too weak to support the latter, more severe burden. \*\*\*

The Court's use of the secondary effects rationale to permit a total ban has grave implications for basic free speech principles. Ordinarily, laws regulating

the primary effects of speech, *i. e.*, the intended persuasive effects caused by the speech, are presumptively invalid. Under today's opinion, a State may totally ban speech based on its secondary effects—which are defined as those effects that "happen to be associated" with speech—yet the regulation is not presumptively invalid. Because the category of effects that "happen to be associated" with speech includes the narrower subset of effects caused by speech, today's holding has the effect of swallowing whole a most fundamental principle of First Amendment jurisprudence.

## II

The plurality's mishandling of our secondary effects cases is not limited to its approval of a total ban. It compounds that error by dramatically reducing the degree to which the State's interest must be furthered by the restriction imposed on speech, and by ignoring the critical difference between secondary effects caused by speech and the incidental effects on speech that may be caused by a regulation of conduct.

In what can most delicately be characterized as an enormous understatement, the plurality concedes that "requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects." To believe that the mandatory addition of pasties and a G-string will have *any* kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible. It would be more accurate to acknowledge, as Justice Scalia does, that there is no reason to believe that such a requirement "will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease." Nevertheless, the plurality concludes that the "less stringent" test announced in *United States v. O'Brien* (1968), "requires only that the regulation further the interest in combating such effects." It is one thing to say, however, that *O'Brien* is more lenient than the "more demanding standard" we have imposed in cases such as *Texas v. Johnson* (1989). It is quite another to say that the test can be satisfied by nothing more than the mere possibility of *de minimis* effects on the neighborhood.

The plurality is also mistaken in equating our secondary effects cases with the "incidental burdens" doctrine applied in cases such as *O'Brien*; and it aggravates the error by invoking the latter line of cases to support its assertion that Erie's ordinance is unrelated to speech. The incidental burdens doctrine applies when "`speech' and `nonspeech' elements are combined in the same course of conduct," and the government's interest in regulating the latter justifies incidental burdens on the former. *O'Brien*. Secondary effects, on the other hand, are indirect consequences of protected speech and may justify regulation of the places where that speech may occur. When a State enacts a regulation, it might focus on the secondary effects of speech as its aim, or it might concentrate on nonspeech related concerns, having no thoughts at all with respect to how its regulation will affect speech—and only later, when the regulation is found to burden speech, justify the imposition as an unintended incidental consequence. But those interests are not the same, and the plurality cannot ignore their differences and insist that both aims are equally unrelated to speech simply because Erie might have "recogniz[ed]" that it could possibly

have had either aim in mind. One can think of an apple and an orange at the same time; that does not turn them into the same fruit.

Of course, the line between governmental interests aimed at conduct and unrelated to speech, on the one hand, and interests arising out of the effects of the speech, on the other, may be somewhat imprecise in some cases. In this case, however, we need not wrestle with any such difficulty because Erie has expressly justified its ordinance with reference to secondary effects. Indeed, if Erie's concern with the effects of the message were unrelated to the message itself, it is strange that the only means used to combat those effects is the suppression of the message. For these reasons, the plurality's argument that "this case is similar to *O'Brien*," is quite wrong, as are its citations to *Clark v. Community for Creative Non-Violence* (1984), and *Ward v. Rock Against Racism* (1989), neither of which involved secondary effects. The plurality cannot have its cake and eat it too—either Erie's ordinance was not aimed at speech and the plurality may attempt to justify the regulation under the incidental burdens test, or Erie has aimed its law at the secondary effects of speech, and the plurality can try to justify the law under that doctrine. But it cannot conflate the two with the expectation that Erie's interests aimed at secondary effects will be rendered unrelated to speech by virtue of this doctrinal polyglot.

Correct analysis of the issue in this case should begin with the proposition that nude dancing is a species of expressive conduct that is protected by the First Amendment. As Chief Judge Posner has observed, nude dancing fits well within a broad, cultural tradition recognized as expressive in nature and entitled to First Amendment protection. The nudity of the dancer is both a component of the protected expression and the specific target of the ordinance. It is pure sophistry to reason from the premise that the regulation of the nudity component of nude dancing is unrelated to the message conveyed by nude dancers. Indeed, both the text of the ordinance and the reasoning in the plurality's opinion make it pellucidly clear that the city of Erie has prohibited nude dancing "*precisely because of its communicative attributes.*" *Barnes* (Scalia, J., concurring in judgment) (emphasis in original); *Barnes* (White, J., dissenting).

### III

The censorial purpose of Erie's ordinance precludes reliance on the judgment in *Barnes* as sufficient support for the Court's holding today. Several differences between the Erie ordinance and the statute at issue in *Barnes* belie the plurality's assertion that the two laws are "almost identical." To begin with, the preamble to Erie's ordinance candidly articulates its agenda, declaring:

"Council specifically wishes to adopt the concept of Public Indecency prohibited by the laws of the State of Indiana, which was approved by the U. S. Supreme Court in *Barnes vs. Glen Theatre Inc.*, . . . for the purpose of limiting a recent increase in nude live entertainment within the City." (emphasis added).

As its preamble forthrightly admits, the ordinance's "purpose" is to "limi[t]" a protected form of speech; its invocation of *Barnes* cannot obliterate that professed aim.

Erie's ordinance differs from the statute in *Barnes* in another respect. In *Barnes*, the Court expressly observed that the Indiana statute had not been given a

limiting construction by the Indiana Supreme Court. As presented to this Court, there was nothing about the law itself that would confine its application to nude dancing in adult entertainment establishments. Erie's ordinance, however, comes to us in a much different posture. In an earlier proceeding in this case, the Court of Common Pleas asked Erie's counsel "what effect would this ordinance have on theater . . . productions such as *Equus*, *Hair*, *O[h!] Calcutta[!]*? Under your ordinance would these things be prevented . . . ?" Counsel responded: "No, they wouldn't, Your Honor." Indeed, as *stipulated* in the record, the city permitted a production of *Equus* to proceed without prosecution, even after the ordinance was in effect, and despite its awareness of the nudity involved in the production. Even if, in light of its broad applicability, the statute in *Barnes* was not aimed at a particular form of speech, Erie's ordinance is quite different. As presented to us, the ordinance is deliberately targeted at Kandyland's type of nude dancing (to the exclusion of plays like *Equus*), in terms of both its applicable scope and the city's enforcement.

This narrow aim is confirmed by the expressed views of the Erie City Councilmembers who voted for the ordinance. The four city councilmembers who approved the measure (of the six total councilmembers) each stated his or her view that the ordinance was aimed specifically at nude adult entertainment, and not at more mainstream forms of entertainment that include total nudity, nor even at nudity in general. One lawmaker observed: "We're not talking about nudity. We're not talking about the theater or art . . . . We're talking about what is indecent and immoral. . . . We're not prohibiting nudity, we're prohibiting nudity when it's used in a lewd and immoral fashion." Though not quite as succinct, the other councilmembers expressed similar convictions. For example, one member illustrated his understanding of the aim of the law by contrasting it with his recollection about high school students swimming in the nude in the school's pool. The ordinance was not intended to cover those incidents of nudity: "But what I'm getting at is [the swimming] wasn't indecent, it wasn't an immoral thing, and yet there was nudity." The same lawmaker then disfavorably compared the nude swimming incident to the activities that occur in "some of these clubs" that exist in Erie—clubs that would be covered by the law. Though such comments could be consistent with an interest in a general prohibition of nudity, the complete absence of commentary on that broader interest, and the councilmembers' exclusive focus on adult entertainment, is evidence of the ordinance's aim. In my view, we need not strain to find consistency with more general purposes when the most natural reading of the record reflects a near obsessive preoccupation with a single target of the law.

The text of Erie's ordinance is also significantly different from the law upheld in *Barnes*. In *Barnes*, the statute defined "nudity" as "the showing of the human male or female genitals" (and certain other regions of the body) "with less than a fully opaque covering." The Erie ordinance duplicates that definition in all material respects, but adds the following to its definition of "[n]udity":

"[T]he exposure of any device, costume, or covering *which gives the appearance of or simulates* the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, *which device simulates and gives the realistic appearance* of nipples and/or areola." (emphasis added).

Can it be doubted that this out-of-the-ordinary definition of "nudity" is aimed directly at the dancers in establishments such as Kandyland? Who else is likely to don such garments? We should not stretch to embrace fanciful explanations when the most natural reading of the ordinance unmistakably identifies its intended target.

It is clear beyond a shadow of a doubt that the Erie ordinance was a response to a more specific concern than nudity in general, namely, nude dancing of the sort found in Kandyland. Given that the Court has not even tried to defend the ordinance's total ban on the ground that its censorship of protected speech might be justified by an overriding state interest, it should conclude that the ordinance is patently invalid. For these reasons, as well as the reasons set forth in Justice White's dissent in *Barnes*, I respectfully dissent.

## Notes

1. What is the doctrine of "secondary effects"? How does it relate to doctrines such as expressive conduct?
2. The term "secondary effects" originated in a footnote authored by Justice Stevens. Writing for the Court in the 1976 case of *Young v. American Mini Theatres*, Stevens referred to the government's determination that a concentration of "adult" movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. He continued, it "is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech." These effects include crime, prostitution, rape, incest, assaults, public intoxication, and lowered property values. But as his opinion in *Erie v. Pap's A.M.* shows, Stevens came to disavow the term. In his opinion, Justice Souter, although he had no part in the term's invention, also expressed regret at his embrace of the doctrine. Why do these Justices believe the doctrine is misguided?

## IV. Children, Regulated Media, and the Internet Age

### *Note: Ginsberg v. New York and New York v. Ferber*

In ***Ginsberg v. New York***, 390 U.S. 629 (1968), Justice Brennan began the opinion for the Court with this issue articulation:

This case presents the question of the constitutionality on its face of a New York criminal obscenity statute which prohibits the sale to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults.

The Ginsbergs, operating "Sam's Stationery and Luncheonette" in Bellmore, Long Island sold some so-called "girlie" magazines to a 16 year old boy. The New York statute criminalized the knowing sale . . . to a minor" under 17 of "(a) any picture . . . which depicts nudity . . . and which is harmful to minors," and "(b) any . . . magazine . . . which contains . . . [such pictures] . . . and which, taken as a whole, is harmful to minors."

The Court held that although the material may not have been obscene under the then-applicable *Roth* definition as applied to adults,

We do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms. Rather [the New York statute] simply adjusts the definition of obscenity "to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . ." of such minors.

Sixteen years later, in ***New York v. Ferber***, 458 U.S. 747(1982), the Court, in an opinion by Justice White essentially carved out "child pornography" from the First Amendment.

Before the Court in *Ferber* was yet another New York statute, this one prohibiting persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material which depicts such a performance. The statute defined "sexual performance" as any performance that includes sexual conduct by such a child, and "sexual conduct" is in turn defined as actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals. Note that the statute encompasses a broader definition than that in the *Miller* standard.

The bookstore proprietor was convicted under the statute for selling films depicting young boys masturbating, and the Appellate Division of the New York Supreme Court affirmed. The New York Court of Appeals reversed, holding that the statute violated the First Amendment as being both underinclusive and overbroad. The court reasoned that the statute could not be construed to include the *Miller* obscenity standard and therefore would prohibit the promotion of materials traditionally entitled to protection under the First Amendment.

The Court reasoned that the standard of *Miller v. California* for determining what is legally obscene was not a satisfactory solution for the child pornography problem; that the advertising and selling of child pornography is the economic motive and integral part of the production of such materials, an activity illegal throughout the Nation; the value of permitting live performances and photographic reproductions of children engaged in lewd exhibitions is exceedingly modest, if not de *minimis*; and recognizing and classifying child pornography as a category of material

outside the First Amendment's protection is not incompatible with the Court's decisions dealing with what speech is unprotected.

“When a definable class of material, such as that covered by the New York statute, bears so heavily and pervasively on the welfare of children engaged in its production, the balance of competing interests is clearly struck, and it is permissible to consider these materials as without the First Amendment's protection.”

The Court also concluded that the New York statute was not unconstitutionally overbroad as forbidding the distribution of material with serious literary, scientific, or educational value, ruling that this is a “paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications,” and whatever overbreadth may exist should be cured on a case by case basis.

### ***Note: Fleeting Expletives and Fleeting Nudity on Broadcast Television***

Several incidents of fleeting expletives and nudity and their regulation by the Federal Communications Commission (FCC) have occupied the Court in two cases, *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (*Fox I*), and *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. \_ (2012) (*Fox II*).

These cases involved several incidents of fleeting expletives sanctioned by the FCC. The first incident of fleeting expletives involved the 2002 Billboard Music Awards, broadcast by Fox Television Stations, Inc., during which the singer Cher exclaimed during an unscripted acceptance speech: “I’ve also had my critics for the last 40 years saying that I was on my way out every year. Right. So f \* \* \* ’em. The second incident involved the broadcast of the Billboard Music Awards the next year, 2003, during which Nicole Richie made the following unscripted remark while presenting an award: “Have you ever tried to get cow s\* \* \* out of a Prada purse? It’s not so f \* \* \*ing simple.” During the 2003 Golden Globe Awards, broadcast by NBC, upon winning the award for Best Original Song, the singer Bono exclaimed: “ ‘This is really, really, f \* \* \* ing brilliant. Really, really great.’

The FCC also took action against an incident of fleeting nudity that involved an episode of *NYPD Blue*, a regular television show broadcast by ABC Television Network. The episode broadcast on February 25, 2003, showed the nude buttocks of an adult female character for approximately seven seconds and for a moment the side of her breast. During the scene, in which the character was preparing to take a shower, a child portraying her boyfriend's son entered the bathroom. “A moment of awkwardness followed.” The FCC determined that, regardless of medical

definitions, displays of buttocks fell within the category of displays of sexual or excretory organs because the depiction was “widely associated with sexual arousal and closely associated by most people with excretory activities.” The scene was deemed patently offensive as measured by contemporary community standards, and the Commission determined that “[t]he female actor's nudity is presented in a manner that clearly panders to and titillates the audience.”

In *Fox I*, a divided Court decided an administrative law issue and the majority concluded that the FCC’s change in its previous policy regarding enforcement of so-called indecency ban, under which nonrepetitive use of expletive was per se nonactionable, in favor of context-based approach which allowed it to treat as actionably indecent even isolated uses of sexual and excretory words in awards show broadcasts, was neither arbitrary nor capricious.

In *Fox II*, a unanimous Court concluded that because the FCC failed to give Fox or ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent, the FCC’s standards as applied to these broadcasts were so vague as to violate due process.

However, while neither *Fox I* or *Fox II* rested on the First Amendment, free speech issues permeated the cases. Excerpts from the opinions follow.

### ***Fox I***

JUSTICE THOMAS, CONCURRING.

I join the Court's opinion, which, as a matter of administrative law, correctly upholds the Federal Communications Commission's (FCC) policy with respect to indecent broadcast speech under the Administrative Procedure Act. I write separately, however, to note the questionable viability of the two precedents that support the FCC's assertion of constitutional authority to regulate the programming at issue in this case. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). *Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity. “The text of the First Amendment makes no distinctions among print, broadcast, and cable media, but we have done so” in these cases.

In *Red Lion*, this Court upheld the so-called “fairness doctrine,” a Government requirement “that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage.” The decision relied heavily on the scarcity of available broadcast frequencies. According to the Court, because broadcast spectrum was so scarce, it “could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard.” To this end, the Court concluded that the Government should be “permitted to put

restraints on licensees in favor of others whose views should be expressed on this unique medium.” Applying this principle, the Court held that “[i]t does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern.”

*Red Lion* specifically declined to answer whether the First Amendment authorized the Government's “refusal to permit the broadcaster to carry a particular program or to publish his own views[,] ... [or] government censorship of a particular program.” But then in *Pacifica*, this Court rejected a challenge to the FCC's authority to impose sanctions on the broadcast of indecent material. [In the plurality opinion], relying on *Red Lion*, the Court noted that “broadcasting ... has received the most limited First Amendment protection.” The Court also emphasized the “uniquely pervasive presence” of the broadcast media in Americans' lives and the fact that broadcast programming was “uniquely accessible to children.”

This deep intrusion into the First Amendment rights of broadcasters, which the Court has justified based only on the nature of the medium, is problematic on two levels. First, instead of looking to first principles to evaluate the constitutional question, the Court relied on a set of transitory facts, *e.g.*, the “scarcity of radio frequencies,” to determine the applicable First Amendment standard. But the original meaning of the Constitution cannot turn on modern necessity: “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.” \*\*\* Indeed, the logical weakness of *Red Lion* and *Pacifica* has been apparent for some time: “It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media.”

Highlighting the doctrinal incoherence of *Red Lion* and *Pacifica*, the Court has declined to apply the lesser standard of First Amendment scrutiny imposed on broadcast speech to federal regulation of telephone dial-in services, see *Sable Communications of Cal., Inc. v. FCC* (1989), cable television programming, see *Turner Broadcasting System, Inc. v. FCC* (1994), and the Internet, see *Reno v. American Civil Liberties Union* (1997). “There is no justification for this apparent dichotomy in First Amendment jurisprudence. Whatever the merits of *Pacifica* when it was issued [,] ... it makes no sense now.” The justifications relied on by the Court in *Red Lion* and *Pacifica*—“spectrum scarcity, intrusiveness, and accessibility to children—neither distinguish broadcast from cable, nor explain the relaxed application of the principles of the First Amendment to broadcast.”

Second, even if this Court's disfavored treatment of broadcasters under the First Amendment could have been justified at the time of *Red Lion* and *Pacifica*, dramatic technological advances have eviscerated the factual assumptions underlying those decisions. Broadcast spectrum is significantly less scarce than it was 40 years ago. As NBC notes, the number of over-the-air broadcast stations grew from 7,411 in 1969, when *Red Lion* was issued, to 15,273 by the end of 2004. And the trend should continue with broadcast television's imminent switch from analog to digital transmission, which will allow the FCC to “stack broadcast channels right beside one another along the spectrum, and

ultimately utilize significantly less than the 400 MHz of spectrum the analog system absorbs today.”

Moreover, traditional broadcast television and radio are no longer the “uniquely pervasive” media forms they once were. For most consumers, traditional broadcast media programming is now bundled with cable or satellite services. Broadcast and other video programming is also widely available over the Internet. And like radio and television broadcasts, Internet access is now often freely available over the airwaves and can be accessed by portable computer, cell phones, and other wireless devices. The extant facts that drove this Court to subject broadcasters to unique disfavor under the First Amendment simply do not exist today.

These dramatic changes in factual circumstances might well support a departure from precedent under the prevailing approach to *stare decisis*. \*\*\* For all these reasons, I am open to reconsideration of *Red Lion* and *Pacifica* in the proper case.

JUSTICE GINSBURG, DISSENTING.

The mainspring of this case is a Government restriction on spoken words. This appeal, I recognize, arises under the Administrative Procedure Act. \*\*\* The Commission's bold stride beyond the bounds of *FCC v. Pacifica Foundation*, (1978), I agree [with Breyer, dissenting] exemplified “arbitrary” and “capricious” decisionmaking. I write separately only to note that there is no way to hide the long shadow the First Amendment casts over what the Commission has done. Today's decision does nothing to diminish that shadow.

More than 30 years ago, a sharply divided Court allowed the FCC to sanction a midafternoon radio broadcast of comedian George Carlin's 12-minute “Filthy Words” monologue. Carlin satirized the “original” seven dirty words and repeated them relentlessly in a variety of colloquialisms. The monologue was aired as part of a program on contemporary attitudes toward the use of language. In rejecting the First Amendment challenge, the Court “emphasize[d] the narrowness of [its] holding.” In this regard, the majority stressed that the Carlin monologue deliberately repeated the dirty words “over and over again.” Justice Powell, concurring, described Carlin's speech as “verbal shock treatment.”

In contrast, the unscripted fleeting expletives at issue here are neither deliberate nor relentlessly repetitive. Nor does the Commission's policy home in on expressions used to describe sexual or excretory activities or organs. Spontaneous utterances used simply to convey an emotion or intensify a statement fall within the order's compass. *Cf. Cohen v. California* (1971) (“[W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.”); *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC* (1996) (Kennedy, J., concurring in part, concurring in judgment in part, and dissenting in part) (a word

categorized as indecent “often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power”).

The *Pacifica* decision, however it might fare on reassessment was tightly cabined, and for good reason. In dissent, Justice Brennan observed that the Government should take care before enjoining the broadcast of words or expressions spoken by many “in our land of cultural pluralism.” That comment, fitting in the 1970's, is even more potent today. If the reserved constitutional question reaches this Court, we should be mindful that words unpalatable to some may be “commonplace” for others, “the stuff of everyday conversations.”

## ***Fox II***

KENNEDY, J., DELIVERED THE OPINION OF THE COURT, IN WHICH ROBERTS, C.J., AND SCALIA, THOMAS, BREYER, ALITO, AND KAGAN, JJ., JOINED. GINSBURG, J., FILED AN OPINION CONCURRING IN THE JUDGMENT. SOTOMAYOR, J., TOOK NO PART IN THE CONSIDERATION OR DECISION OF THE CASES.

KENNEDY FOR THE COURT.

It is necessary to make three observations about the scope of this decision. First, because the Court resolves these cases on fair notice grounds under the Due Process Clause, it need not address the First Amendment implications of the Commission's indecency policy. It is argued that this Court's ruling in *Pacifica* (and the less rigorous standard of scrutiny it provided for the regulation of broadcasters), should be overruled because the rationale of that case has been overtaken by technological change and the wide availability of multiple other choices for listeners and viewers. The Government for its part maintains that when it licenses a conventional broadcast spectrum, the public may assume that the Government has its own interest in setting certain standards. These arguments need not be addressed here. In light of the Court's holding that the Commission's policy failed to provide fair notice it is unnecessary to reconsider *Pacifica* at this time.

This leads to a second observation. Here, the Court rules that Fox and ABC lacked notice at the time of their broadcasts that the material they were broadcasting could be found actionably indecent under then-existing policies. Given this disposition, it is unnecessary for the Court to address the constitutionality of the current indecency policy as expressed in the Golden Globes Order and subsequent adjudications. The Court adheres to its normal practice of declining to decide cases not before it. *See, e.g., Sweatt v. Painter* (1950) (“Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court”).

Third, this opinion leaves the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements. And it leaves the courts free to review the current policy or any modified policy in light of its content and application.

JUSTICE GINSBURG, CONCURRING IN THE JUDGMENT.

In my view, the Court's decision in *FCC v. Pacifica Foundation* (1978) was wrong when it issued. Time, technological advances, and the Commission's untenable rulings in the cases now before the Court show why *Pacifica* bears reconsideration. Cf. *FCC v. Fox Television Stations, Inc.* (2009) (Thomas, J., concurring).

## *United States v. Williams*

553 U.S. 285 (2008)

SCALIA, J., DELIVERED THE OPINION OF THE COURT, IN WHICH ROBERTS, C. J., AND STEVENS, KENNEDY, THOMAS, BREYER, AND ALITO, JJ., JOINED. STEVENS, J., FILED A CONCURRING OPINION, IN WHICH BREYER, J., JOINED. SOUTER, J., FILED A DISSENTING OPINION, IN WHICH GINSBURG, J., JOINED.

JUSTICE SCALIA DELIVERED THE OPINION OF THE COURT.

Section 2252A(a)(3)(B) of Title 18, United States Code, criminalizes, in certain specified circumstances, the pandering or solicitation of child pornography. This case presents the question whether that statute is overbroad under the First Amendment or impermissibly vague under the Due Process Clause of the Fifth Amendment.

I

A

We have long held that obscene speech--sexually explicit material that violates fundamental notions of decency--is not protected by the First Amendment. See *Roth v. United States* (1957). But to protect explicit material that has social value, we have limited the scope of the obscenity exception, and have overturned convictions for the distribution of sexually graphic but nonobscene material. See *Miller v. California* (1973).

Over the last 25 years, we have confronted a related and overlapping category of proscribable speech: child pornography. See *Ashcroft v. Free Speech Coalition* (2002); *Osborne v. Ohio* (1990); *New York v. Ferber* (1982). This consists of sexually explicit visual portrayals that feature children. We have held that a statute which proscribes the distribution of all child pornography, even material that does not qualify as obscenity, does not on its face violate the First Amendment. Moreover, we have held that the government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults.

The broad authority to proscribe child pornography is not, however, unlimited. Four Terms ago, we held facially overbroad two provisions of the federal Child Pornography Protection Act of 1996 (CPPA). *Ashcroft v. Free Speech Coalition*. The first of these banned the possession and distribution of "any visual depiction" that "is, or appears to be, of a minor engaging in sexually explicit conduct," even if it contained only youthful-looking adult actors or virtual images of children generated by a computer. This was invalid, we explained,

because the child-protection rationale for speech restriction does not apply to materials produced without children. The second provision at issue in *Free Speech Coalition* criminalized the possession and distribution of material that had been pandered as child pornography, regardless of whether it actually was that. A person could thus face prosecution for possessing unobjectionable material that someone else had pandered. We held that this prohibition, which did "more than prohibit pandering," was also facially overbroad. After our decision in *Free Speech Coalition*, Congress went back to the drawing board and produced legislation with the unlikely title of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, 117 Stat. 650. We shall refer to it as the Act. Section 503 of the Act amended 18 U.S.C. §2252A to add a new pandering and solicitation provision, relevant portions of which now read as follows:

"(a) Any person who--

"(3) knowingly--

"(B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains--

"(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

"(ii) a visual depiction of an actual minor engaging in sexually explicit conduct, "shall be punished as provided in subsection (b)."

Section 2256(2)(A) defines "sexually explicit conduct" as

"actual or simulated--

"(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

"(ii) bestiality;

"(iii) masturbation;

"(iv) sadistic or masochistic abuse; or

"(v) lascivious exhibition of the genitals or pubic area of any person."

Violation of §2252A(a)(3)(B) incurs a minimum sentence of 5 years imprisonment and a maximum of 20 years.

The Act's express findings indicate that Congress was concerned that limiting the child-pornography prohibition to material that could be *proved* to feature actual children, as our decision in *Free Speech Coalition* required, would enable many child pornographers to evade conviction. The emergence of new technology and the repeated retransmission of picture files over the Internet could make it nearly impossible to prove that a particular image was produced using real children--even though "[t]here is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children," virtual imaging being prohibitively expensive.

## B

The following facts appear in the opinion of the Eleventh Circuit. On April 26, 2004, respondent Michael Williams, using a sexually explicit screen name, signed in to a public Internet chat room. A Secret Service agent had also signed

in to the chat room under the moniker "Lisa n Miami." The agent noticed that Williams had posted a message that read: "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam." The agent struck up a conversation with Williams, leading to an electronic exchange of nonpornographic pictures of children. (The agent's picture was in fact a doctored photograph of an adult.) Soon thereafter, Williams messaged that he had photographs of men molesting his 4-year-old daughter. Suspicious that "Lisa n Miami" was a law-enforcement agent, before proceeding further Williams demanded that the agent produce additional pictures. When he did not, Williams posted the following public message in the chat room: "HERE ROOM; I CAN PUT UPLINK CUZ IM FOR REAL--SHE CANT." Appended to this declaration was a hyperlink that, when clicked, led to seven pictures of actual children, aged approximately 5 to 15, engaging in sexually explicit conduct and displaying their genitals. The Secret Service then obtained a search warrant for Williams's home, where agents seized two hard drives containing at least 22 images of real children engaged in sexually explicit conduct, some of it sadomasochistic.

Williams was charged with one count of pandering child pornography under §2252A(a)(3)(B) and one count of possessing child pornography under §2252A(a)(5)(B). He pleaded guilty to both counts but reserved the right to challenge the constitutionality of the pandering conviction. The District Court rejected his challenge, and sentenced him to concurrent 60-month sentences on the two counts. The United States Court of Appeals for the Eleventh Circuit reversed the pandering conviction, holding that the statute was both overbroad and impermissibly vague.

We granted certiorari.

## II

### A

According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. *Virginia v. Hicks* (2003). On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional--particularly a law directed at conduct so antisocial that it has been made criminal--has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. Invalidation for overbreadth is ""strong medicine"" that is not to be "casually employed."

The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers. Generally speaking, §2252A(a)(3)(B) prohibits offers to provide and requests to obtain child pornography. The statute does not require the actual existence of child pornography. In this respect, it differs from the statutes in *Ferber*, *Osborne*, and *Free Speech Coalition*, which prohibited the possession or distribution of child pornography. Rather than targeting the underlying material, this statute bans the collateral speech that introduces

such material into the child-pornography distribution network. Thus, an Internet user who solicits child pornography from an undercover agent violates the statute, even if the officer possesses no child pornography. Likewise, a person who advertises virtual child pornography as depicting actual children also falls within the reach of the statute.

The statute's definition of the material or purported material that may not be pandered or solicited precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller*: obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct.

A number of features of the statute are important to our analysis:

First, the statute includes a scienter requirement. The first word of §2252A(a)(3)--"knowingly"--applies to both of the immediately following subdivisions, both the previously existing §2252A(a)(3)(A) and the new §2252A(a)(3)(B) at issue here. We think that the best reading of the term in context is that it applies to every element of the two provisions. This is not a case where grammar or structure enables the challenged provision or some of its parts to be read apart from the "knowingly" requirement. Here "knowingly" introduces the challenged provision itself, making clear that it applies to that provision in its entirety; and there is no grammatical barrier to reading it that way.

Second, the statute's string of operative verbs--"advertises, promotes, presents, distributes, or solicits"--is reasonably read to have a transactional connotation. That is to say, the statute penalizes speech that accompanies or seeks to induce a transfer of child pornography--via reproduction or physical delivery--from one person to another. For three of the verbs, this is obvious: advertising, distributing, and soliciting are steps taken in the course of an actual or proposed transfer of a product, typically but not exclusively in a commercial market. When taken in isolation, the two remaining verbs--"promotes" and "presents"--are susceptible of multiple and wide-ranging meanings. In context, however, those meanings are narrowed by the commonsense canon of *noscitur a sociis*--which counsels that a word is given more precise content by the neighboring words with which it is associated. "Promotes," in a list that includes "solicits," "distributes," and "advertises," is most sensibly read to mean the act of recommending purported child pornography to another person for his acquisition. See American Heritage Dictionary 1403 (4th ed. 2000) (def. 4: "To attempt to sell or popularize by advertising or publicity"). Similarly, "presents," in the context of the other verbs with which it is associated, means showing or offering the child pornography to another person with a view to his acquisition. (def. 3a: "To make a gift or award of"). (The envisioned acquisition, of course, could be an electronic one, for example reproduction of the image on the recipient's computer screen.)

To be clear, our conclusion that all the words in this list relate to transactions is not to say that they relate to *commercial* transactions. One could certainly "distribute" child pornography without expecting payment in return. Indeed, in much Internet file sharing of child pornography each participant makes his files available for free to other participants--as Williams did in this case.

"Distribution may involve sophisticated pedophile rings or organized crime groups that operate for profit, but in many cases, is carried out by individual amateurs who seek no financial reward." Child Pornography on the Internet 9. To run afoul of the statute, the speech need only accompany or seek to induce the transfer of child pornography from one person to another.

Third, the phrase "in a manner that reflects the belief" includes both subjective and objective components. "[A] manner that reflects the belief" is quite different from "a manner that would give one cause to believe." The first formulation suggests that the defendant must actually have held the subjective "belief" that the material or purported material was child pornography. Thus, a misdescription that leads the listener to believe the defendant is offering child pornography, when the defendant in fact does not believe the material is child pornography, does not violate this prong of the statute. (It may, however, violate the "manner ... that is intended to cause another to believe" prong if the misdescription is intentional.) There is also an objective component to the phrase "manner that reflects the belief." The statement or action must objectively manifest a belief that the material is child pornography; a mere belief, without an accompanying statement or action that would lead a reasonable person to understand that the defendant holds that belief, is insufficient.

Fourth, the other key phrase, "in a manner . . . that is intended to cause another to believe," contains only a subjective element: The defendant must "intend" that the listener believe the material to be child pornography, and must select a manner of "advertising, promoting, presenting, distributing, or soliciting" the material that *he* thinks will engender that belief--whether or not a reasonable person would think the same. (Of course in the ordinary case the proof of the defendant's intent will be the fact that, as an objective matter, the manner of "advertising, promoting, presenting, distributing, or soliciting" plainly sought to convey that the material was child pornography.)

Fifth, the definition of "sexually explicit conduct" (the visual depiction of which, engaged in by an actual minor, is covered by the Act's pandering and soliciting prohibition even when it is not obscene) is very similar to the definition of "sexual conduct" in the New York statute we upheld against an overbreadth challenge in *Ferber*. That defined "sexual conduct" as "'actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.'" Congress used essentially the same constitutionally approved definition in the present Act. If anything, the fact that the defined term here is "sexually *explicit* conduct," rather than (as in *Ferber*) merely "sexual conduct," renders the definition more immune from facial constitutional attack. "[S]imulated sexual intercourse" (a phrase found in the *Ferber* definition as well) is even less susceptible here of application to the sorts of sex scenes found in R-rated movies--which suggest that intercourse is taking place without explicitly depicting it, and without causing viewers to believe that the actors are actually engaging in intercourse. "Sexually *explicit* conduct" connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And "simulated" sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer

to believe that the actors actually engaged in that conduct on camera. Critically, unlike in *Free Speech Coalition*, §2252A(a)(3)(B)(ii)'s requirement of a "visual depiction of an actual minor" makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This change eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term "simulated sexual intercourse."

## B

We now turn to whether the statute, as we have construed it, criminalizes a substantial amount of protected expressive activity.

Offers to engage in illegal transactions are categorically excluded from First Amendment protection. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations* (1973); *Giboney v. Empire Storage & Ice Co.* (1949). One would think that this principle resolves the present case, since the statute criminalizes only offers to provide or requests to obtain contraband--child obscenity and child pornography involving actual children, both of which are proscribed, see 18 U.S.C. §1466A(a), §2252A(a)(5)(B) (2000 ed., Supp. V), and the proscription of which is constitutional, see *Free Speech Coalition*. The Eleventh Circuit, however, believed that the exclusion of First Amendment protection extended only to *commercial* offers to provide or receive contraband: "Because [the statute] is not limited to commercial speech but extends also to non-commercial promotion, presentation, distribution, and solicitation, we must subject the content-based restriction of the PROTECT Act pandering provision to strict scrutiny ...."

This mistakes the rationale for the categorical exclusion. It is based not on the less privileged First Amendment status of commercial speech, see *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.* (1980), but on the principle that offers to give or receive what it is unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protection. Many long established criminal proscriptions--such as laws against conspiracy, incitement, and solicitation--criminalize speech (commercial or not) that is intended to induce or commence illegal activities. See, *e.g.*, ALI, Model Penal Code §5.02(1) (1985) (solicitation to commit a crime); §5.03(1)(a) (conspiracy to commit a crime). Offers to provide or requests to obtain unlawful material, whether as part of a commercial exchange or not, are similarly undeserving of First Amendment protection. It would be an odd constitutional principle that permitted the government to prohibit offers to sell illegal drugs, but not offers to give them away for free.

To be sure, there remains an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality. See *Brandenburg v. Ohio* (1969) (*per curiam*). The Act before us does not prohibit advocacy of child pornography, but only offers to provide or requests to obtain it. There is no doubt that this prohibition falls well within constitutional bounds. The constitutional defect we found in the pandering provision at issue in *Free Speech Coalition* was that it went *beyond* pandering to prohibit possession of material that could not otherwise be proscribed.

In sum, we hold that offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment. Since the Eleventh Circuit erroneously concluded otherwise, it applied strict scrutiny to §2252A(a)(3)(B), lodging three fatal objections. We address these objections because they could be recast as arguments that Congress has gone beyond the categorical exception.

The Eleventh Circuit believed it a constitutional difficulty that no child pornography need exist to trigger the statute. In its view, the fact that the statute could punish a "braggart, exaggerator, or outright liar" rendered it unconstitutional. That seems to us a strange constitutional calculus. Although we have held that the government can ban *both* fraudulent offers *and* offers to provide illegal products, the Eleventh Circuit would forbid the government from punishing *fraudulent offers to provide illegal products*. We see no logic in that position; if anything, such statements are doubly excluded from the First Amendment.

\*\*\* [T]he Eleventh Circuit also thought that the statute could apply to someone who subjectively believes that an innocuous picture of a child is "lascivious." (Clause (v) of the definition of "sexually explicit conduct" is "lascivious exhibition of the genitals or pubic area of any person.") That is not so. The defendant must believe that the picture contains certain material, and that material in fact (and not merely in his estimation) must meet the statutory definition. Where the material at issue is a harmless picture of a child in a bathtub and the defendant, knowing that material, erroneously believes that it constitutes a "lascivious display of the genitals," the statute has no application.

Williams and *amici* raise other objections, which demonstrate nothing so forcefully as the tendency of our overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals. Williams argues, for example, that a person who offers nonpornographic photographs of young girls to a pedophile could be punished under the statute if the pedophile secretly expects that the pictures will contain child pornography. That hypothetical does not implicate the statute, because the offeror does not hold the belief or intend the recipient to believe that the material is child pornography.

*Amici* contend that some advertisements for mainstream Hollywood movies that depict underage characters having sex violate the statute. We think it implausible that a reputable distributor of Hollywood movies, such as Amazon.com, believes that one of these films contains *actual* children engaging in *actual or simulated* sex on camera; and even more implausible that Amazon.com would *intend* to make its customers believe such a thing. The average person understands that sex scenes in mainstream movies use nonchild actors, depict sexual activity in a way that would not rise to the explicit level necessary under the statute, or, in most cases, both.

There was raised at oral argument the question whether turning child pornography over to the police might not count as "present[ing]" the material. An interpretation of "presents" that would include turning material over to the authorities would of course be self-defeating in a statute that looks to the prosecution of people who deal in child pornography. And it would effectively nullify §2252A(d), which provides an affirmative defense to the possession ban if

a defendant promptly delivers child pornography to a law-enforcement agency. (The possession offense would simply be replaced by a pandering offense for delivering the material to law-enforcement officers.) In any event, the verb "present"--along with "distribute" and "advertise," as well as "give," "lend," "deliver," and "transfer"--was used in the definition of "promote" in *Ferber*. Despite that inclusion, we had no difficulty concluding that the New York statute survived facial challenge. \*\*\*

It was also suggested at oral argument that the statute might cover documentary footage of atrocities being committed in foreign countries, such as soldiers raping young children. Perhaps so, if the material rises to the high level of explicitness that we have held is required. That sort of documentary footage could of course be the subject of an as-applied challenge. The courts presumably would weigh the educational interest in the dissemination of information about the atrocities against the government's interest in preventing the distribution of materials that constitute "a permanent record" of the children's degradation whose dissemination increases "the harm to the child." Assuming that the constitutional balance would have to be struck in favor of the documentary, the existence of that exception would not establish that the statute is *substantially* overbroad. The "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council of Los Angeles v. Taxpayers for Vincent* (1984). In the vast majority of its applications, this statute raises no constitutional problems whatever.

Finally, the dissent accuses us of silently overruling our prior decisions in *Ferber* and *Free Speech Coalition*. \*\*\* We fail to see what First Amendment interest would be served by drawing a distinction between two defendants who attempt to acquire contraband, one of whom happens to be mistaken about the contraband nature of what he would acquire. Is Congress forbidden from punishing those who attempt to acquire what they believe to be national-security documents, but which are actually fakes? To ask is to answer. There is no First Amendment exception from the general principle of criminal law that a person attempting to commit a crime need not be exonerated because he has a mistaken view of the facts.

### III

As an alternative ground for facial invalidation, the Eleventh Circuit held that §2252A(a)(3)(B) is void for vagueness. Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. \*\*\*

Child pornography harms and debases the most defenseless of our citizens. Both the State and Federal Governments have sought to suppress it for many years, only to find it proliferating through the new medium of the Internet. This Court held unconstitutional Congress's previous attempt to meet this new threat, and Congress responded with a carefully crafted attempt to eliminate the First Amendment problems we identified. As far as the provision at issue in this case is concerned, that effort was successful.

The judgment of the Eleventh Circuit is reversed.

*It is so ordered.*

JUSTICE STEVENS, WITH WHOM JUSTICE BREYER JOINS, CONCURRING.

My conclusion that this statutory provision is not facially unconstitutional is buttressed by two interrelated considerations on which Justice Scalia finds it unnecessary to rely. First, I believe the result to be compelled by the principle that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."

Second, to the extent the statutory text alone is unclear, our duty to avoid constitutional objections makes it especially appropriate to look beyond the text in order to ascertain the intent of its drafters. It is abundantly clear from the provision's legislative history that Congress' aim was to target materials advertised, promoted, presented, distributed, or solicited with a lascivious purpose--that is, with the intention of inciting sexual arousal. \*\*\*

JUSTICE SOUTER, WITH WHOM JUSTICE GINSBURG JOINS, DISSENTING.

Dealing in obscenity is penalized without violating the First Amendment, but as a general matter pornography lacks the harm to justify prohibiting it. If, however, a photograph (to take the kind of image in this case) shows an actual minor child as a pornographic subject, its transfer and even its possession may be made criminal. *New York v. Ferber* (1982); *Osborne v. Ohio* (1990). The exception to the general rule rests not on the content of the picture but on the need to foil the exploitation of child subjects, and the justification limits the exception: only pornographic photographs of actual children may be prohibited, *Ashcroft v. Free Speech Coalition* (2002). Thus, just six years ago the Court struck down a statute outlawing particular material merely represented to be child pornography, but not necessarily depicting actual children.

The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (Act), 117 Stat. 650, was enacted in the wake of *Free Speech Coalition*. The Act responds by avoiding any direct prohibition of transactions in child pornography when no actual minors may be pictured; instead, it prohibits proposals for transactions in pornography when a defendant manifestly believes or would induce belief in a prospective party that the subject of an exchange or exhibition is or will be an actual child, not an impersonated, simulated or "virtual" one, or the subject of a composite created from lawful photos spliced together. The Act specifically prohibits three types of those proposals. It outlaws solicitation of child pornography, as well as two distinct kinds of offers: those "advertis[ing]" or "promot[ing]" prosecutable child pornography, which recommend the material with the implication that the speaker can make it available, and those "present[ing]" or "distribut[ing]" such child pornography, which make the material available to anyone who chooses to take it.

The Court holds it is constitutional to prohibit these proposals, and up to a point I do not disagree. In particular, I accept the Court's explanation that Congress may criminalize proposals unrelated to any extant image. I part ways

from the Court, however, on the regulation of proposals made with regard to specific, existing representations. Under the new law, the elements of the pandering offense are the same, whether or not the images are of real children. As to those that do not show real children, of course, a transaction in the material could not be prosecuted consistently with the First Amendment, and I believe that maintaining the First Amendment protection of expression we have previously held to cover fake child pornography requires a limit to the law's criminalization of pandering proposals. In failing to confront the tension between ostensibly protecting the material pandered while approving prosecution of the pandering of that same material, and in allowing the new pandering prohibition to suppress otherwise protected speech, the Court undermines *Ferber* and *Free Speech Coalition* in both reasoning and result. This is the significant element of today's holding, and I respectfully dissent from it.

I

[omitted]

II

What justification can there be for making independent crimes of proposals to engage in transactions that may include protected materials? The Court gives three answers, none of which comes to grips with the difficulty raised by the question. The first says it is simply wrong to say that the Act makes it criminal to propose a lawful transaction, since an element of the forbidden proposal must express a belief or inducement to believe that the subject of the proposed transaction shows actual children. But this does not go to the point. The objection is not that the Act criminalizes a proposal for a transaction described as being in virtual (that is, protected) child pornography. The point is that some proposals made criminal, because they express a belief that they refer to real child pornography, will relate to extant material that does not, or cannot be, demonstrated to show real children and so may not be prohibited. When a proposal covers existing photographs, the Act does not require that the requisite belief (manifested or encouraged) in the reality of the subjects be a correct belief. Prohibited proposals may relate to transactions in lawful, as well as unlawful, pornography.

Much the same may be said about the Court's second answer, that a proposal to commit a crime enjoys no speech protection. For the reason just given, that answer does not face up to the source of the difficulty: the action actually contemplated in the proposal, the transfer of the particular image, is not criminal if it turns out that an actual child is not shown in the photograph. If *Ferber* and *Free Speech Coalition* are good law, the facts sufficient for conviction under the Act do not suffice to show that the image (perhaps merely simulated), and thus a transfer of that image, are outside the bounds of constitutional protection. For this reason, it is not enough just to say that the First Amendment does not protect proposals to commit crimes. For that rule rests on the assumption that the proposal is actually to commit a crime, not to do an act that may turn out to be no crime at all. Why should the general rule of unprotected criminal proposals cover a case like the proposal to transfer what may turn out to be fake child pornography?

The Court's third answer analogizes the proposal to an attempt to commit a crime, and relies on the rule of criminal law that an attempt is criminal even

when some impediment makes it impossible to complete the criminal act (the possible impediment here being the advanced age, say, or simulated character of the child-figure). Although the actual transfer the speaker has in mind may not turn out to be criminal, the argument goes, the transfer intended by the speaker is criminal, because the speaker believes that the contemplated transfer will be of real child pornography, and transfer of real child pornography is criminal. The fact that the circumstances are not as he believes them to be, because the material does not depict actual minors, is no defense to his attempt to engage in an unlawful transaction.

But invoking attempt doctrine to dispense with *Free Speech Coalition's* real-child requirement in the circumstances of this case is incoherent with the Act, and it fails to fit the paradigm of factual impossibility or qualify for an extended version of that rule. \*\*\* Treating pandering itself as a species of attempt would thus mean that there is a statutory, inchoate offense of attempting to attempt to commit a substantive child pornography crime. A metaphysician could imagine a system like this, but the universe of inchoate crimes is not expandable indefinitely under the actual principles of criminal law, let alone when First Amendment protection is threatened.

\*\*\* Where Government documents, blank cartridges, and baking powder are involved, deterrence can be promoted without compromising any other important policy, which is not true of criminalizing mistaken child pornography proposals. There are three dispositive differences. As for the first, if the law can criminalize proposals for transactions in fake as well as true child pornography as if they were like attempts to sell cocaine that turned out to be baking powder, constitutional law will lose something sufficiently important to have made it into multiple holdings of this Court, and that is the line between child pornography that may be suppressed and fake child pornography that falls within First Amendment protection. No one can seriously assume that after today's decision the Government will go on prosecuting defendants for selling child pornography (requiring a showing that a real child is pictured, under *Free Speech Coalition*); it will prosecute for merely proposing a pornography transaction manifesting or inducing the belief that a photo is real child pornography, free of any need to demonstrate that any extant underlying photo does show a real child. If the Act can be enforced, it will function just as it was meant to do, by merging the whole subject of child pornography into the offense of proposing a transaction, dispensing with the real-child element in the underlying subject. And eliminating the need to prove a real child will be a loss of some consequence. This is so not because there will possibly be less pornography available owing to the greater ease of prosecuting, but simply because there must be a line between what the Government may suppress and what it may not, and a segment of that line will be gone. This Court went to great pains to draw it in *Ferber* and *Free Speech Coalition*; it was worth drawing and it is worth respecting now in facing the attempt to end-run that line through the provisions of the Act.

The second reason for treating child pornography differently follows from the first. If the deluded drug dealer is held liable for an attempt crime there is no risk of eliminating baking powder from trade in lawful commodities. Likewise, if the mistaken spy is convicted of attempting to disclose classified national

security documents there will be no worry that lawful speech will be suppressed as a consequence; any unclassified documents in question can be quoted in the newspaper, other unclassified documents will circulate, and analysts of politics and foreign policy will be able to rely on them. But if the Act can effectively eliminate the real-child requirement when a proposal relates to extant material, a class of protected speech will disappear. True, what will be lost is short on merit, but intrinsic value is not the reason for protecting unpopular expression.

Finally, if the Act stands when applied to identifiable, extant pornographic photographs, then in practical terms *Ferber* and *Free Speech Coalition* fall. They are left as empty as if the Court overruled them formally, and when a case as well considered and as recently decided as *Free Speech Coalition* is put aside (after a mere six years) there ought to be a very good reason. Another pair of First Amendment cases come to mind, compare *Minersville School Dist. v. Gobotis* (1940), with *West Virginia Bd. of Ed. v. Barnette* (1943). In *Barnette*, the Court set out the reason for its abrupt turn in overruling *Gobotis* after three years, but here nothing is explained. Attempts with baking powder and unclassified documents can be punished without damage to confidence in precedent; suppressing protected pornography cannot be.

These differences should be dispositive. Eliminating the line between protected and unprotected speech, guaranteeing the suppression of a category of expression previously protected, and reducing recent and carefully considered First Amendment precedents to empty shells are heavy prices, not to be paid without a substantial offset, which is missing from this case. Hence, my answer that there is no justification for saving the Act's attempt to get around our holdings. We should hold that a transaction in what turns out to be fake pornography is better understood, not as an incomplete attempt to commit a crime, but as a completed series of intended acts that simply do not add up to a crime, owing to the privileged character of the material the parties were in fact about to deal in.

The upshot is that there ought to be no absolute rule on the relationship between attempt liability and a frustrating mistake. Not all attempts frustrated by mistake should be punishable, and not all mistaken assumptions that expressive material is unprotected should bar liability for attempts to commit a crime. The legitimacy of attempt liability should turn on its consequences for protected expression and the law that protects it. When, as here, a protected category of expression would inevitably be suppressed and its First Amendment safeguard left pointless, the Government has the burden to justify this damage to free speech.

### III

Untethering the power to suppress proposals about extant pornography from any assessment of the likely effects the proposals might have has an unsettling significance well beyond the subject of child pornography. For the Court is going against the grain of pervasive First Amendment doctrine that tolerates speech restriction not on mere general tendencies of expression, or the private understandings of speakers or listeners, but only after a critical assessment of practical consequences. Thus, one of the milestones of American political liberty is *Brandenburg v. Ohio* (1969) (*per curiam*), which is seen as the culmination of a half century's development that began with Justice Holmes's dissent in

*Abrams v. United States* (1919). In place of the rule that dominated the First World War sedition and espionage cases, allowing suppression of speech for its tendency and the intent behind it, see *Schenck v. United States* (1919), *Brandenburg* insisted that

"the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

*Brandenburg* unmistakably insists that any limit on speech be grounded in a realistic, factual assessment of harm. This is a far cry from the Act before us now, which rests criminal prosecution for proposing transactions in expressive material on nothing more than a speaker's statement about the material itself, a statement that may disclose no more than his own belief about the subjects represented or his desire to foster belief in another. This should weigh heavily in the overbreadth balance, because "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Free Speech Coalition*. See also *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995) ("The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis").

#### IV

I said that I would not pay the price enacted by the Act without a substantial justification, which I am at a loss to find here. I have to assume that the Court sees some grounding for the Act that I do not, however, and I suppose the holding can only be explained as an uncritical acceptance of a claim made both to Congress and to this Court. In each forum the Government argued that a jury's appreciation of the mere possibility of simulated or virtual child pornography will prevent convictions for the real thing, by inevitably raising reasonable doubt about whether actual children are shown. The Government voices the fear that skeptical jurors will place traffic in child pornography beyond effective prosecution unless it can find some way to avoid the *Ferber* limitation, skirt *Free Speech Coalition*, and allow prosecution whether pornography shows actual children or not.

The claim needs to be taken with a grain of salt. There has never been a time when some such concern could not be raised. Long before the Act was passed, for example, pornographic photos could be taken of models one day into adulthood, and yet there is no indication that prosecution has ever been crippled by the need to prove young-looking models were underage.

Still, if I were convinced there was a real reason for the Government's fear stemming from computer simulation, I would be willing to reexamine *Ferber*. Conditions can change, and if today's technology left no other effective way to stop professional and amateur pornographers from exploiting children there

would be a fair claim that some degree of expressive protection had to yield to protect the children.

But the Government does not get a free pass whenever it claims a worthy objective for curtailing speech, and I have further doubts about the need claimed here. Although Congress found that child pornography defendants "almost universally rais[e]" the defense that the alleged child pornography could be simulated or virtual, neither Congress nor this Court has been given the citation to a single case in which a defendant's acquittal is reasonably attributable to that defense. See Brief for Free Speech Coalition et al. as *Amici Curiae* 21-23; Brief for National Law Center for Children and Families et al. as *Amici Curiae* 10-13. The Government thus seems to be selling itself short; it appears to be highly successful in convicting child pornographers, the overwhelming majority of whom plead guilty rather than try their luck before a jury with a virtual-child defense. And little seems to have changed since the time of *Free Speech Coalition*, when the Court rejected an assertion of the same interest. ("[T]he Government says that the possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children.... The necessary solution, the argument runs, is to prohibit both kinds of images. The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down"); (*Thomas, J.*, concurring in judgment) ("At this time ... the Government asserts only that defendants *raise* such defenses, not that they have done so successfully. In fact, the Government points to no case in which a defendant has been acquitted based on a 'computer-generated images' defense").

Without some convincing evidence to the contrary, experience tells us to have faith in the capacity of the jury system, which I would have expected to operate in much the following way, if the Act were not on the books. If the Government sought to prosecute proposals about extant images as attempts, it would seek to carry its burden of showing that real children were depicted in the image subject to the proposal simply by introducing the image into evidence; if the figures in the picture looked like real children, the Government would have made its prima facie demonstration on that element. The defense might well offer expert testimony to the effect that technology can produce convincing simulations, but if this was the extent of the testimony that came in, the cross-examination would ask whether the witness could say that this particular, seemingly authentic representation was merely simulated. If the witness could say that (or said so on direct), and survived further questioning about the basis for the opinion and its truth, acquittal would have been proper; the defendant would have raised reasonable doubt about whether a child had been victimized (the same standard that would govern if the defendant were on trial for abusing a child personally). But if the defense had no specific evidence that the particular image failed to show actual children, I am skeptical that a jury would have been likely to entertain reasonable doubt that the image showed a real child.

Perhaps I am wrong, but without some demonstration that juries have been rendering exploitation of children unpunishable, there is no excuse for cutting back on the First Amendment and no alternative to finding overbreadth in this

Act. I would hold it unconstitutional on the authority of *Ferber* and *Free Speech Coalition*.

### **Note: Funding**

The protection of children and the standards of decency unmoored from obscenity doctrine often implicate the “unconstitutional conditions” doctrine discussed in Chapter 6.

For example, The Children’s Internet Protection Act, CIPA, passed by Congress in 2000, attached a condition to the receipt of government discounts or grants to libraries and schools supporting computer use. The condition was the installation of software on all computers to prevent minors from accessing harmful material. Such filters would mean, for example, that a library patron could not freely access information regarding Janet Jackson’s wardrobe malfunction. This would be true because a search for “Super Bowl XXXVIII” would be blocked: XXX would be a filtered term. Similarly, a search for “breast,” even if accompanied with “cancer” or “chicken,” would be blocked. Arguably, an adult library patron could consult with a librarian and have the software disabled.

The American Library Association challenged CIPA based on the forfeiture of First Amendment rights as an unconstitutional condition. In its decision in *United States v. American Library Association* (2003), a majority of the Court upheld CIPA, with Justices Stevens, Ginsburg, and Souter dissenting. Justice Rehnquist, writing for the plurality phrased the holding thusly:

CIPA does not “penalize” libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, CIPA simply reflects Congress’ decision not to subsidize their doing so. To the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance.

Whether or not a library could continue to exist or to finance computer access for its patrons without these federal subsidies was not a relevant inquiry.

The Court in *American Library Association* relied upon its 1998 decision in *National Endowment for Arts v. Finley*. Karen Finley, one of the six plaintiffs, was an artist whose performance piece of her nude but chocolate-covered body became notorious. Finley had been recommended for a National Endowment for the Arts (NEA) grant, but was vetoed at the highest levels. Congress had recently mandated the NEA to ensure not only that artistic excellence and merit were criteria, but also to take into consideration “general standards of decency and respect for the diverse beliefs and values of the American public.” This change was motivated by

Congressional disapproval of the previous use of NEA money by a museum funding a retrospective of the photography of Robert Mapplethorpe, which included nudity and homoeroticism, and by a different arts organization that had funded the work of Andres Serrano, maker of the controversial *Piss Christ*.

In considering Finley's First Amendment challenge that the decency provision was unconstitutional viewpoint discrimination, the Court stressed that Congress did not compel any particular action by the NEA, but only required the NEA to "take into consideration" general standards of decency in making its funding decisions.

Moreover, decency could mean different things to different people; the Court contrasted "a septegenarian in Tuscaloosa and a teenager in Las Vegas." The vagueness of "decency" worked in favor of it not being a preclusion of a particular viewpoint, even as the Court rejected the argument that "decency" was unconstitutionally vague. The status of the government as funder was pivotal: "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe."

## V. The Limits of Obscenity and the Categorical Approach?

### *United States v. Stevens*

559 U.S. 460 (2010)

ROBERTS, C. J., DELIVERED THE OPINION OF THE COURT, IN WHICH STEVENS, SCALIA, KENNEDY, THOMAS, GINSBURG, BREYER, AND SOTOMAYOR, JJ., JOINED. ALITO, J., FILED A DISSENTING OPINION.

CHIEF JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

Congress enacted 18 U. S. C. §48 to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty. The statute does not address underlying acts harmful to animals, but only portrayals of such conduct. The question presented is whether the prohibition in the statute is consistent with the freedom of speech guaranteed by the First Amendment.

#### I

Section 48 establishes a criminal penalty of up to five years in prison for anyone who knowingly "creates, sells, or possesses a depiction of animal cruelty," if done "for commercial gain" in interstate or foreign commerce. §48(a).[Footnote 1] A depiction of "animal cruelty" is defined as one "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if that conduct violates federal or state law where "the creation, sale, or possession takes place." §48(c)(1). In what is referred to as the "exceptions clause," the law

exempts from prohibition any depiction “that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.” §48(b).

The legislative background of §48 focused primarily on the interstate market for “crush videos.” According to the House Committee Report on the bill, such videos feature the intentional torture and killing of helpless animals, including cats, dogs, monkeys, mice, and hamsters. H. R. Rep. No. 106–397, p. 2 (1999) (hereinafter H. R. Rep.). Crush videos often depict women slowly crushing animals to death “with their bare feet or while wearing high heeled shoes,” sometimes while “talking to the animals in a kind of dominatrix patter” over “[t]he cries and squeals of the animals, obviously in great pain.” *Ibid.* Apparently these depictions “appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting.” The acts depicted in crush videos are typically prohibited by the animal cruelty laws enacted by all 50 States and the District of Columbia. See Brief for United States 25, n. 7 (listing statutes). But crush videos rarely disclose the participants’ identities, inhibiting prosecution of the underlying conduct. See H. R. Rep., at 3; accord, Brief for State of Florida et al. as *Amici Curiae* 11.

This case, however, involves an application of §48 to depictions of animal fighting. Dogfighting, for example, is unlawful in all 50 States and the District of Columbia, see Brief for United States 26, n. 8 (listing statutes), and has been restricted by federal law since 1976. Animal Welfare Act Amendments of 1976. Respondent Robert J. Stevens ran a business, “Dogs of Velvet and Steel,” and an associated Web site, through which he sold videos of pit bulls engaging in dogfights and attacking other animals. Among these videos were Japan Pit Fights and Pick-A-Winna: A Pit Bull Documentary, which include contemporary footage of dogfights in Japan (where such conduct is allegedly legal) as well as footage of American dogfights from the 1960’s and 1970’s. A third video, Catch Dogs and Country Living, depicts the use of pit bulls to hunt wild boar, as well as a “gruesome” scene of a pit bull attacking a domestic farm pig. On the basis of these videos, Stevens was indicted on three counts of violating §48.

Stevens moved to dismiss the indictment, arguing that §48 is facially invalid under the First Amendment. The District Court denied the motion. It held that the depictions subject to §48, like obscenity or child pornography, are categorically unprotected by the First Amendment. It went on to hold that §48 is not substantially overbroad, because the exceptions clause sufficiently narrows the statute to constitutional applications. The jury convicted Stevens on all counts, and the District Court sentenced him to three concurrent sentences of 37 months’ imprisonment, followed by three years of supervised release.

The en banc Third Circuit, over a three-judge dissent, declared §48 facially unconstitutional and vacated Stevens’s conviction. The Court of Appeals first held that §48 regulates speech that is protected by the First Amendment. The Court declined to recognize a new category of unprotected speech for depictions of animal cruelty, and rejected the Government’s analogy between animal cruelty depictions and child pornography.

The Court of Appeals then held that §48 could not survive strict scrutiny as a content-based regulation of protected speech. It found that the statute lacked a

compelling government interest and was neither narrowly tailored to preventing animal cruelty nor the least restrictive means of doing so. It therefore held §48 facially invalid.

In an extended footnote, the Third Circuit noted that §48 “might also be unconstitutionally overbroad,” because it “potentially covers a great deal of constitutionally protected speech” and “sweeps [too] widely” to be limited only by prosecutorial discretion. But the Court of Appeals declined to rest its analysis on this ground.

We granted certiorari.

## II

The Government’s primary submission is that §48 necessarily complies with the Constitution because the banned depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment. We disagree.

The First Amendment provides that “Congress shall make no law ... abridging the freedom of speech.” “[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Ashcroft v. American Civil Liberties Union* (2002) (internal quotation marks omitted). Section 48 explicitly regulates expression based on content: The statute restricts “visual [and] auditory depiction[s],” such as photographs, videos, or sound recordings, depending on whether they depict conduct in which a living animal is intentionally harmed. As such, §48 is “presumptively invalid,” and the Government bears the burden to rebut that presumption.” *United States v. Playboy Entertainment Group, Inc.*, (2000) (quoting *R. A. V. v. St. Paul* (1992)).

“From 1791 to the present,” however, the First Amendment has “permitted restrictions upon the content of speech in a few limited areas,” and has never “include[d] a freedom to disregard these traditional limitations.” These “historic and traditional categories long familiar to the bar,”—including obscenity, *Roth v. United States* (1957), defamation, *Beauharnais v. Illinois* (1952), fraud, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976), incitement, *Brandenburg v. Ohio* (1969) (*per curiam*), and speech integral to criminal conduct, *Giboney v. Empire Storage & Ice Co.* (1949)—are “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” *Chaplinsky v. New Hampshire* (1942).

The Government argues that “depictions of animal cruelty” should be added to the list. It contends that depictions of “illegal acts of animal cruelty” that are “made, sold, or possessed for commercial gain” necessarily “lack expressive value,” and may accordingly “be regulated as *unprotected* speech.” Brief for United States 10 (emphasis added). The claim is not just that Congress may regulate depictions of animal cruelty subject to the First Amendment, but that these depictions are outside the reach of that Amendment altogether—that they fall into a “‘First Amendment Free Zone.’” *Board of Airport Comm’rs of Los Angeles v. Jews for Jesus, Inc.* (1987).

As the Government notes, the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies. see,

*e.g.*, The Body of Liberties §92 (Mass. Bay Colony 1641), reprinted in American Historical Documents 1000–1904, 43 Harvard Classics 66, 79 (C. Eliot ed. 1910) (“No man shall exercise any Tirranny or Crueltie towards any brute Creature which are usuallie kept for man’s use”). But we are unaware of any similar tradition excluding *depictions* of animal cruelty from “the freedom of speech” codified in the First Amendment, and the Government points us to none.

The Government contends that “historical evidence” about the reach of the First Amendment is not “a necessary prerequisite for regulation today,” and that categories of speech may be exempted from the First Amendment’s protection without any long-settled tradition of subjecting that speech to regulation. Instead, the Government points to Congress’s “legislative judgment that ... depictions of animals being intentionally tortured and killed [are] of such minimal redeeming value as to render [them] unworthy of First Amendment protection,” and asks the Court to uphold the ban on the same basis. The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: “Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.”

As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document “prescribing limits, and declaring that those limits may be passed at pleasure.” *Marbury v. Madison*, 1 Cranch 137, 178 (1803).

To be fair to the Government, its view did not emerge from a vacuum. As the Government correctly notes, this Court has often *described* historically unprotected categories of speech as being “‘of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’” *R. A. V.* (quoting *Chaplinsky*). In *New York v. Ferber* (1982), we noted that within these categories of unprotected speech, “the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required,” because “the balance of competing interests is clearly struck.” The Government derives its proposed test from these descriptions in our precedents.

But such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute’s favor.

When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis. In *Ferber*, for example, we classified child pornography as such a category. We noted that the State of New York had a compelling interest in

protecting children from abuse, and that the value of using children in these works (as opposed to simulated conduct or adult actors) was *de minimis*. But our decision did not rest on this “balance of competing interests” alone. We made clear that *Ferber* presented a special case: The market for child pornography was “intrinsically related” to the underlying abuse, and was therefore “an integral part of the production of such materials, an activity illegal throughout the Nation.” As we noted, “[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.” *Ferber* thus grounded its analysis in a previously recognized, long-established category of unprotected speech, and our subsequent decisions have shared this understanding.

Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that “depictions of animal cruelty” is among them. We need not foreclose the future recognition of such additional categories to reject the Government’s highly manipulable balancing test as a means of identifying them.

### III

Because we decline to carve out from the First Amendment any novel exception for §48, we review Stevens’s First Amendment challenge under our existing doctrine.

#### A

Stevens challenged §48 on its face, arguing that any conviction secured under the statute would be unconstitutional. The court below decided the case on that basis, and we granted the Solicitor General’s petition for certiorari to determine “whether 18 U. S. C. 48 is facially invalid under the Free Speech Clause of the First Amendment.”

To succeed in a typical facial attack, Stevens would have to establish “that no set of circumstances exists under which [§48] would be valid,” *United States v. Salerno* (1987), or that the statute lacks any “plainly legitimate sweep,” *Washington v. Glucksberg* (1997) (Stevens, J., concurring in judgments). Which standard applies in a typical case is a matter of dispute that we need not and do not address, and neither *Salerno* nor *Glucksberg* is a speech case. Here the Government asserts that Stevens cannot prevail because §48 is plainly legitimate as applied to crush videos and animal fighting depictions. Deciding this case through a traditional facial analysis would require us to resolve whether these applications of §48 are in fact consistent with the Constitution.

In the First Amendment context, however, this Court recognizes “a second type of facial challenge,” whereby a law may be invalidated as overbroad if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *Washington State Grange v. Washington State Republican Party* (2008) (internal quotation marks omitted). Stevens argues that §48 applies to common depictions of ordinary and lawful activities, and that these depictions constitute the vast majority of materials subject to the statute. The Government makes no effort to defend such a broad

ban as constitutional. Instead, the Government's entire defense of §48 rests on interpreting the statute as narrowly limited to specific types of "extreme" material. Brief for United States 8. As the parties have presented the issue, therefore, the constitutionality of §48 hinges on how broadly it is construed. It is to that question that we now turn.

## B

As we explained two Terms ago, "[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams* (2008). Because §48 is a federal statute, there is no need to defer to a state court's authority to interpret its own law.

We read §48 to create a criminal prohibition of alarming breadth. To begin with, the text of the statute's ban on a "depiction of animal cruelty" nowhere requires that the depicted conduct be cruel. That text applies to "any ... depiction" in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." §48(c)(1). "[M]aimed, mutilated, [and] tortured" convey cruelty, but "wounded" or "killed" do not suggest any such limitation.

The Government contends that the terms in the definition should be read to require the additional element of "accompanying acts of cruelty." The Government bases this argument on the definiendum, "depiction of animal cruelty," and on " 'the commonsense canon of *noscitur a sociis*.' " As that canon recognizes, an ambiguous term may be "given more precise content by the neighboring words with which it is associated." Likewise, an unclear definitional phrase may take meaning from the term to be defined.

But the phrase "wounded ... or killed" at issue here contains little ambiguity. The Government's opening brief properly applies the ordinary meaning of these words, stating for example that to " 'kill' is 'to deprive of life.' " We agree that "wounded" and "killed" should be read according to their ordinary meaning. Nothing about that meaning requires cruelty.

While not requiring cruelty, §48 does require that the depicted conduct be "illegal." But this requirement does not limit §48 along the lines the Government suggests. There are myriad federal and state laws concerning the proper treatment of animals, but many of them are not designed to guard against animal cruelty. Protections of endangered species, for example, restrict even the humane "wound[ing] or kill[ing]" of "living animal[s]." §48(c)(1). Livestock regulations are often designed to protect the health of human beings, and hunting and fishing rules (seasons, licensure, bag limits, weight requirements) can be designed to raise revenue, preserve animal populations, or prevent accidents. The text of §48(c) draws no distinction based on the reason the intentional killing of an animal is made illegal, and includes, for example, the humane slaughter of a stolen cow.

What is more, the application of §48 to depictions of illegal conduct extends to conduct that is illegal in only a single jurisdiction. Under subsection (c)(1), the depicted conduct need only be illegal in "the State in which the creation, sale, or possession takes place, regardless of whether the ... wounding ... or killing took place in [that] State." A depiction of entirely lawful conduct runs afoul of the ban if that depiction later finds its way into another State where the same

conduct is unlawful. This provision greatly expands the scope of §48, because although there may be “a broad societal consensus” against cruelty to animals, there is substantial disagreement on what types of conduct are properly regarded as cruel. Both views about cruelty to animals and regulations having no connection to cruelty vary widely from place to place.

In the District of Columbia, for example, all hunting is unlawful. D. C. Munic. Regs., tit. 19, §1560 (2009). Other jurisdictions permit or encourage hunting, and there is an enormous national market for hunting-related depictions in which a living animal is intentionally killed. Hunting periodicals have circulations in the hundreds of thousands or millions, see *Mediaweek*, Sept. 29, 2008, p. 28, and hunting television programs, videos, and Web sites are equally popular, see Brief for Professional Outdoor Media Association et al. as *Amici Curiae* 9–10. The demand for hunting depictions exceeds the estimated demand for crush videos or animal fighting depictions by several orders of magnitude. Compare Brief for National Rifle Association of America, Inc., as *Amicus Curiae* 12 (hereinafter NRA Brief) (estimating that hunting magazines alone account for \$135 million in annual retail sales) with Brief for United States 43–44, 46 (suggesting \$1 million in crush video sales per year, and noting that Stevens earned \$57,000 from his videos). Nonetheless, because the statute allows each jurisdiction to export its laws to the rest of the country, §48(a) extends to *any* magazine or video depicting lawful hunting, so long as that depiction is sold within the Nation’s Capital.

Those seeking to comply with the law thus face a bewildering maze of regulations from at least 56 separate jurisdictions. Some States permit hunting with crossbows, Ga. Code Ann. §27–3–4(1) (2007); Va. Code Ann. §29.1–519(A)(6) (Lexis 2008 Cum. Supp.), while others forbid it, Ore. Admin. Reg. 635–065–0725 (2009), or restrict it only to the disabled, N. Y. Envir. Conserv. Law Ann. §11–0901(16) (West 2005). Missouri allows the “canned” hunting of ungulates held in captivity, Mo. Code Regs. Ann., tit. 3, 10–9.560(1), but Montana restricts such hunting to certain bird species, Mont. Admin. Rule 12.6.1202(1) (2007). The sharp-tailed grouse may be hunted in Idaho, but not in Washington. Compare Idaho Admin. Code §13.01.09.606 (2009) with Wash. Admin. Code §232–28–342 (2009).

The disagreements among the States—and the “commonwealth[s], territor[ies], or possession[s] of the United States,” 18 U. S. C. §48(c)(2)—extend well beyond hunting. State agricultural regulations permit different methods of livestock slaughter in different places or as applied to different animals. Compare, *e.g.*, Fla. Stat. §828.23(5) (2007) (excluding poultry from humane slaughter requirements) with Cal. Food & Agric. Code Ann. §19501(b) (West 2001) (including some poultry). California has recently banned cutting or “docking” the tails of dairy cattle, which other States permit. 2009 Cal. Legis. Serv. Ch. 344 (S. B. 135) (West). Even cockfighting, long considered immoral in much of America, see *Barnes v. Glen Theatre, Inc.* (1991) (Scalia, J., concurring in judgment), is legal in Puerto Rico, see 15 Laws P. R. Ann. §301 (Supp. 2008); *Posadas de Puerto Rico Associates v. Tourism Co. of P. R.* (1986), and was legal in Louisiana until 2008, see La. Stat. Ann. §14:102.23 (West) (effective Aug. 15, 2008). An otherwise-lawful image of any of these practices, if sold or possessed

for commercial gain within a State that happens to forbid the practice, falls within the prohibition of §48(a).

### C

The only thing standing between defendants who sell such depictions and five years in federal prison—other than the mercy of a prosecutor—is the statute’s exceptions clause. Subsection (b) exempts from prohibition “any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.” The Government argues that this clause substantially narrows the statute’s reach: News reports about animal cruelty have “journalistic” value; pictures of bullfights in Spain have “historical” value; and instructional hunting videos have “educational” value. Thus, the Government argues, §48 reaches only crush videos, depictions of animal fighting (other than Spanish bullfighting), and perhaps other depictions of “extreme acts of animal cruelty.”

The Government’s attempt to narrow the statutory ban, however, requires an unrealistically broad reading of the exceptions clause. As the Government reads the clause, any material with “redeeming societal value,” Brief at 9, 16, 23, “ ‘at least some minimal value,’ ” Reply Brief 6 (quoting H. R. Rep., at 4), or anything more than “scant social value,” Reply Brief 11, is excluded under §48(b). But the text says “serious” value, and “serious” should be taken seriously. We decline the Government’s invitation—advanced for the first time in this Court—to regard as “serious” anything that is not “scant.” (Or, as the dissent puts it, “trifling.”) As the Government recognized below, “serious” ordinarily means a good bit more. The District Court’s jury instructions required value that is “significant and of great import,” and the Government defended these instructions as properly relying on “a commonly accepted meaning of the word ‘serious.’ ”

Quite apart from the requirement of “serious” value in §48(b), the excepted speech must also fall within one of the enumerated categories. Much speech does not. Most hunting videos, for example, are not obviously instructional in nature, except in the sense that all life is a lesson. According to Safari Club International and the Congressional Sportsmen’s Foundation, many popular videos “have primarily entertainment value” and are designed to “entertai[n] the viewer, marke[t] hunting equipment, or increas[e] the hunting community.” Brief for Safari Club International et al. as *Amici Curiae* 12. The National Rifle Association agrees that “much of the content of hunting media ... is merely *recreational* in nature.” NRA Brief 28. The Government offers no principled explanation why these depictions of hunting or depictions of Spanish bullfights would be *inherently* valuable while those of Japanese dogfights are not. The dissent contends that hunting depictions must have serious value because hunting has serious value, in a way that dogfights presumably do not. But §48(b) addresses the value of the *depictions*, not of the underlying activity. There is simply no adequate reading of the exceptions clause that results in the statute’s banning only the depictions the Government would like to ban.

The Government explains that the language of §48(b) was largely drawn from our opinion in *Miller v. California* (1973), which excepted from its definition of obscenity any material with “serious literary, artistic, political, or scientific value.” According to the Government, this incorporation of the *Miller* standard into §48 is therefore surely enough to answer any First Amendment objection.

In *Miller* we held that “serious” value shields depictions of sex from regulation as obscenity. Limiting *Miller*’s exception to “serious” value ensured that “ [a] quotation from Voltaire in the flyleaf of a book [would] not constitutionally redeem an otherwise obscene publication.’ ” We did not, however, determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place. *Most* of what we say to one another lacks “religious, political, scientific, educational, journalistic, historical, or artistic value” (let alone serious value), but it is still sheltered from government regulation. Even “ [w]holly neutral futilities ... come under the protection of free speech as fully as do Keats’ poems or Donne’s sermons.’ ” *Cohen v. California*, (1971).

Thus, the protection of the First Amendment presumptively extends to many forms of speech that do not qualify for the serious-value exception of §48(b), but nonetheless fall within the broad reach of §48(c).

#### D

Not to worry, the Government says: The Executive Branch construes §48 to reach only “extreme” cruelty, Brief for United States 8, and it “neither has brought nor will bring a prosecution for anything less,” Reply Brief 6–7. The Government hits this theme hard, invoking its prosecutorial discretion several times. See *id.*, at 6–7, 10, and n. 6, 19, 22. But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.

This prosecution is itself evidence of the danger in putting faith in government representations of prosecutorial restraint. When this legislation was enacted, the Executive Branch announced that it would interpret §48 as covering only depictions “of wanton cruelty to animals designed to appeal to a prurient interest in sex.” See Statement by President William J. Clinton upon Signing H. R. 1887, 34 Weekly Comp. Pres. Doc. 2557 (Dec. 9, 1999). No one suggests that the videos in this case fit that description. The Government’s assurance that it will apply §48 far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading.

Nor can we rely upon the canon of construction that “ambiguous statutory language [should] be construed to avoid serious constitutional doubts.” *FCC v. Fox Television Stations, Inc.* (2009). “[T]his Court may impose a limiting construction on a statute only if it is ‘readily susceptible’ to such a construction.” *Reno v. American Civil Liberties Union* (1997). We “ ‘will not rewrite a ... law to conform it to constitutional requirements,’” for doing so would constitute a “serious invasion of the legislative domain,” and sharply diminish Congress’s “incentive to draft a narrowly tailored law in the first place.” To read §48 as the Government desires requires rewriting, not just reinterpretation.

Our construction of §48 decides the constitutional question; the Government makes no effort to defend the constitutionality of §48 as applied beyond crush videos and depictions of animal fighting. It argues that those particular depictions are intrinsically related to criminal conduct or are analogous to

obscenity (if not themselves obscene), and that the ban on such speech is narrowly tailored to reinforce restrictions on the underlying conduct, prevent additional crime arising from the depictions, or safeguard public mores. But the Government nowhere attempts to extend these arguments to depictions of any other activities—depictions that are presumptively protected by the First Amendment but that remain subject to the criminal sanctions of §48.

Nor does the Government seriously contest that the presumptively impermissible applications of §48 (properly construed) far outnumber any permissible ones. However “growing” and “lucrative” the markets for crush videos and dogfighting depictions might be, see Brief for United States 43, 46 (internal quotation marks omitted), they are dwarfed by the market for other depictions, such as hunting magazines and videos, that we have determined to be within the scope of §48. We therefore need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional. We hold only that §48 is not so limited but is instead substantially overbroad, and therefore invalid under the First Amendment.

The judgment of the United States Court of Appeals for the Third Circuit is affirmed.

It is so ordered.

JUSTICE ALITO, DISSENTING.

The Court strikes down in its entirety a valuable statute, 18 U. S. C. §48, that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty—in particular, the creation and commercial exploitation of “crush videos,” a form of depraved entertainment that has no social value. The Court’s approach, which has the practical effect of legalizing the sale of such videos and is thus likely to spur a resumption of their production, is unwarranted. Respondent was convicted under §48 for selling videos depicting dogfights. On appeal, he argued, among other things, that §48 is unconstitutional as applied to the facts of this case, and he highlighted features of those videos that might distinguish them from other dogfight videos brought to our attention. The Court of Appeals—incorrectly, in my view—declined to decide whether §48 is unconstitutional as applied to respondent’s videos and instead reached out to hold that the statute is facially invalid. Today’s decision does not endorse the Court of Appeals’ reasoning, but it nevertheless strikes down §48 using what has been aptly termed the “strong medicine” of the overbreadth doctrine.

Instead of applying the doctrine of overbreadth, I would vacate the decision below and instruct the Court of Appeals on remand to decide whether the videos that respondent sold are constitutionally protected. If the question of overbreadth is to be decided, however, I do not think the present record supports the Court’s conclusion that §48 bans a substantial quantity of protected speech.

I  
[omitted]

II

[omitted]

### III

In holding that §48 violates the overbreadth rule, the Court declines to decide whether, as the Government maintains, §48 is constitutional as applied to two broad categories of depictions that exist in the real world: crush videos and depictions of deadly animal fights. Instead, the Court tacitly assumes for the sake of argument that §48 is valid as applied to these depictions, but the Court concludes that §48 reaches too much protected speech to survive. The Court relies primarily on depictions of hunters killing or wounding game and depictions of animals being slaughtered for food. I address the Court's examples below.

#### A

I turn first to depictions of hunting. As the Court notes, photographs and videos of hunters shooting game are common. But hunting is legal in all 50 States, and §48 applies only to a depiction of conduct that is illegal in the jurisdiction in which the depiction is created, sold, or possessed. Therefore, in all 50 States, the creation, sale, or possession for sale of the vast majority of hunting depictions indisputably falls outside §48's reach.

Straining to find overbreadth, the Court suggests that §48 prohibits the sale or possession in the District of Columbia of any depiction of hunting because the District—undoubtedly because of its urban character—does not permit hunting within its boundaries. The Court also suggests that, because some States prohibit a particular type of hunting (*e.g.*, hunting with a crossbow or “canned” hunting) or the hunting of a particular animal (*e.g.*, the “sharp-tailed grouse”), §48 makes it illegal for persons in such States to sell or possess for sale a depiction of hunting that was perfectly legal in the State in which the hunting took place.

The Court's interpretation is seriously flawed. “When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction.”

Applying this canon, I would hold that §48 does not apply to depictions of hunting. First, because §48 targets depictions of “animal cruelty,” I would interpret that term to apply only to depictions involving acts of animal cruelty as defined by applicable state or federal law, not to depictions of acts that happen to be illegal for reasons having nothing to do with the prevention of animal cruelty. \*\*\*

Second, even if the hunting of wild animals were otherwise covered by §48(a), I would hold that hunting depictions fall within the exception in §48(b) for depictions that have “serious” (*i.e.*, not “trifling”) “scientific,” “educational,” or “historical” value. While there are certainly those who find hunting objectionable, the predominant view in this country has long been that hunting serves many important values, and it is clear that Congress shares that view. \*\*\*

But even if §48 did impermissibly reach the sale or possession of depictions of hunting in a few unusual situations (for example, the sale in Oregon of a

depiction of hunting with a crossbow in Virginia or the sale in Washington State of the hunting of a sharp-tailed grouse in Idaho, see *ante*, at 14), those isolated applications would hardly show that §48 bans a substantial amount of protected speech.

## B

Although the Court’s overbreadth analysis rests primarily on the proposition that §48 substantially restricts the sale and possession of hunting depictions, the Court cites a few additional examples, including depictions of methods of slaughter and the docking of the tails of dairy cows.

Such examples do not show that the statute is substantially overbroad, for two reasons. First, as explained above, §48 can reasonably be construed to apply only to depictions involving acts of animal cruelty as defined by applicable state or federal law, and anti-cruelty laws do not ban the sorts of acts depicted in the Court’s hypotheticals. \*\*\*

Second, nothing in the record suggests that any one has ever created, sold, or possessed for sale a depiction of the slaughter of food animals or of the docking of the tails of dairy cows that would not easily qualify under the exception set out in §48(b). Depictions created to show proper methods of slaughter or tail-docking would presumably have serious “educational” value, and depictions created to focus attention on methods thought to be inhumane or otherwise objectionable would presumably have either serious “educational” or “journalistic” value or both. In short, the Court’s examples of depictions involving the docking of tails and humane slaughter do not show that §48 suffers from any overbreadth, much less substantial overbreadth. \*\*\*

## IV

### A

#### 1

As the Court of Appeals recognized, “the primary conduct that Congress sought to address through its passage [of §48] was the creation, sale, or possession of ‘crush videos.’ ” A sample crush video, which has been lodged with the Clerk, records the following event:

“[A] kitten, secured to the ground, watches and shrieks in pain as a woman thrusts her high-heeled shoe into its body, slams her heel into the kitten’s eye socket and mouth loudly fracturing its skull, and stomps repeatedly on the animal’s head. The kitten hemorrhages blood, screams blindly in pain, and is ultimately left dead in a moist pile of blood-soaked hair and bone.” Brief for Humane Society of United States as *Amicus Curiae* 2 (hereinafter Humane Society Brief).

It is undisputed that the *conduct* depicted in crush videos may constitutionally be prohibited. All 50 States and the District of Columbia have enacted statutes prohibiting animal cruelty. But before the enactment of §48, the underlying conduct depicted in crush videos was nearly impossible to prosecute. These videos, which “ often appeal to persons with a very specific sexual fetish” were made in secret, generally without a live audience, and “the faces of the women inflicting the torture in the material often were not shown, nor could the location of the place where the cruelty was being inflicted or the date of the

activity be ascertained from the depiction.” Thus, law enforcement authorities often were not able to identify the parties responsible for the torture. In the rare instances in which it was possible to identify and find the perpetrators, they “often were able to successfully assert as a defense that the State could not prove its jurisdiction over the place where the act occurred or that the actions depicted took place within the time specified in the State statute of limitations.”

In light of the practical problems thwarting the prosecution of the creators of crush videos under state animal cruelty laws, Congress concluded that the only effective way of stopping the underlying criminal conduct was to prohibit the commercial exploitation of the videos of that conduct. And Congress’ strategy appears to have been vindicated. We are told that “[b]y 2007, sponsors of §48 declared the crush video industry dead. Even overseas Websites shut down in the wake of §48. Now, after the Third Circuit’s decision [facially invalidating the statute], crush videos are already back online.” Humane Society Brief 5 (citations omitted).

## 2

The First Amendment protects freedom of speech, but it most certainly does not protect violent criminal conduct, even if engaged in for expressive purposes. Crush videos present a highly unusual free speech issue because they are so closely linked with violent criminal conduct. The videos record the commission of violent criminal acts, and it appears that these crimes are committed for the sole purpose of creating the videos. \*\*\*

The most relevant of our prior decisions is *Ferber* which concerned child pornography. The Court there held that child pornography is not protected speech, and I believe that *Ferber*’s reasoning dictates a similar conclusion here.

\*\*\* It must be acknowledged that §48 differs from a child pornography law in an important respect: preventing the abuse of children is certainly much more important than preventing the torture of the animals used in crush videos. It was largely for this reason that the Court of Appeals concluded that *Ferber* did not support the constitutionality of §48. But while protecting children is unquestionably *more* important than protecting animals, the Government also has a compelling interest in preventing the torture depicted in crush videos.

\*\*\* In short, *Ferber* is the case that sheds the most light on the constitutionality of Congress’ effort to halt the production of crush videos. Applying the principles set forth in *Ferber*, I would hold that crush videos are not protected by the First Amendment.

## B

Application of the *Ferber* framework also supports the constitutionality of §48 as applied to depictions of brutal animal fights. (For convenience, I will focus on videos of dogfights, which appear to be the most common type of animal fight videos.)

First, such depictions, like crush videos, record the actual commission of a crime involving deadly violence. Dogfights are illegal in every State and the District of Columbia and under federal law constitute a felony punishable by imprisonment for up to five years.

Second, Congress had an ample basis for concluding that the crimes depicted in these videos cannot be effectively controlled without targeting the videos. Like crush videos and child pornography, dogfight videos are very often produced as part of a “low-profile, clandestine industry,” and “the need to market the resulting products requires a visible apparatus of distribution.” In such circumstances, Congress had reasonable grounds for concluding that it would be “difficult, if not impossible, to halt” the underlying exploitation of dogs by pursuing only those who stage the fights.

\*\*\* For these dogs, unlike the animals killed in crush videos, the suffering lasts for years rather than minutes. As with crush videos, moreover, the statutory ban on commerce in dogfighting videos is also supported by compelling governmental interests in effectively enforcing the Nation’s criminal laws and preventing criminals from profiting from their illegal activities.

In sum, §48 may validly be applied to at least two broad real-world categories of expression covered by the statute: crush videos and dogfighting videos. Thus, the statute has a substantial core of constitutionally permissible applications. Moreover, for the reasons set forth above, the record does not show that §48, properly interpreted, bans a substantial amount of protected speech in absolute terms. *A fortiori*, respondent has not met his burden of demonstrating that any impermissible applications of the statute are “substantial” in relation to its “plainly legitimate sweep.” Accordingly, I would reject respondent’s claim that §48 is facially unconstitutional under the overbreadth doctrine.

For these reasons, I respectfully dissent.

## ***Brown v. Entertainment Merchants Association***

564 U.S. \_\_\_ (2011)

SCALIA, J., DELIVERED THE OPINION OF THE COURT, IN WHICH KENNEDY, GINSBURG, SOTOMAYOR, AND KAGAN, JJ., JOINED. ALITO, J., FILED AN OPINION CONCURRING IN THE JUDGMENT, IN WHICH ROBERTS, C. J., JOINED. THOMAS, J., AND BREYER, J., FILED DISSENTING OPINIONS.

JUSTICE SCALIA DELIVERED THE OPINION OF THE COURT.

We consider whether a California law imposing restrictions on violent video games comports with the First Amendment.

### I

California Assembly Bill 1179 (2005), Cal. Civ. Code Ann. §§1746–1746.5 (West 2009) (Act), prohibits the sale or rental of “violent video games” to minors, and requires their packaging to be labeled “18.” The Act covers games “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted” in a manner that “[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors,” that is “patently offensive to prevailing standards in the community as to what is suitable for minors,” and that “causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.” Violation of the Act is punishable by a civil fine of up to \$1,000. Respondents, representing the video-game and software industries, brought a preenforcement challenge to the Act in the

United States District Court for the Northern District of California. That court concluded that the Act violated the First Amendment and permanently enjoined its enforcement. The Court of Appeals affirmed and we granted certiorari.

## II

California correctly acknowledges that video games qualify for First Amendment protection. The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try. “Everyone is familiar with instances of propaganda through fiction. What is one man’s amusement, teaches another’s doctrine.” *Winters v. New York* (1948). Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world). That suffices to confer First Amendment protection. Under our Constitution, “esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.” *United States v. Playboy Entertainment Group, Inc.* (2000). And whatever the challenges of applying the Constitution to ever-advancing technology, “the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary” when a new and different medium for communication appears. *Joseph Burstyn, Inc. v. Wilson* (1952).

The most basic of those principles is this: “[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Ashcroft v. American Civil Liberties Union* (2002). There are of course exceptions. “ ‘From 1791 to the present,’ . . . the First Amendment has ‘permitted restrictions upon the content of speech in a few limited areas,’ and has never ‘include[d] a freedom to disregard these traditional limitations.’ ” *United States v. Stevens* (2010). These limited areas—such as obscenity, *Roth v. United States* (1957), incitement, *Brandenburg v. Ohio* (1969) (per curiam), and fighting words, *Chaplinsky v. New Hampshire* (1942)—represent “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”

Last Term, in *Stevens*, we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated. \*\*\*

That holding controls this case. As in *Stevens*, California has tried to make violent-speech regulation look like obscenity regulation by appending a saving clause required for the latter. That does not suffice. Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of “sexual conduct,” *Miller*.

*Stevens* was not the first time we have encountered and rejected a State’s attempt to shoehorn speech about violence into obscenity. In *Winters*, we considered a New York criminal statute “forbid[ding] the massing of stories of bloodshed and lust in such a way as to incite to crime against the person.” The New York Court of Appeals upheld the provision as a law against obscenity.

“[T]here can be no more precise test of written indecency or obscenity,” it said, “than the continuing and changeable experience of the community as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order. ” That is of course the same expansive view of governmental power to abridge the freedom of speech based on interest-balancing that we rejected in *Stevens*. Our opinion in *Winters*, which concluded that the New York statute failed a heightened vagueness standard applicable to restrictions upon speech entitled to First Amendment protection, made clear that violence is not part of the obscenity that the Constitution permits to be regulated. The speech reached by the statute contained “no indecency or obscenity in any sense heretofore known to the law.” Because speech about violence is not obscene, it is of no consequence that California’s statute mimics the New York statute regulating obscenity-for-minors that we upheld in *Ginsberg v. New York* (1968). That case approved a prohibition on the sale to minors of sexual material that would be obscene from the perspective of a child. We held that the legislature could “adju[s]t the definition of obscenity ‘to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . .’ of . . . minors. ” And because “obscenity is not protected expression,” the New York statute could be sustained so long as the legislature’s judgment that the proscribed materials were harmful to children “was not irrational.”

The California Act is something else entirely. It does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children. California does not argue that it is empowered to prohibit selling offensively violent works to adults—and it is wise not to, since that is but a hair’s breadth from the argument rejected in *Stevens*. Instead, it wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children.

\*\*\* California’s argument would fare better if there were a longstanding tradition in this country of specially restricting children’s access to depictions of violence, but there is none. Certainly the books we give children to read—or read to them when they are younger—contain no shortage of gore. Grimm’s Fairy Tales, for example, are grim indeed. As her just deserts for trying to poison Snow White, the wicked queen is made to dance in red hot slippers “till she fell dead on the floor, a sad example of envy and jealousy.” Cinderella’s evil stepsisters have their eyes pecked out by doves. And Hansel and Gretel (children!) kill their captor by baking her in an oven.

High-school reading lists are full of similar fare. Homer’s Odysseus blinds Polyphemus the Cyclops by grinding out his eye with a heated stake. In the *Inferno*, Dante and Virgil watch corrupt politicians struggle to stay submerged beneath a lake of boiling pitch, lest they be skewered by devils above the surface. And Golding’s *Lord of the Flies* recounts how a schoolboy called Piggy is savagely murdered by other children while marooned on an island.

This is not to say that minors’ consumption of violent entertainment has never encountered resistance. In the 1800’s, dime novels depicting crime and “penny dreadfuls” (named for their price and content) were blamed in some quarters for juvenile delinquency. When motion pictures came along, they became the

villains instead. “The days when the police looked upon dime novels as the most dangerous of textbooks in the school for crime are drawing to a close. . . . They say that the moving picture machine . . . tends even more than did the dime novel to turn the thoughts of the easily influenced to paths which sometimes lead to prison.” Moving Pictures as Helps to Crime, N. Y. Times, Feb. 21, 1909, quoted in Brief for Cato Institute, at 8. For a time, our Court did permit broad censorship of movies because of their capacity to be “used for evil,” see *Mutual Film Corp. v. Industrial Comm’n of Ohio* (1915), but we eventually reversed course. Many in the late 1940’s and early 1950’s blamed comic books for fostering a “preoccupation with violence and horror” among the young, leading to a rising juvenile crime rate. But efforts to convince Congress to restrict comic books failed. And, of course, after comic books came television and music lyrics.

California claims that video games present special problems because they are “interactive,” in that the player participates in the violent action on screen and determines its outcome. The latter feature is nothing new: Since at least the publication of *The Adventures of You: Sugarcane Island* in 1969, young readers of choose-your-own adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to. As for the argument that video games enable participation in the violent action, that seems to us more a matter of degree than of kind. As Judge Posner has observed, all literature is interactive. “[T]he better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader’s own.” *American Amusement Machine Assn. v. Kendrick*, 244 F. 3d 572 (7<sup>th</sup> Cir. 2001) (striking down a similar restriction on violent video games).

Justice Alito [concurring] has done considerable independent research to identify video games in which “the violence is astounding.” “Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. . . . Blood gushes, splatters, and pools.” Justice Alito recounts all these disgusting video games in order to disgust us—but disgust is not a valid basis for restricting expression. And the same is true of Justice Alito’s description of those video games he has discovered that have a racial or ethnic motive for their violence—“ ‘ethnic cleansing’ [of] . . . African Americans, Latinos, or Jews.” To what end does he relate this? Does it somehow increase the “aggressiveness” that California wishes to suppress? Who knows? But it does arouse the reader’s ire, and the reader’s desire to put an end to this horrible message. Thus, ironically, Justice Alito’s argument highlights the precise danger posed by the California Act: that the ideas expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription.

### III

Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. *R. A. V.* The State must specifically identify an “actual problem” in need of solving and the curtailment of free speech must be actually

necessary to the solution. That is a demanding standard. “It is rare that a regulation restricting speech because of its content will ever be permissible.”

California cannot meet that standard. \*\*\*

The State’s evidence is not compelling. California relies primarily on the research of Dr. Craig Anderson and a few other research psychologists whose studies purport to show a connection between exposure to violent video games and harmful effects on children. These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games cause minors to act aggressively (which would at least be a beginning). \*\*\* They show at best some correlation between exposure to violent entertainment and minuscule real-world effects, such as children’s feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game.

Even taking for granted Dr. Anderson’s conclusions that violent video games produce some effect on children’s feelings of aggression, those effects are both small and indistinguishable from effects produced by other media. In his testimony in a similar lawsuit, Dr. Anderson admitted that the “effect sizes” of children’s exposure to violent video games are “about the same” as that produced by their exposure to violence on television. And he admits that the same effects have been found when children watch cartoons starring Bugs Bunny or the Road Runner, or when they play video games like Sonic the Hedgehog that are rated “E” (appropriate for all ages) or even when they “vie[w] a picture of a gun.” Of course, California has (wisely) declined to restrict Saturday morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns. The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint. Here, California has singled out the purveyors of video games for disfavored treatment—at least when compared to booksellers, cartoonists, and movie producers—and has given no persuasive reason why.

The Act is also seriously underinclusive in another respect—and a respect that renders irrelevant the contentions of the concurrence and the dissents that video games are qualitatively different from other portrayals of violence. The California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it’s OK. And there are not even any requirements as to how this parental or avuncular relationship is to be verified; apparently the child’s or putative parent’s, aunt’s, or uncle’s say-so suffices. That is not how one addresses a serious social problem.\*\*\*

But leaving that aside, California cannot show that the Act’s restrictions meet a substantial need of parents who wish to restrict their children’s access to violent video games but cannot do so. The video-game industry has in place a voluntary rating system designed to inform consumers about the content of games. The system, implemented by the Entertainment Software Rating Board (ESRB), assigns age-specific ratings to each video game submitted: EC (Early

Childhood); E (Everyone); E10+ (Everyone 10 and older); T (Teens); M (17 and older); and AO (Adults Only—18 and older). The Video Software Dealers Association encourages retailers to prominently display information about the ESRB system in their stores; to refrain from renting or selling adult-only games to minors; and to rent or sell “M” rated games to minors only with parental consent. In 2009, the Federal Trade Commission (FTC) found that, as a result of this system, “the video game industry outpaces the movie and music industries” in “(1) restricting targetmarketing of mature-rated products to children; (2) clearly and prominently disclosing rating information; and (3) restricting children’s access to mature-rated products at retail.” FTC, Report to Congress, Marketing Violent Entertainment to Children 30 (Dec. 2009). This system does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home. Filling the remaining modest gap in concerned-parents’ control can hardly be a compelling state interest.

And finally, the Act’s purported aid to parental authority is vastly overinclusive. Not all of the children who are forbidden to purchase violent video games on their own have parents who care whether they purchase violent video games. While some of the legislation’s effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents ought to want. This is not the narrow tailoring to “assisting parents” that restriction of First Amendment rights requires.

California’s effort to regulate violent video games is the latest episode in a long series of failed attempts to censor violent entertainment for minors. While we have pointed out above that some of the evidence brought forward to support the harmfulness of video games is unpersuasive, we do not mean to demean or disparage the concerns that underlie the attempt to regulate them—concerns that may and doubtless do prompt a good deal of parental oversight. We have no business passing judgment on the view of the California Legislature that violent video games (or, for that matter, any other forms of speech) corrupt the young or harm their moral development. Our task is only to say whether or not such works constitute a “well-defined and narrowly limited clas[s] of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem,” *Chaplinsky* (the answer plainly is no); and if not, whether the regulation of such works is justified by that high degree of necessity we have described as a compelling state interest (it is not). Even where the protection of children is the object, the constitutional limits on governmental action apply.

California’s legislation straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children. Both ends are legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993). As a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto. And as a means of assisting concerned parents it is seriously overinclusive because it

abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime. And the overbreadth in achieving one goal is not cured by the underbreadth in achieving the other. Legislation such as this, which is neither fish nor fowl, cannot survive strict scrutiny.

*We affirm the judgment below. It is so ordered.*

JUSTICE ALITO, WITH WHOM THE CHIEF JUSTICE JOINS, CONCURRING IN THE JUDGMENT.

The California statute that is before us in this case represents a pioneering effort to address what the state legislature and others regard as a potentially serious social problem: the effect of exceptionally violent video games on impressionable minors, who often spend countless hours immersed in the alternative worlds that these games create. Although the California statute is well intentioned, its terms are not framed with the precision that the Constitution demands, and I therefore agree with the Court that this particular law cannot be sustained.

I disagree, however, with the approach taken in the Court's opinion. In considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution. We should make every effort to understand the new technology. We should take into account the possibility that developing technology may have important societal implications that will become apparent only with time. We should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar. And we should not hastily dismiss the judgment of legislators, who may be in a better position than we are to assess the implications of new technology. The opinion of the Court exhibits none of this caution.

In the view of the Court, all those concerned about the effects of violent video games—federal and state legislators, educators, social scientists, and parents—are unduly fearful, for violent video games really present no serious problem. Spending hour upon hour controlling the actions of a character who guns down scores of innocent victims is not different in “kind” from reading a description of violence in a work of literature.

The Court is sure of this; I am not. There are reasons to suspect that the experience of playing violent video games just might be very different from reading a book, listening to the radio, or watching a movie or a television show.

## I

Respondents in this case, representing the video-game industry, ask us to strike down the California law on two grounds: The broad ground adopted by the Court and the narrower ground that the law's definition of “violent video game” is impermissibly vague. Because I agree with the latter argument, I see no need to reach the broader First Amendment issues addressed by the Court.

\*\*\*

## II

\*\*\* When all of the characteristics of video games are taken into account, there is certainly a reasonable basis for thinking that the experience of playing a video game may be quite different from the experience of reading a book, listening to a radio broadcast, or viewing a movie. And if this is so, then for at least some minors, the effects of playing violent video games may also be quite different. The Court acts prematurely in dismissing this possibility out of hand.

\* \* \* For all these reasons, I would hold only that the particular law at issue here fails to provide the clear notice that the Constitution requires. I would not squelch legislative efforts to deal with what is perceived by some to be a significant and developing social problem.

JUSTICE THOMAS, DISSENTING.

The Court's decision today does not comport with the original public understanding of the First Amendment. The majority strikes down, as facially unconstitutional, a state law that prohibits the direct sale or rental of certain video games to minors because the law "abridg[es] the freedom of speech." U. S. Const., Amdt. 1. But I do not think the First Amendment stretches that far. The practices and beliefs of the founding generation establish that "the freedom of speech," as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians. I would hold that the law at issue is not facially unconstitutional under the First Amendment, and reverse and remand for further proceedings.

\*\*\* [extensive opinion omitted]

JUSTICE BREYER, DISSENTING.

California imposes a civil fine of up to \$1,000 upon any person who distributes a violent video game in California without labeling it "18," or who sells or rents a labeled violent video game to a person under the age of 18. Representatives of the video game and software industries, claiming that the statute violates the First Amendment on its face, seek an injunction against its enforcement. Applying traditional First Amendment analysis, I would uphold the statute as constitutional on its face and would consequently reject the industries' facial challenge.

#### I.

\*\*\* [T]he special First Amendment category I find relevant is \*\*\* the category of "protection of children." This Court has held that the "power of the state to control the conduct of children reaches beyond the scope of its authority over adults." *Prince v. Massachusetts* (1944). And the "regulatio[n] of communication addressed to [children] need not conform to the requirements of the [F]irst [A]mendment in the same way as those applicable to adults.'" *Ginsberg v. New York* (1968).

The majority's claim that the California statute, if upheld, would create a "new categor[y] of unprotected speech" is overstated. No one here argues that depictions of violence, even extreme violence, automatically fall outside the First

Amendment's protective scope as, for example, do obscenity and depictions of child pornography. We properly speak of categories of expression that lack protection when, like "child pornography," the category is broad, when it applies automatically, and when the State can prohibit everyone, including adults, from obtaining access to the material within it. But where, as here, careful analysis must precede a narrower judicial conclusion (say, denying protection to a shout of "fire" in a crowded theater, or to an effort to teach a terrorist group how to peacefully petition the United Nations), we do not normally describe the result as creating a "new category of unprotected speech." See *Schenck v. United States* (1919); *Holder v. Humanitarian Law Project* (2010). Thus, in *Stevens*, after rejecting the claim that all depictions of animal cruelty (a category) fall outside the First Amendment's protective scope, we went on to decide whether the particular statute at issue violates the First Amendment under traditional standards; and we held that, because the statute was overly broad, it was invalid. Similarly, here the issue is whether, applying traditional First Amendment standards, this statute does, or does not, pass muster.

## II

In my view, California's statute provides "fair notice of what is prohibited," and consequently it is not impermissibly vague. *Ginsberg* explains why that is so. The Court there considered a New York law that forbade the sale to minors of a "picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity . . . , " that "predominately appeals to the prurient, shameful or morbid interest of minors," and "is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors," and "is utterly without redeeming social importance for minors." This Court upheld the New York statute in *Ginsberg* (which is sometimes unfortunately confused with a very different, earlier case, *Ginzburg v. United States*, (1966)). The five-Justice majority, in an opinion written by Justice Brennan, wrote that the statute was sufficiently clear. No Member of the Court voiced any vagueness objection.

Comparing the language of California's statute with the language of New York's statute it is difficult to find any vagueness-related difference. Why are the words "kill," "maim," and "dismember" any more difficult to understand than the word "nudity?" \*\*\*

The remainder of California's definition copies, almost word for word, the language this Court used in *Miller v. California* (1973), in permitting a total ban on material that satisfied its definition (one enforced with criminal penalties).  
\*\*\*

Both the *Miller* standard and the law upheld in *Ginsberg* lack perfect clarity. But that fact reflects the difficulty of the Court's long search for words capable of protecting expression without depriving the State of a legitimate constitutional power to regulate. As is well known, at one point Justice Stewart thought he could do no better in defining obscenity than, "I know it when I see it." *Jacobellis v. Ohio* (1964) (concurring opinion). And Justice Douglas dissented from *Miller's* standard, which he thought was still too vague. Ultimately, however, this Court accepted the "community standards" tests used in *Miller* and *Ginsberg*. They reflect the fact that sometimes, even when a

precise standard proves elusive, it is easy enough to identify instances that fall within a legitimate regulation. And they seek to draw a line, which, while favoring free expression, will nonetheless permit a legislature to find the words necessary to accomplish a legitimate constitutional objective.

#### IV

The upshot is that California's statute, as applied to its heartland of applications (i.e., buyers under 17; extremely violent, realistic video games), imposes a restriction on speech that is modest at most. That restriction is justified by a compelling interest (supplementing parents' efforts to prevent their children from purchasing potentially harmful violent, interactive material). And there is no equally effective, less restrictive alternative. California's statute is consequently constitutional on its face—though litigants remain free to challenge the statute as applied in particular instances, including any effort by the State to apply it to minors aged 17.

I add that the majority's different conclusion creates a serious anomaly in First Amendment law. *Ginsberg* makes clear that a State can prohibit the sale to minors of depictions of nudity; today the Court makes clear that a State cannot prohibit the sale to minors of the most violent interactive video games. But what sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her? What kind of First Amendment would permit the government to protect children by restricting sales of that extremely violent video game only when the woman—bound, gagged, tortured, and killed—is also topless?

This anomaly is not compelled by the First Amendment. It disappears once one recognizes that extreme violence, where interactive, and without literary, artistic, or similar justification, can prove at least as, if not more, harmful to children as photographs of nudity. And the record here is more than adequate to support such a view. That is why I believe that *Ginsberg* controls the outcome here a fortiori. And it is why I believe California's law is constitutional on its face.

This case is ultimately less about censorship than it is about education. Our Constitution cannot succeed in securing the liberties it seeks to protect unless we can raise future generations committed cooperatively to making our system of government work. Education, however, is about choices. Sometimes, children need to learn by making choices for themselves. Other times, choices are made for children—by their parents, by their teachers, and by the people acting democratically through their governments. In my view, the First Amendment does not disable government from helping parents make such a choice here—a choice not to have their children buy extremely violent, interactive video games, which they more than reasonably fear pose only the risk of harm to those children.

For these reasons, I respectfully dissent.

## **Note: Reconsidering the Categorical Approach**

1. After the Court's decision in *United States v. Stevens*, Congress passed - - - and President Obama signed - - - the Animal Crush Video Prohibition Act of 2010, Pub. L. 111-294, now codified at 18 U.S.C. §48.

Congress reasserted its findings that there are "certain extreme acts of animal cruelty that appeal to a specific sexual fetish. These acts of extreme animal cruelty are videotaped, and the resulting video tapes are commonly referred to as 'animal crush videos.'" The statute defines 'animal crush video' as "any photograph, motion-picture film, video or digital recording, or electronic image that—

(1) depicts actual conduct in which 1 or more living nonhuman mammals, birds, reptiles, or amphibians is intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury . . . . and

(2) is obscene.

Note that the definition does not include insects. The statute specifically exempts any visual depiction of

(A) customary and normal veterinary or agricultural husbandry practices;

(B) the slaughter of animals for food; or

(C) hunting, trapping, or fishing.

The Fifth Circuit in *United States v. Richards*, 755 F.3d 269 (5th Cir. 2014), upheld the statute. The defendants, who were engaged in "crush porn" videos unlike *Stevens*, argued that even if § 48 is limited to *Miller* obscenity, it nonetheless is facially unconstitutional because it violates the rationale set forth in *R.A. V. v. City of St. Paul* (1992). The Fifth Circuit panel highlighted the exceptions in *R.A.V.*:

First, "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.... A State might choose to prohibit only that obscenity which is the most patently offensive in its prurience—i.e., that which involves the most lascivious displays of sexual activity." *R.A.V.* Second, "[a]nother valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular secondary effects of the speech, so that the regulation is justified without reference to the content of the ... speech." *Id.* (citing *Renton v. Playtime Theatres, Inc.* (1986)). "A State could, for example, permit all obscene live performances except those involving minors." *Id.* Third, "[t]o validate such selectivity (where totally proscribable speech is at issue) it may not even be necessary to identify any particular 'neutral' basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *Id.*

(ellipses in original). Interestingly the Fifth Circuit focused on the second exception - - - the secondary effects doctrine and stated that the statute

“regulates a content-defined subclass based on its secondary effects and is justified without reference to the content of the speech.” It stated:

§ 48 is justified with reference not to the content of such a message but rather to its secondary effects-wanton torture and killing that, as demonstrated by federal and state animal-cruelty laws, society has deemed worthy of criminal sanction. See 156 Cong. Rec. S7653–54 (2010) (“The other element that occurs in animal crush videos and which warrants a higher punishment than simple obscenity is that it involves the intentional torture or pain to a living animal. Congress finds this combination deplorable and worthy of special punishment.”).

Does this analysis satisfy the concerns the Court raised in *Stevens*? The United States Supreme Court denied certiorari. *United States v. Richards*, 755 F.3d 269 (5th Cir. 2014) *cert. denied sub nom. Justice v. United States*, 135 S. Ct. 1546 (2015) and *cert. denied*, 135 S. Ct. 1547 (2015).

2. The Court declined to extend the categorical exception to “animal cruelty” in *Stevens* and to violence in *Brown v. Entertainment Merchants Association*. Are you satisfied with the limited number of types of speech in the categorical exceptions? Should “obscenity” be one of them?

# Part II: The Religion Clauses

# Chapter Eleven: DEFINING RELIGION

This very brief chapter introduces the “Religion Clauses” of the First Amendment with an exploration of the meaning of “religion.”

## Chapter Outline

*United States v. Seeger*

*Welsh v. United States*

Notes

## *United States v. Seeger*

380 U.S. 163 (1965)

JUSTICE CLARK DELIVERED THE OPINION OF THE COURT, IN WHICH WARREN, C.J., AND BLACK, HARLAN, BRENNAN, STEWART, WHITE, AND GOLDBERG, J.J., JOINED. DOUGLAS, J., FILED A CONCURRING OPINION.

JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

These cases involve claims of conscientious objectors under 6 (j) of the Universal Military Training and Service Act, 50 U.S.C. App. 456 (j) (1958 ed.), which exempts from combatant training and service in the armed forces of the United States those persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form. The cases were consolidated for argument and we consider them together although each involves different facts and circumstances. The parties raise the basic question of the constitutionality of the section which defines the term "religious training and belief," as used in the Act, as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." The constitutional attack is launched under the First Amendment's Establishment and Free Exercise Clauses and is twofold: (1) The section does not exempt nonreligious conscientious objectors; and (2) it discriminates between different forms of religious expression in violation of the Due Process Clause of the Fifth Amendment. \*\*\* We granted certiorari in each of the cases because of their importance in the administration of the Act.

We have concluded that Congress, in using the expression "Supreme Being" rather than the designation "God," was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, the test of belief "in a relation to a Supreme Being" is

whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is "in a relation to a Supreme Being" and the other is not. We have concluded that the beliefs of the objectors in these cases meet these criteria. \*\*\*

#### THE FACTS IN THE CASES.

No. 50: Seeger was convicted in the District Court for the Southern District of New York of having refused to submit to induction in the armed forces. He was originally classified 1-A in 1953 by his local board, but this classification was changed in 1955 to 2-S (student) and he remained in this status until 1958 when he was reclassified 1-A. He first claimed exemption as a conscientious objector in 1957 after successive annual renewals of his student classification. Although he did not adopt verbatim the printed Selective Service System form, he declared that he was conscientiously opposed to participation in war in any form by reason of his "religious" belief; that he preferred to leave the question as to his belief in a Supreme Being open, "rather than answer `yes' or `no'"; that his "skepticism or disbelief in the existence of God" did "not necessarily mean lack of faith in anything whatsoever"; that his was a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." He cited such personages as Plato, Aristotle and Spinoza for support of his ethical belief in intellectual and moral integrity "without belief in God, except in the remotest sense." His belief was found to be sincere, honest, and made in good faith; and his conscientious objection to be based upon individual training and belief, both of which included research in religious and cultural fields. Seeger's claim, however, was denied solely because it was not based upon a "belief in a relation to a Supreme Being" as required by 6 (j) of the Act. At trial Seeger's counsel admitted that Seeger's belief was not in relation to a Supreme Being as commonly understood, but contended that he was entitled to the exemption because "under the present law Mr. Seeger's position would also include definitions of religion which have been stated more recently," and could be "accommodated" under the definition of religious training and belief in the Act. He was convicted and the Court of Appeals reversed, holding that the Supreme Being requirement of the section distinguished "between internally derived and externally compelled beliefs" and was, therefore, an "impermissible classification" under the Due Process Clause of the Fifth Amendment.

\*\*\* [facts of companion cases omitted]

#### BACKGROUND OF 6 (j).

Chief Justice Hughes, in his opinion in *United States v. Macintosh* (1931), enunciated the rationale behind the long recognition of conscientious objection to participation in war accorded by Congress in our various conscription laws when he declared that "in the forum of conscience, duty to a moral power higher than the State has always been maintained." In a similar vein Harlan Fiske Stone, later Chief Justice, drew from the Nation's past when he declared that

"both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of

preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process."

Stone, *The Conscientious Objector*, 21 COL. UNIV. Q. 253, 269 (1919).

Governmental recognition of the moral dilemma posed for persons of certain religious faiths by the call to arms came early in the history of this country. Various methods of ameliorating their difficulty were adopted by the Colonies, and were later perpetuated in state statutes and constitutions. Thus by the time of the Civil War there existed a state pattern of exempting conscientious objectors on religious grounds. \*\*\*

The need for conscription did not again arise until World War I. The Draft Act of 1917, 40 Stat. 76, 78, afforded exemptions to conscientious objectors who were affiliated with a "well-recognized religious sect or organization [then] organized and existing and whose existing creed or principles [forbade] its members to participate in war in any form . . . ." The Act required that all persons be inducted into the armed services, but allowed the conscientious objectors to perform noncombatant service in capacities designated by the President of the United States. Although the 1917 Act excused religious objectors only, in December 1917, the Secretary of War instructed that "personal scruples against war" be considered as constituting "conscientious objection." This Act, including its conscientious objector provisions, was upheld against constitutional attack in the *Selective Draft Law Cases* (1918).

In adopting the 1940 Selective Training and Service Act Congress broadened the exemption afforded in the 1917 Act by making it unnecessary to belong to a pacifist religious sect if the claimant's own opposition to war was based on "religious training and belief." Those found to be within the exemption were not inducted into the armed services but were assigned to noncombatant service under the supervision of the Selective Service System. The Congress recognized that one might be religious without belonging to an organized church just as surely as minority members of a faith not opposed to war might through religious reading reach a conviction against participation in war. Indeed, the consensus of the witnesses appearing before the congressional committees was that individual belief - rather than membership in a church or sect - determined the duties that God imposed upon a person in his everyday conduct; and that "there is a higher loyalty than loyalty to this country, loyalty to God." Thus, while shifting the test from membership in such a church to one's individual belief the Congress nevertheless continued its historic practice of excusing from armed service those who believed that they owed an obligation, superior to that due the state, of not participating in war in any form.

Between 1940 and 1948 two courts of appeals held that the phrase "religious training and belief" did not include philosophical, social or political policy. Then in 1948 the Congress amended the language of the statute and declared that "religious training and belief" was to be defined as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or

philosophical views or a merely personal moral code." The only significant mention of this change in the provision appears in the report of the Senate Armed Services Committee recommending adoption. It said simply this: "This section reenacts substantially the same provisions as were found in subsection 5 (g) of the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relation to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and noncombatant military service.

#### INTERPRETATION OF 6 (j).

1. The crux of the problem lies in the phrase "religious training and belief" which Congress has defined as "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation." In assigning meaning to this statutory language we may narrow the inquiry by noting briefly those scruples expressly excepted from the definition. The section excludes those persons who, disavowing religious belief, decide on the basis of essentially political, sociological or economic considerations that war is wrong and that they will have no part of it. These judgments have historically been reserved for the Government, and in matters which can be said to fall within these areas the conviction of the individual has never been permitted to override that of the state. The statute further excludes those whose opposition to war stems from a "merely personal moral code," a phrase to which we shall have occasion to turn later in discussing the application of 6 (j) to these cases. We also pause to take note of what is not involved in this litigation. No party claims to be an atheist or attacks the statute on this ground. The question is not, therefore, one between theistic and atheistic beliefs. We do not deal with or intimate any decision on that situation in these cases. Nor do the parties claim the monotheistic belief that there is but one God; what they claim (with the possible exception of Seeger who bases his position here not on factual but on purely constitutional grounds) is that they adhere to theism, which is the "Belief in the existence of a god or gods; . . . Belief in superhuman powers or spiritual agencies in one or many gods," as opposed to atheism. Our question, therefore, is the narrow one: Does the term "Supreme Being" as used in 6 (j) mean the orthodox God or the broader concept of a power or being, or a faith, "to which all else is subordinate or upon which all else is ultimately dependent"? Webster's New International Dictionary (Second Edition). In considering this question we resolve it solely in relation to the language of 6 (j) and not otherwise.

2. Few would quarrel, we think, with the proposition that in no field of human endeavor has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man's predicament in life, in death or in final judgment and retribution. This fact makes the task of discerning the intent of Congress in using the phrase "Supreme Being" a complex one. Nor is it made the easier by the richness and variety of spiritual life in our country. Over 250 sects inhabit our land. Some believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace. There are those who think of God as the depth of our being; others, such as the Buddhists, strive for a state of lasting rest through self-denial and inner purification; in Hindu philosophy, the Supreme Being is the transcendental reality which is truth,

knowledge and bliss. Even those religious groups which have traditionally opposed war in every form have splintered into various denominations: from 1940 to 1947 there were four denominations using the name "Friends;" the "Church of the Brethren" was the official name of the oldest and largest church body of four denominations composed of those commonly called Brethren; and the "Mennonite Church" was the largest of 17 denominations, including the Amish and Hutterites, grouped as "Mennonite bodies" in the 1936 report on the Census of Religious Bodies. This vast panoply of beliefs reveals the magnitude of the problem which faced the Congress when it set about providing an exemption from armed service. It also emphasizes the care that Congress realized was necessary in the fashioning of an exemption which would be in keeping with its long-established policy of not picking and choosing among religious beliefs.

In spite of the elusive nature of the inquiry, we are not without certain guidelines. In amending the 1940 Act, Congress adopted almost intact the language of Chief Justice Hughes in *United States v. Macintosh*:

"The essence of religion is belief in a relation to *God* involving duties superior to those arising from any human relation." (Emphasis supplied.)

By comparing the statutory definition with those words, however, it becomes readily apparent that the Congress deliberately broadened them by substituting the phrase "Supreme Being" for the appellation "God." And in so doing it is also significant that Congress did not elaborate on the form or nature of this higher authority which it chose to designate as "Supreme Being." By so refraining it must have had in mind the admonitions of the Chief Justice when he said in the same opinion that even the word "God" had myriad meanings for men of faith:

"[P]utting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field."

Moreover, the Senate Report on the bill specifically states that 6 (j) was intended to re-enact "substantially the same provisions as were found" in the 1940 Act. That statute, of course, refers to "religious training and belief" without more. Admittedly, all of the parties here purport to base their objection on religious belief. It appears, therefore, that we need only look to this clear statement of congressional intent as set out in the report. Under the 1940 Act it was necessary only to have a conviction based upon religious training and belief; we believe that is all that is required here. Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal

treatment for those whose opposition to service is grounded in their religious tenets.

3. \*\*\* Thus the history of the Act belies the notion that it was to be restrictive in application and available only to those believing in a traditional God. \*\*\* Section 6 (j), then, is no more than a clarification of the 1940 provision \*\*\* [and] continues the congressional policy of providing exemption from military service for those whose opposition is based on grounds that can fairly be said to be "religious." To hold otherwise would not only fly in the face of Congress' entire action in the past; it would ignore the historic position of our country on this issue since its founding.

4. Moreover, we believe this construction embraces the ever-broadening understanding of the modern religious community. The eminent Protestant theologian, Dr. Paul Tillich, whose views the Government concedes would come within the statute, identifies God not as a projection "out there" or beyond the skies but as the ground of our very being.\*\*\* In his book, SYSTEMATIC THEOLOGY (1957), Dr. Tillich says:

"I have written of the God above the God of theism . . . . In such a state [of self-affirmation] the God of both religious and theological language disappears. But something remains, namely, the seriousness of that doubt in which meaning within meaninglessness is affirmed. The source of this affirmation of meaning within meaninglessness, of certitude within doubt, is not the God of traditional theism but the 'God above God,' the power of being, which works through those who have no name for it, not even the name God."

Another eminent cleric, the Bishop of Woolwich, John A. T. Robinson, in his book, HONEST TO GOD (1963), states:

"The Bible speaks of a God 'up there.' No doubt its picture of a three-decker universe, of 'the heaven above, the earth beneath and the waters under the earth,' was once taken quite literally. . . ." "[Later] *in place of a God who is literally or physically 'up there' we have accepted, as part of our mental furniture, a God who is spiritually or metaphysically 'out there.'* . . . But now it seems there is no room for him, not merely in the inn, but in the entire universe: for there are no vacant places left. In reality, of course, our new view of the universe has made not the slightest difference. . . ."

"But the idea of a God spiritually or metaphysically 'out there' dies very much harder. Indeed, most people would be seriously disturbed by the thought that it should need to die at all. For it is their God, and they have nothing to put in its place. . . . Every one of us lives with some mental picture of a God 'out there,' a God who 'exists' above and beyond the world he made, a God 'to' whom we pray and to whom we 'go' when we die."

"But the signs are that we are reaching the point at which the whole conception of a God 'out there,' which has served us so well since the collapse of the three-decker universe, is itself becoming more of a hindrance than a help." (Emphasis in original.)

The Schema of the recent Ecumenical Council included a most significant declaration on religion:

"The community of all peoples is one. One is their origin, for God made the entire human race live on all the face of the earth. One, too, is their ultimate end, God. Men expect from the various religions answers to the riddles of the human condition: What is man? What is the meaning and purpose of our lives? What is the moral good and what is sin? What are death, judgment, and retribution after death?

.....

"Ever since primordial days, numerous peoples have had a certain perception of that hidden power which hovers over the course of things and over the events that make up the lives of men; some have even come to know of a Supreme Being and Father. Religions in an advanced culture have been able to use more refined concepts and a more developed language in their struggle for an answer to man's religious questions

.....

"Nothing that is true and holy in these religions is scorned by the Catholic Church. Ceaselessly the Church proclaims Christ, 'the Way, the Truth, and the Life,' in whom God reconciled all things to Himself. The Church regards with sincere reverence those ways of action and of life, precepts and teachings which, although they differ from the ones she sets forth, reflect nonetheless a ray of that Truth which enlightens all men."

Dr. David Saville Muzzey, a leader in the Ethical Culture Movement, states in his book, *ETHICS AS A RELIGION* (1951), that "[e]verybody except the avowed atheists (and they are comparatively few) believes in some kind of God," and that "The proper question to ask, therefore, is not the futile one, Do you believe in God? but rather, What kind of God do you believe in?" Dr. Muzzey attempts to answer that question:

"Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human experience. It is anthropocentric, not theocentric. Religion, for all the various definitions that have been given of it, must surely mean the devotion of man to the highest ideal that he can conceive. And that ideal is a community of spirits in which the latent moral potentialities of men shall have been elicited by their reciprocal endeavors to cultivate the best in their fellow men. What ultimate reality is we do not know; but we have the faith that it expresses itself in the human world as the power which inspires in men moral purpose."

"Thus the 'God' that we love is not the figure on the great white throne, but the perfect pattern, envisioned by faith, of humanity as it should be, purged of the evil elements which retard its progress toward the knowledge, love and practice of the right."

These are but a few of the views that comprise the broad spectrum of religious beliefs found among us. But they demonstrate very clearly the diverse manners in which beliefs, equally paramount in the lives of their possessors, may be articulated. They further reveal the difficulties inherent in placing too narrow a construction on the provisions of 6 (j) and thereby lend conclusive support to the construction which we today find that Congress intended.

5. We recognize the difficulties that have always faced the trier of fact in these cases. We hope that the test that we lay down proves less onerous. The examiner is furnished a standard that permits consideration of criteria with which he has had considerable experience. While the applicant's words may

differ, the test is simple of application. It is essentially an objective one, namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?

Moreover, it must be remembered that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight. \*\*\*

But we hasten to emphasize that while the "truth" of a belief is not open to question, there remains the significant question whether it is "truly held." This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact - a prime consideration to the validity of every claim for exemption as a conscientious objector. \*\*\*

#### APPLICATION OF 6 (j) TO THE INSTANT CASES.

As we noted earlier, the statutory definition excepts those registrants whose beliefs are based on a "merely personal moral code." The records in these cases, however, show that at no time did any one of the applicants suggest that his objection was based on a "merely personal moral code." Indeed at the outset each of them claimed in his application that his objection was based on a religious belief. We have construed the statutory definition broadly and it follows that any exception to it must be interpreted narrowly. The use by Congress of the words "merely personal" seems to us to restrict the exception to a moral code which is not only personal but which is the sole basis for the registrant's belief and is in no way related to a Supreme Being. It follows, therefore, that if the claimed religious beliefs of the respective registrants in these cases meet the test that we lay down then their objections cannot be based on a "merely personal" moral code.

In *Seeger*, the Court of Appeals failed to find sufficient "externally compelled beliefs." However, it did find that "it would seem impossible to say with assurance that [Seeger] is not bowing to 'external commands' in virtually the same sense as is the objector who defers to the will of a supernatural power."  
\*\*\*

The Court of Appeals also found that there was no question of the applicant's sincerity. He was a product of a devout Roman Catholic home; he was a close student of Quaker beliefs from which he said "much of [his] thought is derived"; he approved of their opposition to war in any form; he devoted his spare hours to the American Friends Service Committee and was assigned to hospital duty.

In summary, Seeger professed "religious belief" and "religious faith." He did not disavow any belief "in a relation to a Supreme Being"; indeed he stated that "the cosmic order does, perhaps, suggest a creative intelligence." He decried the tremendous "spiritual" price man must pay for his willingness to destroy human life. In light of his beliefs and the unquestioned sincerity with which he held them, we think the Board, had it applied the test we propose today, would have granted him the exemption. We think it clear that the beliefs which prompted his objection occupy the same place in his life as the belief in a

traditional deity holds in the lives of his friends, the Quakers. We are reminded once more of Dr. Tillich's thoughts:

"And if that word [God] has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, of your ultimate concern, of what you take seriously without any reservation. Perhaps, in order to do so, you must forget everything traditional that you have learned about God . . . ."

Tillich, *THE SHAKING OF THE FOUNDATIONS* 57 (1948). (Emphasis supplied.)

It may be that Seeger did not clearly demonstrate what his beliefs were with regard to the usual understanding of the term "Supreme Being." But as we have said Congress did not intend that to be the test. We therefore affirm the judgment in No. 50. \*\*\*

*It is so ordered.*

JUSTICE DOUGLAS, CONCURRING.

If I read the statute differently from the Court, I would have difficulties. For then those who embraced one religious faith rather than another would be subject to penalties; and that kind of discrimination, as we held in *Sherbert v. Verner* (1963) would violate the Free Exercise Clause of the First Amendment. It would also result in a denial of equal protection by preferring some religions over others - an invidious discrimination that would run afoul of the Due Process Clause of the Fifth Amendment. See *Bolling v. Sharpe* (1954) .

The legislative history of this Act leaves much in the dark. But it is, in my opinion, not a tour de force if we construe the words "Supreme Being" to include the cosmos, as well as an anthropomorphic entity. \*\*\*

The words "a Supreme Being" have no narrow technical meaning in the field of religion. Long before the birth of our Judeo-Christian civilization the idea of God had taken hold in many forms. Mention of only two - Hinduism and Buddhism - illustrates the fluidity and evanescent scope of the concept. In the Hindu religion the Supreme Being is conceived in the forms of several cult Deities. The chief of these, which stand for the Hindu Triad, are Brahma, Vishnu and Siva. Another Deity, and the one most widely worshipped, is Sakti, the Mother Goddess, conceived as power, both destructive and creative. Though Hindu religion encompasses the worship of many Deities, it believes in only one single God, the eternally existent One Being with his manifold attributes and manifestations. This idea is expressed in Rigveda, the earliest sacred text of the Hindus, in verse 46 of a hymn attributed to the mythical seer Dirghatamas (Rigveda, I, 164):

"They call it Indra, Mitra, Varuna and Agni And also heavenly beautiful  
Garutman: The Real is One, though sages name it variously - They call it Agni,  
Yama, Matarisvan."

Indian philosophy, which comprises several schools of thought, has advanced different theories of the nature of the Supreme Being. According to the Upanisads, Hindu sacred texts, the Supreme Being is described as the power which creates and sustains everything, and to which the created things return upon dissolution. The word which is commonly used in the Upanisads to

indicate the Supreme Being is Brahman. Philosophically, the Supreme Being is the transcendental Reality which is Truth, Knowledge, and Bliss. It is the source of the entire universe. In this aspect Brahman is Isvara, a personal Lord and Creator of the universe, an object of worship. But, in the view of one school of thought, that of Sankara, even this is an imperfect and limited conception of Brahman which must be transcended: to think of Brahman as the Creator of the material world is necessarily to form a concept infected with illusion, or maya - which is what the world really is, in highest truth. Ultimately, mystically, Brahman must be understood as without attributes, as neti neti (not this, not that).

Buddhism - whose advent marked the reform of Hinduism - continued somewhat the same concept. As stated by Nancy Wilson Ross, "God - if I may borrow that word for a moment - the universe, and man are one indissoluble existence, one total whole. Only THIS - capital THIS - is. Anything and everything that appears to us as an individual entity or phenomenon, whether it be a planet or an atom, a mouse or a man, is but a temporary manifestation of THIS in form; every activity that takes place, whether it be birth or death, loving or eating breakfast, is but a temporary manifestation of THIS in activity. When we look at things this way, naturally we cannot believe that each individual person has been endowed with a special and individual soul or self. Each one of us is but a cell, as it were, in the body of the Great Self, a cell that comes into being, performs its functions, and passes away, transformed into another manifestation. Though we have temporary individuality, that temporary, limited individuality is not either a true self or our true self. Our true self is the Great Self; our true body is the Body of Reality, or the Dharmakaya, to give it its technical Buddhist name."

Does a Buddhist believe in "God" or a "Supreme Being"? That, of course, depends on how one defines "God" \*\*\*

When the present Act was adopted in 1948 we were a nation of Buddhists, Confucianists, and Taoists, as well as Christians. Hawaii, then a Territory, was indeed filled with Buddhists, Buddhism being "probably the major faith, if Protestantism and Roman Catholicism are deemed different faiths." \*\*\*

When the Congress spoke in the vague general terms of a Supreme Being I cannot, therefore, assume that it was so parochial as to use the words in the narrow sense urged on us. I would attribute tolerance and sophistication to the Congress, commensurate with the religious complexion of our communities. In sum, I agree with the Court that any person opposed to war on the basis of a sincere belief, which in his life fills the same place as a belief in God fills in the life of an orthodox religionist, is entitled to exemption under the statute. None comes to us an avowedly irreligious person or as an atheist; one, as a sincere believer in "goodness and virtue for their own sakes." His questions and doubts on theological issues, and his wonder, are no more alien to the statutory standard than are the awe-inspired questions of a devout Buddhist.

## Welsh v. United States

398 U.S. 333 (1970)

JUSTICE BLACK ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED AN OPINION IN WHICH JUSTICE DOUGLAS, JUSTICE BRENNAN, AND JUSTICE MARSHALL JOIN. JUSTICE HARLAN ISSUED AN OPINION CONCURRING IN THE RESULT. JUSTICE WHITE ISSUED A DISSIDENTING OPINION IN WHICH THE CHIEF JUSTICE AND JUSTICE STEWART JOINED. JUSTICE BLACKMUN TOOK NO PART IN THE CONSIDERATION OR DECISION OF THIS CASE.

JUSTICE BLACK ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED AN OPINION IN WHICH JUSTICE DOUGLAS, JUSTICE BRENNAN, AND JUSTICE MARSHALL JOIN.

The petitioner, Elliott Ashton Welsh II, was convicted by a United States District Judge of refusing to submit to induction into the Armed Forces \*\*\* sentenced to imprisonment for three years. One of petitioner's defenses to the prosecution was that 6 (j) of the Universal Military Training and Service Act exempted him from combat and noncombat service because he was "by reason of religious training and belief . . . conscientiously opposed to participation in war in any form." After finding that there was no religious basis for petitioner's conscientious objector claim, the Court of Appeals, Judge Hamley dissenting, affirmed the conviction. We granted certiorari chiefly to review the contention that Welsh's conviction should be set aside on the basis of this Court's decision in *United States v. Seeger* (1965). For the reasons to be stated, and without passing upon the constitutional arguments that have been raised, we vote to reverse this conviction because of its fundamental inconsistency with *United States v. Seeger*.

The controlling facts in this case are strikingly similar to those in *Seeger*. Both *Seeger* and Welsh were brought up in religious homes and attended church in their childhood, but in neither case was this church one which taught its members not to engage in war at any time for any reason. Neither *Seeger* nor Welsh continued his childhood religious ties into his young manhood, and neither belonged to any religious group or adhered to the teachings of any organized religion during the period of his involvement with the Selective Service System. At the time of registration for the draft, neither had yet come to accept pacifist principles. Their views on war developed only in subsequent years, but when their ideas did fully mature both made application to their local draft boards for conscientious objector exemptions from military service under 6 (j) of the Universal Military Training and Service Act. \*\*\*

In filling out their exemption applications both *Seeger* and Welsh were unable to sign the statement that, as printed in the Selective Service form, stated "I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form." *Seeger* could sign only after striking the words "training and" and putting quotation marks around the word "religious." Welsh could sign only after striking the words "my religious training and." On those same applications, neither could definitely affirm or deny that he believed in a "Supreme Being," both stating that they preferred to leave the question open. But both *Seeger* and Welsh affirmed on those applications that they held deep conscientious scruples against taking part in wars where people were killed. Both strongly believed that killing in war was wrong, unethical, and

immoral, and their consciences forbade them to take part in such an evil practice. Their objection to participating in war in any form could not be said to come from a "still, small voice of conscience"; rather, for them that voice was so loud and insistent that both men preferred to go to jail rather than serve in the Armed Forces. There was never any question about the sincerity and depth of Seeger's convictions as a conscientious objector, and the same is true of Welsh. In this regard the Court of Appeals noted, "[t]he government concedes that [Welsh's] beliefs are held with the strength of more traditional religious convictions." But in both cases the Selective Service System concluded that the beliefs of these men were in some sense insufficiently "religious" to qualify them for conscientious objector exemptions under the terms of 6 (j). \*\*\* Both Seeger and Welsh subsequently refused to submit to induction into the military and both were convicted of that offense.

In *Seeger* the Court was confronted, first, with the problem that 6 (j) defined "religious training and belief" in terms of a "belief in a relation to a Supreme Being . . .," a definition that arguably gave a preference to those who believed in a conventional God as opposed to those who did not. Noting the "vast panoply of beliefs" prevalent in our country, the Court construed the congressional intent as being in "keeping with its long-established policy of not picking and choosing among religious beliefs," and accordingly interpreted "the meaning of religious training and belief so as to embrace all religions . . . ." But, having decided that all religious conscientious objectors were entitled to the exemption, we faced the more serious problem of determining which beliefs were "religious" within the meaning of the statute. This question was particularly difficult in the case of Seeger himself. Seeger stated that his was a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." In a letter to his draft board, he wrote:

"My decision arises from what I believe to be considerations of validity from the standpoint of the welfare of humanity and the preservation of the democratic values which we in the United States are struggling to maintain. I have concluded that war, from the practical standpoint, is futile and self-defeating and that from the more important moral standpoint it is unethical."

On the basis of these and similar assertions, the Government argued that Seeger's conscientious objection to war was not "religious" but stemmed from "essentially political, sociological, or philosophical views or a merely personal moral code."

In resolving the question whether Seeger and the other registrants in that case qualified for the exemption, the Court stated that "[the] task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious." (Emphasis added.) The reference to the registrant's "own scheme of things" was intended to indicate that the central consideration in determining whether the registrant's beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the registrant's life. The Court's principal statement of its test for determining whether a conscientious objector's beliefs are religious within the meaning of 6 (j) was as follows:

"The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of

those admittedly qualifying for the exemption comes within the statutory definition."

The Court made it clear that these sincere and meaningful beliefs that prompt the registrant's objection to all wars need not be confined in either source or content to traditional or parochial concepts of religion. \*\*\*

Accordingly, the Court found that Seeger should be granted conscientious objector status.

In the case before us the Government seeks to distinguish our holding in *Seeger* on basically two grounds, both of which were relied upon by the Court of Appeals in affirming Welsh's conviction. First, it is stressed that Welsh was far more insistent and explicit than Seeger in denying that his views were religious. For example, in filling out their conscientious objector applications, Seeger put quotation marks around the word "religious," but Welsh struck the word "religious" entirely and later characterized his beliefs as having been formed "by reading in the fields of history and sociology." The Court of Appeals found that Welsh had "denied that his objection to war was premised on religious belief" and concluded that "[t]he Appeal Board was entitled to take him at his word." We think this attempt to distinguish *Seeger* fails for the reason that it places undue emphasis on the registrant's interpretation of his own beliefs. The Court's statement in *Seeger* that a registrant's characterization of his own belief as "religious" should carry great weight, does not imply that his declaration that his views are nonreligious should be treated similarly. When a registrant states that his objections to war are "religious," that information is highly relevant to the question of the function his beliefs have in his life. But very few registrants are fully aware of the broad scope of the word "religious" as used in 6 (j), and accordingly a registrant's statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption. Welsh himself presents a case in point. Although he originally characterized his beliefs as nonreligious, he later upon reflection wrote a long and thoughtful letter to his Appeal Board in which he declared that his beliefs were "certainly religious in the ethical sense of the word." He explained:

"I believe I mentioned taking of life as not being, for me, a religious wrong. Again, I assumed Mr. [Brady (the Department of Justice hearing officer)] was using the word 'religious' in the conventional sense, and, in order to be perfectly honest did not characterize my belief as 'religious.'"

The Government also seeks to distinguish *Seeger* on the ground that Welsh's views, unlike Seeger's were "essentially political, sociological, or philosophical views or a merely personal moral code." As previously noted, the Government made the same argument about Seeger, and not without reason, for Seeger's views had a substantial political dimension. In this case, Welsh's conscientious objection to war was undeniably based in part on his perception of world politics. In a letter to his local board, he wrote:

"I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to 'defend' our 'way of life' profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we, as a nation, fail our responsibility as a nation."

We certainly do not think that 6 (j)'s exclusion of those persons with "essentially political, sociological, or philosophical views or a merely personal moral code" should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy. The two groups of registrants that obviously do fall within these exclusions from the exemption are those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency. In applying 6 (j)'s exclusion of those whose views are "essentially political, sociological, or philosophical" or of those who have a "merely personal moral code," it should be remembered that these exclusions are definitional and do not therefore restrict the category of persons who are conscientious objectors by "religious training and belief." Once the Selective service System has taken the first step and determined under the standards set out here and in *Seeger* that the registrant is a "religious" conscientious objector, it follows that his views cannot be "essentially political, sociological, or philosophical." Nor can they be a "merely personal moral code."

Welsh stated that he "believe[d] the taking of life - anyone's life - to be morally wrong." In his original conscientious objector application he wrote the following:

"I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. This belief (and the corresponding 'duty' to abstain from violence toward another person) is not 'superior to those arising from any human relation.' On the contrary: it is essential to every human relation. I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant."

Welsh elaborated his beliefs in later communications with Selective Service officials. On the basis of these beliefs and the conclusion of the Court of Appeals that he held them "with the strength of more traditional religious convictions," we think Welsh was clearly entitled to a conscientious objector exemption. Section 6 (j) requires no more. That section exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.

The judgment is

*Reversed.*

JUSTICE HARLAN, CONCURRING IN THE RESULT.

Candor requires me to say that I joined the Court's opinion in *United States v. Seeger* (1965), only with the gravest misgivings as to whether it was a legitimate exercise in statutory construction, and today's decision convinces me that in doing so I made a mistake which I should now acknowledge.

\*\*\* In my opinion, the liberties taken with the statute both in *Seeger* and today's decision cannot be justified in the name of the familiar doctrine of construing federal statutes in a manner that will avoid possible constitutional

infirmities in them. There are limits to the permissible application of that doctrine, and, as I will undertake to show in this opinion, those limits were crossed in *Seeger*, and even more apparently have been exceeded in the present case. I therefore find myself unable to escape facing the constitutional issue that this case squarely presents: whether 6 (j) in limiting this draft exemption to those opposed to war in general because of theistic beliefs runs afoul of the religious clauses of the First Amendment. For reasons later appearing I believe it does, and on that basis I concur in the judgment reversing this conviction, and adopt the test announced by JUSTICE BLACK, not as a matter of statutory construction, but as the touchstone for salvaging a congressional policy of long standing that would otherwise have to be nullified.

#### I

\*\*\* It is Congress' will that must here be divined. In that endeavor it is one thing to give words a meaning not necessarily envisioned by Congress so as to adapt them to circumstances also un contemplated by the legislature in order to achieve the legislative policy, *Holy Trinity Church v. United States* (1892); it is a wholly different matter to define words so as to change policy. The limits of this Court's mandate to stretch concededly elastic congressional language are fixed in all cases by the context of its usage and legislative history, if available, that are the best guides to congressional purpose and the lengths to which Congress enacted a policy. The prevailing opinion today snubs both guidelines for it is apparent from a textual analysis of 6 (j) and the legislative history that the words of this section, as used and understood by Congress, fall short of enacting the broad policy of exempting from military service all individuals who in good faith oppose all war.

#### A

The natural reading of 6 (j), which quite evidently draws a distinction between theistic and nontheistic religions, is the only one that is consistent with the legislative history. \*\*\*

#### B

Against this legislative history it is a remarkable feat of judicial surgery to remove, as did *Seeger*, the theistic requirement of 6 (j). The prevailing opinion today, however, in the name of interpreting the will of Congress, has performed a lobotomy and completely transformed the statute by reading out of it any distinction between religiously acquired beliefs and those deriving from "essentially political, sociological, or philosophical views or a merely personal moral code."

In the realm of statutory construction it is appropriate to search for meaning in the congressional vocabulary in a lexicon most probably consulted by Congress. Resort to WEBSTER'S reveals that the meanings of "religion" are: "1. The service and adoration of God or a god as expressed in forms of worship, in obedience to divine commands . . . ; 2. The state of life of a religious . . . ; 3. One of the *systems* of faith and worship; a form of theism; a religious faith . . . ; 4. The profession or practice of religious beliefs; religious observances *collectively*; pl. rites; 5. Devotion or fidelity; . . . conscientiousness; 6. An apprehension, awareness, or conviction of the existence of a supreme being, or more widely, of supernatural powers or influences controlling one's own, humanity's, or nature's destiny; also, such an apprehension, etc., accompanied by or arousing

reverence, love, gratitude, the will to obey and serve, and the like . . . ." (Emphasis added.)

Of the five pertinent definitions four include the notion of either a Supreme Being or a cohesive, organized group pursuing a common spiritual purpose together. While, as the Court's opinion in *Seeger* points out, these definitions do not exhaust the almost infinite and sophisticated possibilities for defining "religion," there is strong evidence that Congress restricted, in this instance, the word to its conventional sense. That it is difficult to plot the semantic penumbra of the word "religion" does not render this term so plastic in meaning that the Court is entitled, as matter of statutory construction, to conclude that any asserted and strongly held belief satisfies its requirements. It must be recognized that the permissible shadow of connotation is limited by the context in which words are used. In 6 (j) Congress has included not only a reference to a Supreme Being but has also explicitly contrasted "religious" beliefs with those that are "essentially political, sociological, or philosophical" and a "personal moral code." This exception certainly is, at the very least, the statutory boundary, the "asymptote," of the word "religion."

For me this dichotomy reveals that Congress was not embracing that definition of religion that alone speaks in terms of "devotion or fidelity" to individual principles acquired on an individualized basis but was adopting, at least, those meanings that associate religion with formal, organized worship or shared beliefs by a recognizable and cohesive group. Indeed, this requirement was explicit in the predecessor to the 1940 statute. \*\*\*

Unless we are to assume an Alice-in-Wonderland world where words have no meaning, I think it fair to say that Congress' choice of language cannot fail to convey to the discerning reader the very policy choice that the prevailing opinion today completely obliterates: that between conventional religions that usually have an organized and formal structure and dogma and a cohesive group identity, even when nontheistic, and cults that represent schools of thought and in the usual case are without formal structure or are, at most, loose and informal associations of individuals who share common ethical, moral, or intellectual views.

## II

When the plain thrust of a legislative enactment can only be circumvented by distortion to avert an inevitable constitutional collision, it is only by exalting form over substance that one can justify this veering off the path that has been plainly marked by the statute. Such a course betrays extreme skepticism as to constitutionality, and, in this instance, reflects a groping to preserve the conscientious objector exemption at all cost.

I cannot subscribe to a wholly emasculated construction of a statute to avoid facing a latent constitutional question, in purported fidelity to the salutary doctrine of avoiding unnecessary resolution of constitutional issues, a principle to which I fully adhere. See *Ashwander v. Tennessee Valley Authority* (1936) (Brandeis, J., concurring). It is, of course, desirable to salvage by construction legislative enactments whenever there is good reason to believe that Congress did not intend to legislate consequences that are unconstitutional, but it is not permissible, in my judgment, to take a lateral step that robs legislation of all

meaning in order to avert the collision between its plainly intended purpose and the commands of the Constitution. \*\*\*

I therefore turn to the constitutional question.

### III

The constitutional question that must be faced in this case is whether a statute that defers to the individual's conscience only when his views emanate from adherence to theistic religious beliefs is within the power of Congress. Congress, of course, could, entirely consistently with the requirements of the Constitution, eliminate all exemptions for conscientious objectors. Such a course would be wholly "neutral" and, in my view, would not offend the Free Exercise Clause, for reasons set forth in my dissenting opinion in *Sherbert v. Verner* (1963). However, having chosen to exempt, it cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other. Any such distinctions are not, in my view, compatible with the Establishment Clause of the First Amendment. The implementation of the neutrality principle of these cases requires, in my view, as I stated in *Walz v. Tax Comm'n* "an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the scope of legislation encircles a class so broad that it can be fairly concluded that [all groups that] could be thought to fall within the natural perimeter [are included]."

The "radius" of this legislation is the conscientiousness with which an individual opposes war in general, yet the statute, as I think it must be construed, excludes from its "scope" individuals motivated by teachings of nontheistic religions, and individuals guided by an inner ethical voice that bespeaks secular and not "religious" reflection. It not only accords a preference to the "religious" but also disadvantages adherents of religions that do not worship a Supreme Being. The constitutional infirmity cannot be cured, moreover, even by an impermissible construction that eliminates the theistic requirement and simply draws the line between religious and nonreligious. This in my view offends the Establishment Clause and is that kind of classification that this Court has condemned.

If the exemption is to be given application, it must encompass the class of individuals it purports to exclude, those whose beliefs emanate from a purely moral, ethical, or philosophical source. The common denominator must be the intensity of moral conviction with which a belief is held. Common experience teaches that among "religious" individuals some are weak and others strong adherents to tenets and this is no less true of individuals whose lives are guided by personal ethical considerations. \*\*\*

### IV

Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion.

The appropriate disposition of this case, which is a prosecution for refusing to submit to induction and not an action for a declaratory judgment on the

constitutionality of 6 (j), is determined by the fact that at the time of Welsh's induction notice and prosecution the Selective Service was, as required by statute, exempting individuals whose beliefs were identical in all respects to those held by petitioner except that they derived from a religious source. Since this created a religious benefit not accorded to petitioner, it is clear to me that this conviction must be reversed under the Establishment Clause of the First Amendment unless Welsh is to go remediless.

This result, while tantamount to extending the statute, is not only the one mandated by the Constitution in this case but also the approach I would take had this question been presented in an action for a declaratory judgment or "an action in equity where the enforcement of a statute awaits the final determination of the court as to validity and scope." While the necessary remedial operation, extension, is more analogous to a graft than amputation, I think the boundaries of permissible choice may properly be considered fixed by the legislative pronouncement on severability. \*\*\*

The policy of exempting religious conscientious objectors is one of longstanding tradition in this country and accords recognition to what is, in a diverse and "open" society, the important value of reconciling individuality of belief with practical exigencies whenever possible. It dates back to colonial times and has been perpetuated in state and federal conscription statutes. That it has been phrased in religious terms reflects, I assume, the fact that ethics and morals, while the concern of secular philosophy, have traditionally been matters taught by organized religion and that for most individuals spiritual and ethical nourishment is derived from that source. It further reflects, I would suppose, the assumption that beliefs emanating from a religious source are probably held with great intensity.

When a policy has roots so deeply embedded in history, there is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals, even though they entail, not simply eliminating an offending section, but rather building upon it. Thus I am prepared to accept the prevailing opinion's conscientious objector test, not as a reflection of congressional statutory intent but as patchwork of judicial making that cures the defect of under-inclusion in 6 (j) and can be administered by local boards in the usual course of business. Like the prevailing opinion, I also conclude that petitioner's beliefs are held with the required intensity and consequently vote to reverse the judgment of conviction.

JUSTICE WHITE, WITH WHOM THE CHIEF JUSTICE AND JUSTICE STEWART JOIN, DISSENTING.

Whether or not *United States v. Seeger* (1965), accurately reflected the intent of Congress in providing draft exemptions for religious conscientious objectors to war, I cannot join today's construction of 6 (j) extending draft exemption to those who disclaim religious objections to war and whose views about war represent a purely personal code arising not from religious training and belief as the statute requires but from readings in philosophy, history, and sociology. Our obligation in statutory construction cases is to enforce the will of Congress,

not our own; and as Justice Harlan has demonstrated, construing 6 (j) to include Welsh exempts from the draft a class of persons to whom Congress has expressly denied an exemption.

For me that conclusion should end this case. Even if Welsh is quite right in asserting that exempting religious believers is an establishment of religion forbidden by the First Amendment, he nevertheless remains one of those persons whom Congress took pains not to relieve from military duty. Whether or not 6 (j) is constitutional, Welsh had no First Amendment excuse for refusing to report for induction. If it is contrary to the express will of Congress to exempt Welsh, as I think it is, then there is no warrant for saving the religious exemption and the statute by redrafting it in this Court to include Welsh and all others like him.

\*\*\* Nothing in the First Amendment prohibits drafting Welsh and other nonreligious objectors to war. Saving 6 (j) by extending it to include Welsh cannot be done in the name of a presumed congressional will but only by the Court's taking upon itself the power to make draft-exemption policy.

If I am wrong in thinking that Welsh cannot benefit from invalidation of 6 (j) on Establishment Clause grounds, I would nevertheless affirm his conviction; for I cannot hold that Congress violated the Clause in exempting from the draft all those who oppose war by reason of religious training and belief. In exempting religious conscientious objectors, Congress was making one of two judgments, perhaps both. First, 6 (j) may represent a purely practical judgment that religious objectors, however admirable, would be of no more use in combat than many others unqualified for military service. Exemption was not extended to them to further religious belief or practice but to limit military service to those who were prepared to undertake the fighting that the armed services have to do. On this basis, the exemption has neither the primary purpose nor the effect of furthering religion. \*\*\*

We have said that neither support nor hostility, but neutrality, is the goal of the religion clauses of the First Amendment. "Neutrality," however, is not self-defining. If it is "favoritism" and not "neutrality" to exempt religious believers from the draft, is it "neutrality" and not "inhibition" of religion to compel religious believers to fight when they have special reasons for not doing so, reasons to which the Constitution gives particular recognition? It cannot be ignored that the First Amendment itself contains a religious classification. The Amendment protects belief and speech, but as a general proposition, the free speech provisions stop short of immunizing conduct from official regulation. The Free Exercise Clause, however, has a deeper cut: it protects conduct as well as religious belief and speech. "[I]t safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, - freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Cantwell v. Connecticut* (1940). Although socially harmful acts may as a rule be banned despite the Free Exercise Clause even where religiously motivated, there is an area of conduct that cannot be forbidden to religious practitioners but that may be forbidden to others. We should thus not labor to find a violation of the Establishment Clause when free exercise values prompt Congress to relieve religious believers from the burdens of the law at

least in those instances where the law is not merely prohibitory but commands the performance of military duties that are forbidden by a man's religion.\*\*\*

*I would affirm the judgment below.*

## Notes

1. Note the difference between *Seeger* and *Welsh* regarding the relationships between statutory construction and the constitutional issue.
2. What do you think of Justice Harlan's concurrence in the judgment in *Welsh*? Without this, the Court would have been evenly divided, resulting in an affirmation of Welsh's conviction.
3. Is the dictionary definition - - - or definitions - - - helpful when considering the meaning of "religion"?
4. The definition of "religion" raises the question whether protection for the same acts should vary depending upon their motivation. Both *Seeger* and *Welsh* wanted an exemption from the draft, clearly based on their beliefs, but the "result" - - - not having to serve in the military - - - would be the same.

This difference is more clearly illustrated by the more recent cases of two teenagers, Danielle Bar-Navon and Ariana Iacono, who each wore facial jewelry to their respective schools. Both violated the school's dress code, both were disciplined, and both brought actions under the First Amendment.

Danielle Bar-Navon argued that her facial jewelry was expressive speech, conveying a message of nonconformity. Ariana Iacono contended that her facial jewelry was appropriate because she was a member of the Church of Body Modification.

Danielle Bar-Navon's claim under the First Amendment speech clause was rejected. In *Bar-Navon v. Brevard County Sch. Bd.*, 290 F. App'x 273, 275 (11th Cir. 2008), the Eleventh Circuit stated that even if Danielle's jewelry had satisfied the speech threshold, the school restriction would merely be subject to intermediate scrutiny, a standard the prohibition easily survived. The court noted that the dress code allowed Danielle adequate alternative methods of communication: she could communicate by talking, by engaging in "active debate," or by wearing "symbolic jewelry through ear piercings." Moreover, the school policy did not prohibit piercings, it only prohibited "wearing jewelry through piercings," and it only applied while she was at school. Thus, Danielle Bar-Navon had no First Amendment right to wear her facial jewelry to high school.

In contrast, a federal judge accepted Ariana Iacono's claim under the First Amendment Free Exercise Clause. In granting a motion for a temporary restraining order in *Iacono v. Croom*, 5:10-CV-416-H, 2010 WL 3984601 (E.D.N.C. Oct. 8, 2010), the judge described the Church of Body Modification as having approximately 3,500 members in the United States who "practice ancient and modern body modification rituals—including piercing, scarring, tattooing, and suspensions—through which they strengthen the connection between their bodies, minds, and souls." The judge noted that Ariana had joined the church the month that school had started, had her nose pierced, and now believed, "according to the Church's teachings, she must wear the nose stud at all times." With no analysis, the judge found that Ariana Iacono was likely to prevail on the free exercise of religion claim, and therefore restrained the school authorities from enforcing the dress code against Ariana as it pertained to her nose stud.

If you were advising Danielle Bar-Navon, in light of *Seeger* and *Welsh*, how might you counsel her?

5. The word "religion" appears in the First Amendment's Religion Clauses only once:

Congress shall make no law respecting an *establishment of religion*, or *prohibiting the free exercise thereof*; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

However, should it have the same meaning in both Clauses? One argument is that the marginal cases should be resolved differently. Most famously advanced by Laurence Tribe, this contention is that:

"All that is arguably religious should be considered religious for free exercise analysis; anything arguably non-religious should not be considered religious in applying the establishment clause."

LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 826-28 (1st ed. 1978). Is this approach viable? Preferable? Actually followed in the marginal cases?

# Chapter Twelve: THE ESTABLISHMENT CLAUSE AND EDUCATION

This Chapter begins with the early developments of the Establishment Clause - - - which might more properly be called the anti-Establishment Clause, or the Establishment Clause prohibition - - - and includes the oft-referred to *Memorial and Remonstrance* which is optional. The second section considers *Lemon* and its applications, while the third section highlights “private choice.” While this Chapter focuses on the school context, consider throughout whether and why educational settings may be unique.

## Chapter Outline

### I. Early History of the Establishment Clause

*Everson v. Board of Education of Ewing Twp.*

Note: Madison’s Memorial and Remonstrance

Note: The “Release Time” Cases

*Engel v. Vitale*

### II. The *Lemon* Test and Its Discontents

*Lemon v. Kurtzman*

Notes

*Lee v. Weisman*

*Santa Fe Independent School District v. Doe*

Note: *Elk Grove Unified Sch. Dist. v. Newdow*

### III. Private Choice and Public Support of Religious Schools

*Zelman v. Simmons-Harris*

Notes

## I. Early History of the Establishment Clause

### *Everson v. Board of Education of Ewing Twp.*

330 U.S. 1 (1947)

JUSTICE BLACK DELIVERED THE OPINION OF THE COURT IN WHICH VINSON, C.J., AND REED, DOUGLAS, AND MURPHY, J.J. JOINED. JACKSON, J., FILED A DISSENTING OPINION IN WHICH FRANKFURTER, J., JOINED. RUTLEDGE, J., FILED A DISSENTING OPINION IN WHICH FRANKFURTER, JACKSON, BURTON, J.J., JOINED.

JUSTICE BLACK DELIVERED THE OPINION OF THE COURT.

A New Jersey statute authorizes its local school districts to make rules and contracts for the transportation of children to and from schools. The appellee, a township board of education, acting pursuant to this statute authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools. These church schools give their students, in addition to secular education, regular religious instruction conforming to the religious tenets and modes of worship of the Catholic Faith. The superintendent of these schools is a Catholic priest.

The appellant, in his capacity as a district taxpayer, filed suit in a State court challenging the right of the Board to reimburse parents of parochial school students. He contended that the statute and the resolution passed pursuant to it violated both the State and the Federal Constitutions. That court held that the legislature was without power to authorize such payment under the State constitution. The New Jersey Court of Errors and Appeals reversed, holding that neither the statute nor the resolution passed pursuant to it was in conflict with the State constitution or the provisions of the Federal Constitution in issue. The case is here on appeal.

\*\*\* [“we put to one side the question as to the validity of the statute against the claim that it does not authorize payment for the transportation generally of school children in New Jersey.”] The only contention here is that the State statute and the resolution, in so far as they authorized reimbursement to parents of children attending parochial schools, violate the Federal Constitution in these two respects, which to some extent, overlap. First. They authorize the State to take by taxation the private property of some and bestow it upon others, to be used for their own private purposes. This, it is alleged violates the due process clause of the Fourteenth Amendment. Second. The statute and the resolution forced inhabitants to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith. This is alleged to be a use of State power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the states.

First. The due process argument that the State law taxes some people to help others carry out their private purposes \*\*\* [is rejected].

Second. The New Jersey statute is challenged as a 'law respecting an establishment of religion.' The First Amendment, as made applicable to the states by the Fourteenth, *Murdock v. Commonwealth of Pennsylvania* (1943), commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' These words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity. Doubtless their goal has not been entirely reached; but so far has the Nation moved toward it that the expression 'law respecting an establishment of religion,' probably does not so vividly remind present-day Americans of the evils, fears, and political problems that caused that expression to be written into our Bill of Rights. Whether this New Jersey law is one respecting the 'establishment of religion' requires an understanding of the meaning of that language, particularly with respect to the imposition of taxes. Once again, therefore, it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted.

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, nonattendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.

These practices of the old world were transplanted to and began to thrive in the soil of the new America. The very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized these individuals and companies to erect religious establishments which all, whether believers or non-believers, would be required to support and attend. An exercise of this authority was accompanied by a repetition of many of the old world practices and persecutions. Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated. And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers

preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters. These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment. No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

The movement toward this end reached its dramatic climax in Virginia in 1785-86 when the Virginia legislative body was about to renew Virginia's tax levy for the support of the established church. Thomas Jefferson and James Madison led the fight against this tax. Madison wrote his great *Memorial and Remonstrance* against the law. In it, he eloquently argued that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions. Madison's *Remonstrance* received strong support throughout Virginia, and the Assembly postponed consideration of the proposed tax measure until its next session. When the proposal came up for consideration at that session, it not only died in committee, but the Assembly enacted the famous 'Virginia Bill for Religious Liberty' originally written by Thomas Jefferson. The preamble to that Bill stated among other things that

'Almighty God hath created the mind free; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . .; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern ...'

And the statute itself enacted

'That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. . . .'

This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson

played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute. Prior to the adoption of the Fourteenth Amendment, the First Amendment did not apply as a restraint against the states. Most of them did soon provide similar constitutional protections for religious liberty. But some states persisted for about half a century in imposing restraints upon the free exercise of religion and in discriminating against particular religious groups. In recent years, so far as the provision against the establishment of a religion is concerned, the question has most frequently arisen in connection with proposed state aid to church schools and efforts to carry on religious teachings in the public schools in accordance with the tenets of a particular sect. Some churches have either sought or accepted state financial support for their schools. Here again the efforts to obtain state aid or acceptance of it have not been limited to any one particular faith. The state courts, in the main, have remained faithful to the language of their own constitutional provisions designed to protect religious freedom and to separate religious and governments. Their decisions, however, show the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion.

\*\*\* The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'

We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. \*\*\* New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief. Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from

spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit company to provide reduced fares to school children including those attending parochial schools, or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose. See *Pierce v. Society of Sisters* (1925). It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.

*AFFIRMED.*

JUSTICE JACKSON, DISSENTING, JOINED BY JUSTICE FRANKFURTER.

I find myself, contrary to first impressions, unable to join in this decision. I have a sympathy, though it is not ideological, with Catholic citizens who are compelled by law to pay taxes for public schools, and also feel constrained by conscience and discipline to support other schools for their own children. Such relief to them as this case involves is not in itself a serious burden to taxpayers

and I had assumed it to be as little serious in principle. Study of this case convinces me otherwise. The Court's opinion marshals every argument in favor of state aid and puts the case in its most favorable light, but much of its reasoning confirms my conclusions that there are no good grounds upon which to support the present legislation. In fact, the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters. The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, 'whispering 'I will ne'er consent,'- consented.'

I.

[omitted]

II.

Whether the taxpayer constitutionally can be made to contribute aid to parents of students because of their attendance at parochial schools depends upon the nature of those schools and their relation to the Church. The Constitution says nothing of education. It lays no obligation on the states to provide schools and does not undertake to regulate state systems of education if they see fit to maintain them. But they cannot, through school policy any more than through other means, invade rights secured to citizens by the Constitution of the United States. *West Virginia State Board of Education v. Barnette*. One of our basic rights is to be free of taxation to support a transgression of the constitutional command that the authorities 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' U.S.Const., Amend. I.

The function of the Church school is a subject on which this record is meager. It shows only that the schools are under superintendence of a priest and that 'religion is taught as part of the curriculum.' But we know that such schools are parochial only in name-they, in fact, represent a worldwide and age-old policy of the Roman Catholic Church. \*\*\*

It is no exaggeration to say that the whole historic conflict in temporal policy between the Catholic Church and non-Catholics comes to a focus in their respective school policies. The Roman Catholic Church, counseled by experience in many ages and many lands and with all sorts and conditions of men, takes what, from the viewpoint of its own progress and the success of its mission, is a wise estimate of the importance of education to religion. It does not leave the individual to pick up religion by chance. It relies on early and indelible indoctrination in the faith and order of the Church by the word and example of persons consecrated to the task.

Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values. It is a relatively recent development dating from about 1840. It is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion. Whether such a disjunction is possible, and if possible whether it is wise, are questions I need not try to answer.

I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church. If put to the choice, that venerable institution, I should expect, would forego its whole service for mature persons before it would give up education of the young, and it would be a wise choice. Its growth and cohesion, discipline and loyalty, spring from its schools. Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself.

### III.

It is of no importance in this situation whether the beneficiary of this expenditure of tax-raised funds is primarily the parochial school and incidentally the pupil, or whether the aid is directly bestowed on the pupil with indirect benefits to the school. The state cannot maintain a Church and it can no more tax its citizens to furnish free carriage to those who attend a Church. The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction and indoctrination.

\*\*\* It seems to me that the basic fallacy in the Court's reasoning, which accounts for its failure to apply the principles it avows, is in ignoring the essentially religious test by which beneficiaries of this expenditure are selected. A policeman protects a Catholic, of course-but not because he is a Catholic; it is because he is a man and a member of our society. The fireman protects the Church school-but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask before he renders aid 'Is this man or building identified with the Catholic Church.' But before these school authorities draw a check to reimburse for a student's fare they must ask just that question, and if the school is a Catholic one they may render aid because it is such, while if it is of any other faith or is run for profit, the help must be withheld. To consider the converse of the Court's reasoning will best disclose its fallacy. That there is no parallel between police and fire protection and this plan of reimbursement is apparent from the incongruity of the limitation of this Act if applied to police and fire service. Could we sustain an Act that said police shall protect pupils on the way to or from public schools and Catholic schools but not while going to and coming from other schools, and firemen shall extinguish a blaze in public or Catholic school buildings but shall not put out a blaze in Protestant Church schools or private schools operated for profit? That is the true analogy to the case we have before us and I should think it pretty plain that such a scheme would not be valid.

\*\*\* This policy of our Federal Constitution has never been wholly pleasing to most religious groups. They all are quick to invoke its protections; they all are irked when they feel its restraints. This Court has gone a long way, if not an unreasonable way, to hold that public business of such paramount importance as maintenance of public order, protection of the privacy of the home, and taxation may not be pursued by a state in a way that even indirectly will interfere with religious proselyting.

But we cannot have it both ways. Religious teaching cannot be a private affair when the state seeks to impose regulations which infringe on it indirectly, and a

public affair when it comes to taxing citizens of one faith to aid another, or those of no faith to aid all. If these principles seem harsh in prohibiting aid to Catholic education, it must not be forgotten that it is the same Constitution that alone assures Catholics the right to maintain these schools at all when predominant local sentiment would forbid them. *Pierce v. Society of Sisters*. Nor should I think that those who have done so well without this aid would want to see this separation between Church and State broken down. If the state may aid these religious schools, it may therefore regulate them. Many groups have sought aid from tax funds only to find that it carried political controls with it. \*\*\*

But in any event, the great purposes of the Constitution do not depend on the approval or convenience of those they restrain. I cannot read the history of the struggle to separate political from ecclesiastical affairs, well summarized in the opinion of MR. JUSTICE RUTLEDGE in which I generally concur, without a conviction that the Court today is unconsciously giving the clock's hands a backward turn.

MR. JUSTICE RUTLEDGE, WITH WHOM MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON AND MR. JUSTICE BURTON AGREE, DISSENTING.

'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. ....' U.S.Const.Am. Art. I.

'Well aware that Almighty God hath created the mind free; ... that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; ...

'We, the General Assembly, do enact, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. ...'

["A Bill for Establishing Religious Freedom," enacted by the General Assembly of Virginia, January 19, 1786].

I cannot believe that the great author of those words [Thomas Jefferson] or the men who made them law, could have joined in this decision. Neither so high nor so impregnable today as yesterday is the wall raised between church and state by Virginia's great statute of religious freedom and the First Amendment, now made applicable to all the states by the Fourteenth. New Jersey's statute sustained is the first, if indeed it is not the second breach to be made by this Court's action. That a third, and a fourth, and still others will be attempted, we may be sure. For just as *Cochran v. Louisiana State Board of Education*, has opened the way by oblique ruling for this decision, so will the two make wider the breach for a third. Thus with time the most solid freedom steadily gives way before continuing corrosive decision.

This case forces us to determine squarely for the first time what was 'an establishment of religion' in the First Amendment's conception; and by that measure to decide whether New Jersey's action violates its command. \*\*\*

## I.

Not simply an established church, but any law respecting an establishment of religion is forbidden. The Amendment was broadly but not loosely phrased. It is the compact and exact summation of its author's views formed during his long struggle for religious freedom. In Madison's own words characterizing Jefferson's Bill for Establishing Religious Freedom, the guaranty he put in our national charter, like the bill he piloted through the Virginia Assembly, was 'a Model of technical precision, and perspicuous brevity.' Madison could not have confused 'church' and 'religion,' or 'an established church' and 'an establishment or religion.'

The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. In proof the Amendment's wording and history unite with this Court's consistent utterances whenever attention has been fixed directly upon the question.

'Religion' appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof.' 'Thereof' brings down 'religion' with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.

No one would claim today that the Amendment is constricted, in 'prohibiting the free exercise' of religion, to securing the free exercise of some formal or creedal observance, of one sect or of many. It secures all forms of religious expression, creedal, sectarian or nonsectarian wherever and however taking place, except conduct which trenches upon the like freedoms of others or clearly and presently endangers the community's good order and security. For the protective purposes of this phase of the basic freedom street preaching, oral or by distribution of literature, has been given 'the same high estate under the First Amendment as ... worship in the churches and preaching from the pulpits.' And on this basis parents have been held entitled to send their children to private, religious schools. *Pierce v. Society of Sisters*. Accordingly, daily religious education commingled with secular is 'religion' within the guaranty's comprehensive scope. So are religious training and teaching in whatever form. The word connotes the broadest content, determined not by the form or formality of the teaching or where it occurs, but by its essential nature regardless of those details.

'Religion' has the same broad significance in the twin prohibition concerning 'an establishment.' The Amendment was not duplicitous. 'Religion' and 'establishment' were not used in any formal or technical sense. The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes.

## II.

No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history. The history includes not only Madison's authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia, of which the Amendment was the direct culmination. In the documents of the times, particularly of Madison, who was leader in the Virginia struggle before he became the Amendment's sponsor, but also in the writings of Jefferson and others and in the issues which engendered them is to be found irrefutable confirmation of the Amendment's sweeping content.

For Madison, as also for Jefferson, religious freedom was the crux of the struggle for freedom in general. Madison was coauthor with George Mason of the religious clause in Virginia's great Declaration of Rights of 1776. He is credited with changing it from a mere statement of the principle of tolerance to the first official legislative pronouncement that freedom of conscience and religion are inherent rights of the individual. He sought also to have the Declaration expressly condemn the existing Virginia establishment. But the forces supporting it were then too strong.

Accordingly Madison yielded on this phase but not for long. At once he resumed the fight, continuing it before succeeding legislative sessions. As a member of the General Assembly in 1779 he threw his full weight behind Jefferson's historic Bill for Establishing Religious Freedom. That bill was a prime phase of Jefferson's broad program of democratic reform undertaken on his return from the Continental Congress in 1776 and submitted for the General Assembly's consideration in 1779 as his proposed revised Virginia code. With Jefferson's departure for Europe in 1784, Madison became the Bill's prime sponsor. Enactment failed in successive legislatures from its introduction in June 1779, until its adoption in January, 1786. But during all this time the fight for religious freedom moved forward in Virginia on various fronts with growing intensity. Madison led throughout, against Patrick Henry's powerful opposing leadership until Henry was elected governor in November, 1784.

The climax came in the legislative struggle of 1784-1785 over the Assessment Bill. This was nothing more nor less than a taxing measure for the support of religion, designed to revive the payment of tithes suspended since 1777. So long as it singled out a particular sect for preference it incurred the active and general hostility of dissentient groups. It was broadened to include them, with the result that some subsided temporarily in their opposition. As altered, the bill gave to each taxpayer the privilege of designating which church should receive his share of the tax. In default of designation the legislature applied it to pious uses. But what is of the utmost significance here, 'in its final form the bill left the taxpayer the option of giving his tax to education.' \*\*\*

[The *Memorial and Remonstrance* is] Madison's complete, though not his only, interpretation of religious liberty. It is a broadside attack upon all forms of 'establishment' of religion, both general and particular, nondiscriminatory or selective. Reflecting not only the many legislative conflicts over the Assessment Bill and the Bill for Establishing Religious Freedom but also, for example, the

struggles for religious incorporations and the continued maintenance of the glebes, the *Remonstrance* is at once the most concise and the most accurate statement of the views of the First Amendment's author concerning what is 'an establishment of religion.' \*\*\*

The next year Madison became a member of the Constitutional Convention. Its work done, he fought valiantly to secure the ratification of its great product in Virginia as elsewhere, and nowhere else more effectively. Madison was certain in his own mind that under the Constitution 'there is not a shadow of right in the general government to intermeddle with religion' and that 'this subject is, for the honor of America, perfectly free and unshackled. The Government has no jurisdiction over it. . . .' Nevertheless he pledged that he would work for a Bill of Rights, including a specific guaranty of religious freedom, and Virginia, with other states, ratified the Constitution on this assurance.

\*\*\* All the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison's life, thought and sponsorship. He epitomized the whole of that tradition in the Amendment's compact, but nonetheless comprehensive, phrasing.

As the *Remonstrance* discloses throughout, Madison opposed every form and degree of official relation between religion and civil authority. For him religion was a wholly private matter beyond the scope of civil power either to restrain or to support. Denial or abridgment of religious freedom was a violation of rights both of conscience and of natural equality. State aid was no less obnoxious or destructive to freedom and to religion itself than other forms of state interference. 'Establishment' and 'free exercise' were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom. The *Remonstrance*, following the Virginia statute's example, referred to the history of religious conflicts and the effects of all sorts of establishments, current and historical, to suppress religion's free exercise. With Jefferson, Madison believed that to tolerate any fragment of establishment would be by so much to perpetuate restraint upon that freedom. Hence he sought to tear out the institution not partially but root and branch, and to bar its return forever.

In no phase was he more unrelentingly absolute than in opposing state support or aid by taxation. Not even 'three pence' contribution was thus to be exacted from any citizen for such a purpose. *Remonstrance*, Par. 3.29 Tithes had been the life blood of establishment before and after other compulsions disappeared. Madison and his coworkers made no exceptions or abridgments to the complete separation they created. Their objection was not to small tithes. It was to any tithes whatsoever. 'If it were lawful to impose a small tax for religion the admission would pave the way for oppressive levies.' Not the amount but 'the principle of assessment was wrong.' And the principle was as much to prevent 'the interference of law in religion' as to restrain religious intervention in political matters. In this field the authors of our freedom would not tolerate 'the first experiment on our liberties' or 'wait till usurped power had strengthened itself by exercise, and entangled the question in precedents.' *Remonstrance*, Par. 3. Nor should we.

In view of this history no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises. But if more were called for, the debates in the First Congress and this Court's consistent expressions, whenever it has touched on the matter directly, supply it. By contrast with the Virginia history, the congressional debates on consideration of the Amendment reveal only sparse discussion, reflecting the fact that the essential issues had been settled. Indeed the matter had become so well understood as to have been taken for granted in all but formal phrasing. Hence, the only enlightening reference shows concern, not to preserve any power to use public funds in aid of religion, but to prevent the Amendment from outlawing private gifts inadvertently by virtue of the breadth of its wording. In the margin are noted also the principal decisions in which expressions of this Court confirm the Amendment's broad prohibition.

### III.

Compulsory attendance upon religious exercises went out early in the process of separating church and state, together with forced observance of religious forms and ceremonies. Test oaths and religious qualification for office followed later. These things none devoted to our great tradition of religious liberty would think of bringing back. Hence today, apart from efforts to inject religious training or exercises and sectarian issues into the public schools, the only serious surviving threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is through use of the taxing power to support religion, religious establishments, or establishments having a religious foundation whatever their form or special religious function.

Does New Jersey's action furnish support for religion by use of the taxing power? Certainly it does, if the test remains undiluted as Jefferson and Madison made it, that money taken by taxation from one is not to be used or given to support another's religious training or belief, or indeed one's own. Today as then the furnishing of 'contributions of money for the propagation of opinions which he disbelieves' is the forbidden exaction; and the prohibition is absolute for whatever measure brings that consequence and whatever mount may be sought or given to that end.

The funds used here were raised by taxation. The Court does not dispute nor could it that their use does in fact give aid and encouragement to religious instruction. It only concludes that this aid is not 'support' in law. But Madison and Jefferson were concerned with aid and support in fact not as a legal conclusion 'entangled in precedents.' *Remonstrance*, Par. 3. Here parents pay money to send their children to parochial schools and funds raised by taxation are used to reimburse them. This not only helps the children to get to school and the parents to send them. It aids them in a substantial way to get the very thing which they are sent to the particular school to secure, namely, religious training and teaching.

Believers of all faiths, and others who do not express their feeling toward ultimate issues of existence in any creedal form, pay the New Jersey tax. When the money so raised is used to pay for transportation to religious schools, the Catholic taxpayer to the extent of his proportionate share pays for the transportation of Lutheran, Jewish and otherwise religiously affiliated children

to receive their non-Catholic religious instruction. Their parents likewise pay proportionately for the transportation of Catholic children to receive Catholic instruction. Each thus contributes to 'the propagation of opinions which he disbelieves' in so far as their religions differ, as do others who accept no creed without regard to those differences. Each thus pays taxes also to support the teaching of his own religion, an exaction equally forbidden since it denies 'the comfortable liberty' of giving one's contribution to the particular agency of instruction he approves.

New Jersey's action therefore exactly fits the type of exaction and the kind of evil at which Madison and Jefferson struck. Under the test they framed it cannot be said that the cost of transportation is no part of the cost of education or of the religious instruction given. That it is a substantial and a necessary element is shown most plainly by the continuing and increasing demand for the state to assume it. Nor is there pretense that it relates only to the secular instruction given in religious schools or that any attempt is or could be made toward allocating proportional shares as between the secular and the religious instruction. It is precisely because the instruction is religious and relates to a particular faith, whether one or another, that parents send their children to religious schools under the *Pierce* doctrine. And the very purpose of the state's contribution is to defray the cost of conveying the pupil to the place where he will receive not simply secular, but also and primarily religious, teaching and guidance.

Indeed the view is sincerely avowed by many of various faiths, that the basic purpose of all education is or should be religious, that the secular cannot be and should not be separated from the religious phase and emphasis. Hence, the inadequacy of public or secular education and the necessity for sending the child to a school where religion is taught. But whatever may be the philosophy or its justification, there is undeniably an admixture of religious with secular teaching in all such institutions. That is the very reason for their being. Certainly for purposes of constitutionality we cannot contradict the whole basis of the ethical and educational convictions of people who believe in religious schooling.

Yet this very admixture is what was disestablished when the First Amendment forbade 'an establishment of religion.' Commingling the religious with the secular teaching does not divest the whole of its religious permeation and emphasis or make them of minor part, if proportion were material. Indeed, on any other view, the constitutional prohibition always could be brought to naught by adding a modicum of the secular.

An appropriation from the public treasury to pay the cost of transportation to Sunday school, to weekday special classes at the church or parish house, or to the meetings of various young people's religious societies, such as the Y.M.C.A., the Y.M.C.A., the Y.M.H.A., the Epworth League, could not withstand the constitutional attack. This would be true, whether or not secular activities were mixed with the religious. If such an appropriation could not stand, then it is hard to see how one becomes valid for the same thing upon the more extended scale of daily instruction. Surely constitutionality does not turn on where or how often the mixed teaching occurs.

Finally, transportation, where it is needed, is as essential to education as any other element. Its cost is as much a part of the total expense, except at times in amount, as the cost of textbooks, of school lunches, of athletic equipment, of writing and other materials; indeed of all other items composing the total burden. \*\*\* For me, therefore, the feat is impossible to select so indispensable an item from the composite of total costs, and characterize it as not aiding, contributing to, promoting or sustaining the propagation of beliefs which it is the very end of all to bring about. Unless this can be maintained, and the Court does not maintain it, the aid thus given is outlawed. Payment of transportation is no more, nor is it any the less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials. Nor is it any the less directly related, in a school giving religious instruction, to the primary religious objective all those essential items of cost are intended to achieve. No rational line can be drawn between payment for such larger, but not more necessary, items and payment for transportation. The only line that can be so drawn is one between more dollars and less. Certainly in this realm such a line can be no valid constitutional measure. Now, as in Madison's time, not the amount but the principle of assessment is wrong. *Remonstrance*, Par. 3.

#### IV.

But we are told that the New Jersey statute is valid in its present application because the appropriation is for a public, not a private purpose, namely, the promotion of education, and the majority accept this idea in the conclusion that all we have here is 'public welfare legislation.' If that is true and the Amendment's force can be thus destroyed, what has been said becomes all the more pertinent. For then there could be no possible objection to more extensive support of religious education by New Jersey.

\*\*\* The reasons underlying the Amendment's policy have not vanished with time or diminished in force. Now as when it was adopted the price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. Madison's *Remonstrance*, Par. 6, 8. The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting. *Id.*, Par. 7, 8.45 Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another. That is precisely the history of societies which have had an established religion and dissident groups. *Id.*, Par. 8, 11. It is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened forms. *Ibid.* The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions. *Id.*, Par. 11.46

Exactly such conflicts have centered of late around providing transportation to religious schools from public funds. \*\*\*

This is not therefore just a little case over bus fares. In paraphrase of Madison, distant as it may be in its present form from a complete establishment of religion, it differs from it only in degree; and is the first step in that direction. Today as in his time 'the same authority which can force a citizen to contribute three pence only ... for the support of any one religious establishment, may force him' to pay more; or 'to conform to any other establishment in all cases whatsoever.' And now, as then, 'either ... we must say, that the will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred.' *Remonstrance*, Par. 15. \*\*\*

## V.

No one conscious of religious values can be unsympathetic toward the burden which our constitutional separation puts on parents who desire religious instruction mixed with secular for their children. They pay taxes for others' children's education, at the same time the added cost of instruction for their own. Nor can one happily see benefits denied to children which others receive, because in conscience they or their parents for them desire a different kind of training others do not demand.

But if those feelings should prevail, there would be an end to our historic constitutional policy and command. No more unjust or discriminatory in fact is it to deny attendants at religious schools the cost of their transportation than it is to deny them tuitions, sustenance for their teachers, or any other educational expense which others receive at public cost. Hardship in fact there is which none can blink. But, for assuring to those who undergo it the greater, the most comprehensive freedom, it is one written by design and firm intent into our basic law.

Of course discrimination in the legal sense does not exist. The child attending the religious school has the same right as any other to attend the public school. But he foregoes exercising it because the same guaranty which assures this freedom forbids the public school or any agency of the state to give or aid him in securing the religious instruction he seeks.

Were he to accept the common school, he would be the first to protest the teaching there of any creed or faith not his own. And it is precisely for the reason that their atmosphere is wholly secular that children are not sent to public schools under the *Pierce* doctrine. But that is a constitutional necessity, because we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion. *Remonstrance*, Par. 8, 12.

\*\*\* The Constitution requires, not comprehensive identification of state with religion, but complete separation.

## VI.

The judgment should be reversed.

## **Note: Madison's Memorial and Remonstrance**

(As reproduced as Appendix A to *Everson v. Board of Education*)

MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS.

TO THE HONORABLE THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA.

A MEMORIAL AND REMONSTRANCE.

We, the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill printed by order of the last Session of General Assembly, entitled 'A Bill establishing a provision for teachers of the Christian Religion,' and conceiving that the same, if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State, to remonstrate against it, and to declare the reasons by which we are determined. We remonstrate against the said Bill,

1. Because we hold it for a fundamental and undeniable truth, 'that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.' 1 The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true, that the majority may trespass on the rights of the minority.

2. Because if religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the co-ordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free government requires not merely, that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves.

3. Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of (the) noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

4. Because, the bill violates that equality which ought to be the basis of every law, and which is more indispensable, in proportion as the validity or expediency of any law is more liable to be impeached. If 'all men are by nature equally free and independent,' all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no

less, one than another, of their natural rights. Above all are they to be considered as retaining an 'equal title to the free exercise of Religion according to the dictates of conscience'. Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered. As the bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions. Are the Quakers and Menonists the only sects who think a compulsive support of their religions unnecessary and unwarrantable? Can their piety alone be intrusted with the care of public worship? Ought their Religions to be endowed above all others, with extraordinary privileges, by which proselytes may be enticed from all others? We think too favorably of the justice and good sense of these denominations, to believe that they either covet pre-eminencies over their fellow citizens, or that they will be seduced by them, from the common opposition to the measure.

5. Because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation.

6. Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself; for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them; and not only during the period of miraculous aid, but long after it had been left to its own evidence, and the ordinary care of Providence: Nay, it is a contradiction in terms; for a Religion not invented by human policy, must have pre-existed and been supported, before it was established by human policy. It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits.

7. Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy. Propose a restoration of this primitive state in which its Teachers depended on the voluntary rewards of their flocks; many of them predict its downfall. On which side ought their testimony to have greatest weight, when for or when against their interest?

8. Because the establishment in question is not necessary for the support of Civil Government. If it be urged as necessary for the support of Civil Government only as it is a means of supporting Religion, and it be not necessary for the latter purpose, it cannot be necessary for the former. If Religion be not within (the) cognizance of Civil Government, how can its legal establishment be said to be necessary to Civil Government? What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberties, may have found an established clergy convenient auxiliaries. A just government, instituted to secure & perpetuate it, needs them not. Such a government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights by any Sect, nor suffering any Sect to invade those of another.

9. Because the proposed establishment is a departure from that generous policy, which, offering an asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the

career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthropy in their due extent may offer a more certain repose from his troubles.

10. Because, it will have a like tendency to banish our Citizens. The allurements presented by other situations are every day thinning their number. To superadd a fresh motive to emigration, by revoking the liberty which they now enjoy, would be the same species of folly which has dishonoured and depopulated flourishing kingdoms.

11. Because, it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs, that equal and complete liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State. If with the salutary effects of this system under our own eyes, we begin to contract the bonds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the first fruit of the threatened innovation. The very appearance of the Bill has transformed that 'Christian forbearance, love and charity,' which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded should this enemy to the public quiet be armed with the force of a law?

12. Because, the policy of the bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy this precious gift, ought to be that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it with the number still remaining under the dominion of false Religions; and how small is the former! Does the policy of the Bill tend to lessen the disproportion? No; it at once discourages those who are strangers to the light of ( revelation) from coming into the Region of it; and countenances, by example the nations who continue in darkness, in shutting out those who might convey it to them. Instead of levelling as far as possible, every obstacle to the victorious progress of truth, the Bill with an ignoble and unchristian timidity would circumscribe it, with a wall of defence, against the encroachments of error.

13. Because attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general, and to slacken the bands of Society. If it be difficult to execute any law which is not generally deemed necessary or salutary, what must be the case where it is deemed invalid and dangerous? and what may be the effect of so striking an example of impotency in the Government, on its general authority?

14. Because a measure of such singular magnitude and delicacy ought not to be imposed, without the clearest evidence that it is called for by a majority of citizens: and no satisfactory method is yet proposed by which the voice of the majority in this case may be determined, or its influence secured. 'The people of the respective counties are indeed requested to signify their opinion respecting the adoption of the Bill to the next Session of Assembly.' But the representation must be made equal, before the voice either of the Representatives or of the Counties, will be that of the people. Our hope is that neither of the former will, after due consideration, expouse the dangerous principle of the Bill. Should the event disappoint us, it will still leave us in full confidence, that a fair appeal to the latter will reverse the sentence against our liberties.

15. Because, finally, 'the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience' is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the Declaration of those rights which pertain to the good people of Virginia, as the 'basis and foundation of Government,' it is enumerated with equal solemnity, or rather studied emphasis. Either then, we must say, that the will of the Legislature is the only measure of their authority; and that in the plentitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred: Either we must say, that they may controul the freedom of the press, may abolish the trial by jury, may swallow up the Executive and Judiciary Powers of the State; nay that they may despoil us of our very right of suffrage, and erect themselves into an independent and hereditary assembly: or we must say,

that they have no authority to enact into law the Bill under consideration. We the subscribers say, that the General Assembly of this Commonwealth have no such authority: And that no effort may be omitted on our part against so dangerous an usurpation, we oppose to it, this remonstrance; earnestly praying, as we are in duty bound, that the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their councils from every act which would affront his holy prerogative, or violate the trust committed to them: and on the other, guide them into every measure which may be worthy of his (blessing, may re) dound to their own praise, and may establish more firmly the liberties, the prosperity, and the Happiness of the Commonwealth.

### **Note: The “Release Time” Cases**

Can time spent in religious instruction be used to satisfy state-mandated compulsory education requirements? Does it matter for Establishment Clause purposes whether that instruction occurs in the school building or outside of it?

With only a single dissenting Justice (Reed), but with separate concurring opinions, the Court decided *People of State of Ill. ex rel. McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign Cnty., Ill.*, 333 U.S. 203 (1948), and held unconstitutional a scheme in which private religious groups were permitted to come weekly into the school buildings during the regular hours set apart for secular teaching, and substitute their religious teaching for the secular education provided under the compulsory education law. The Court’s opinion, authored by Justice Black, and joined by Vinson, Murphy, and - - - importantly, Douglas - - - concluded by stating that

Here not only are the state's taxsupported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State.

The concurring opinion authored by Justice Frankfurter, and joined by Jackson, Rutledge, and Burton, sought to “renew our conviction that ‘we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.’ [quoting and citing *Everson*]. If nowhere else, in the relation between Church and State, ‘good fences make good neighbors.’

This opinion was widely seen as anti-Catholic. A few years later, the Court declined to find *McCullom v. Board of Education* controlling when the religious instruction occurred outside of the school building. In *Zorach v. Clauson*, 343 U.S. 306 (1952), the Court upheld a New York law allowing students to be “released” from school in order to go to religious centers for religious instruction or devotional exercises. In accordance with compulsory attendance laws, students not “released” stayed in the classrooms and received instruction; religious authorities had to report to the schools the names of children released from public schools who

fail to report for religious instruction. Three Justices dissented, each writing separate dissenting opinions: Black, Frankfurter, and Jackson. The Court's opinion, written by Justice Douglas, concluded that the "release" program involved neither religious instruction in public schools nor the expenditure of public funds. Justice Douglas's opinion is most notable for the following passage:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.

There are those who critique this passage from Douglas as being entirely self-serving and related to Douglas's contemplation of a presidential run and the "Catholic vote." It does seem that Douglas's later opinions disavow this view.

As to whether or not *McCullum* and *Zorach* can be reconciled by the inside/outside the school building distinction at least one commentator has argued:

In those cases, like *McCullum*, where the ambiguity in the final opinions results from the Court's failure to decide certain questions, even the most exacting textual exegesis cannot penetrate that ambiguity \*\*\* The inconsistency between the broad nature of the principles which support the majority opinions in *McCullum* and Justice Burton's private agreement to keep the constitutionality of the New York plan an open question may well have contributed in *McCullum* and *Zorach* to the inconsistencies which have never been wholly and convincingly explained.

*The "Released Time" Cases Revisited: A Study of Group Decisionmaking by the Supreme Court*, 83 YALE L. J. 1202 (1974). Interestingly, the author of this published (but unsigned) student note is now a Justice on the United States Supreme Court.

## *Engel v. Vitale*

370 U.S. 421 (1962)

JUSTICE BLACK DELIVERED THE OPINION OF THE COURT, IN WHICH WARREN, C.J., AND DOUGLAS, CLARK, HARLAN, AND BRENNAN, J.J., JOINED. DOUGLAS, J., FILED A CONCURRING OPINION. STEWART, J., FILED A DISSENTING OPINION. FRANKFURTER AND WHITE, J.J., TOOK NO PART IN THE DECISION OF THIS CASE.

JUSTICE BLACK DELIVERED THE OPINION OF THE COURT.

The respondent Board of Education of Union Free School District No. 9, New Hyde Park, New York, acting in its official capacity under state law, directed the School District's principal to cause the following prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day:

"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

This daily procedure was adopted on the recommendation of the State Board of Regents, a governmental agency created by the State Constitution to which the New York Legislature has granted broad supervisory, executive, and legislative powers over the State's public school system. These state officials composed the prayer which they recommended and published as a part of their "Statement on Moral and Spiritual Training in the Schools," saying: "We believe that this Statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program."

Shortly after the practice of reciting the Regents' prayer was adopted by the School District, the parents of ten pupils brought this action in a New York State Court insisting that use of this official prayer in the public schools was contrary to the beliefs, religions, or religious practices of both themselves and their children. Among other things, these parents challenged the constitutionality of both the state law authorizing the School District to direct the use of prayer in public schools and the School District's regulation ordering the recitation of this particular prayer on the ground that these actions of official governmental agencies violate that part of the First Amendment of the Federal Constitution which commands that "Congress shall make no law respecting an establishment of religion" - a command which was "made applicable to the State of New York by the Fourteenth Amendment of the said Constitution." The New York Court of Appeals, over the dissents of Judges Dye and Fuld, sustained an order of the lower state courts which had upheld the power of New York to use the Regents' prayer as a part of the daily procedures of its public schools so long as the schools did not compel any pupil to join in the prayer over his or his parents' objection. We granted certiorari to review this important decision involving rights protected by the First and Fourteenth Amendments.

We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of

such a prayer has always been religious, none of the respondents has denied this and the trial court expressly so found.\*\*\*

The petitioners contend among other things that the state laws requiring or permitting use of the Regents' prayer must be struck down as a violation of the Establishment Clause because that prayer was composed by governmental officials as a part of a governmental program to further religious beliefs. For this reason, petitioners argue, the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State. We agree with that contention since we think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.

It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America. The Book of Common Prayer, which was created under governmental direction and which was approved by Acts of Parliament in 1548 and 1549, set out in minute detail the accepted form and content of prayer and other religious ceremonies to be used in the established, tax-supported Church of England. The controversies over the Book and what should be its content repeatedly threatened to disrupt the peace of that country as the accepted forms of prayer in the established church changed with the views of the particular ruler that happened to be in control at the time. Powerful groups representing some of the varying religious views of the people struggled among themselves to impress their particular views upon the Government and obtain amendments of the Book more suitable to their respective notions of how religious services should be conducted in order that the official religious establishment would advance their particular religious beliefs. Other groups, lacking the necessary political power to influence the Government on the matter, decided to leave England and its established church and seek freedom in America from England's governmentally ordained and supported religion.

It is an unfortunate fact of history that when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies. Indeed, as late as the time of the Revolutionary War, there were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five. But the successful Revolution against English political domination was shortly followed by intense opposition to the practice of establishing religion by law. This opposition crystallized rapidly into an effective political force in Virginia where the minority religious groups such as Presbyterians, Lutherans, Quakers and Baptists had gained such strength that the adherents to the established Episcopal Church were actually a minority themselves. In 1785-1786, those opposed to the established Church, led by James Madison and Thomas Jefferson, who, though themselves not members of any of these dissenting religious groups, opposed all religious establishments by law on

grounds of principle, obtained the enactment of the famous "Virginia Bill for Religious Liberty" by which all religious groups were placed on an equal footing so far as the State was concerned. Similar though less far-reaching legislation was being considered and passed in other States.

By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power. The Constitution was intended to avert a part of this danger by leaving the government of this country in the hands of the people rather than in the hands of any monarch. But this safeguard was not enough. Our Founders were no more willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs. The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say - that the people's religious must not be subjected to the pressures of government for change each time a new political administration is elected to office. Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.

There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer. The respondents' argument to the contrary, which is largely based upon the contention that the Regents' prayer is "non-denominational" and the fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment. Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do

not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand. The Founders knew that only a few years after the Book of Common Prayer became the only accepted form of religious services in the established Church of England, an Act of Uniformity was passed to compel all Englishmen to attend those services and to make it a criminal offense to conduct or attend religious gatherings of any other kind - a law which was consistently flouted by dissenting religious groups in England and which contributed to widespread persecutions of people like John Bunyan who persisted in holding "unlawful [religious] meetings . . . to the great disturbance and distraction of the good subjects of this kingdom . . . ." And they knew that similar persecutions had received the sanction of law in several of the colonies in this country soon after the establishment of official religions in those colonies. It was in large part to get completely away from this sort of systematic religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion. The New York laws officially prescribing the Regents' prayer are inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself.

It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong. The history of man is inseparable from the history of religion. And perhaps it is not too much to say that since the beginning of that history many people have devoutly believed that "More things are wrought by prayer than this world dreams of." It was doubtless largely due to men who believed this that there grew up a sentiment that caused men to leave the cross-currents of officially established state religions and religious persecution in Europe and come to this country filled with the hope that they could find a place in which they could pray when they pleased to the God of their faith in the language they chose. And there were men of this same faith in the power of prayer who led the fight for adoption of our Constitution and also for our Bill of Rights with the very guarantees of religious freedom that forbid the sort of governmental activity which New York has attempted here. These men knew that the First

Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to. It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.

It is true that New York's establishment of its Regents' prayer as an officially approved religious doctrine of that State does not amount to a total establishment of one particular religious sect to the exclusion of all others - that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago. To those who may subscribe to the view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment:

"[I]t is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"

The judgment of the Court of Appeals of New York is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

*Reversed and remanded.*

JUSTICE DOUGLAS, CONCURRING.

It is customary in deciding a constitutional question to treat it in its narrowest form. Yet at times the setting of the question gives it a form and content which no abstract treatment could give. The point for decision is whether the Government can constitutionally finance a religious exercise. Our system at the federal and state levels is presently honeycombed with such financing. Nevertheless, I think it is an unconstitutional undertaking whatever form it takes. \*\*\*

What New York does on the opening of its public schools is what we do when we open court. Our Crier has from the beginning announced the convening of the Court and then added "God save the United States and this Honorable Court." That utterance is a supplication, a prayer in which we, the judges, are free to join, but which we need not recite any more than the students need recite the New York prayer.

What New York does on the opening of its public schools is what each House of Congress does at the opening of each day's business. Reverend Frederick B. Harris is Chaplain of the Senate; Reverend Bernard Braskamp is Chaplain of the House. Guest chaplains of various denominations also officiate.

In New York the teacher who leads in prayer is on the public payroll; and the time she takes seems minuscule as compared with the salaries appropriated by state legislatures and Congress for chaplains to conduct prayers in the legislative halls. Only a bare fraction of the teacher's time is given to reciting this short 22-word prayer, about the same amount of time that our Crier spends announcing the opening of our sessions and offering a prayer for this Court. Yet for me the principle is the same, no matter how briefly the prayer is said, for in each of the instances given the person praying is a public official on the public payroll, performing a religious exercise in a governmental institution. It is said that the element of coercion is inherent in the giving of this prayer. If that is true here, it is also true of the prayer with which this Court is convened, and of those that open the Congress. Few adults, let alone children, would leave our courtroom or the Senate or the House while those prayers are being given. Every such audience is in a sense a "captive" audience.

At the same time I cannot say that to authorize this prayer is to establish a religion in the strictly historic meaning of those words. A religion is not established in the usual sense merely by letting those who choose to do so say the prayer that the public school teacher leads. Yet once government finances a religious exercise it inserts a divisive influence into our communities. The New York Court said that the prayer given does not conform to all of the tenets of the Jewish, Unitarian, and Ethical Culture groups. One of the petitioners is an agnostic. \*\*\*

My problem today would be uncomplicated but for *Everson v. Board of Education*, which allowed taxpayers' money to be used to pay "the bus fares of parochial school pupils as a part of a general program under which" the fares of pupils attending public and other schools were also paid. The *Everson* case seems in retrospect to be out of line with the First Amendment. Its result is appealing, as it allows aid to be given to needy children. Yet by the same token, public funds could be used to satisfy other needs of children in parochial schools - lunches, books, and tuition being obvious examples. \*\*\*

What New York does with this prayer is a break with that tradition. I therefore join the Court in reversing the judgment below.

JUSTICE STEWART, DISSENTING.

A local school board in New York has provided that those pupils who wish to do so may join in a brief prayer at the beginning of each school day, acknowledging their dependence upon God and asking His blessing upon them and upon their parents, their teachers, and their country. The Court today decides that in permitting this brief nondenominational prayer the school board has violated the Constitution of the United States. I think this decision is wrong.

\*\*\* With all respect, I think the Court has misapplied a great constitutional principle. I cannot see how an "official religion" is established by letting those

who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation.

\*\*\*What is relevant to the issue here is not the history of an established church in sixteenth century England or in eighteenth century America, but the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government.

At the opening of each day's Session of this Court we stand, while one of our officials invokes the protection of God. Since the days of John Marshall our Crier has said, "God save the United States and this Honorable Court." Both the Senate and the House of Representatives open their daily Sessions with prayer. Each of our Presidents, from George Washington to John F. Kennedy, has upon assuming his Office asked the protection and help of God.

The Court today says that the state and federal governments are without constitutional power to prescribe any particular form of words to be recited by any group of the American people on any subject touching religion. One of the stanzas of "The Star-Spangled Banner," made our National Anthem by Act of Congress in 1931, contains these verses:

"Blest with victory and peace, may the heav'n rescued land

Praise the Pow'r that hath made and preserved us a nation!

Then conquer we must, when our cause it is just, And this be our motto `In God is our Trust."

In 1954 Congress added a phrase to the Pledge of Allegiance to the Flag so that it now contains the words "one Nation under God, indivisible, with liberty and justice for all." In 1952 Congress enacted legislation calling upon the President each year to proclaim a National Day of Prayer. Since 1865 the words "IN GOD WE TRUST" have been impressed on our coins.

Countless similar examples could be listed, but there is no need to belabor the obvious. \*\*\*

I do not believe that this Court, or the Congress, or the President has by the actions and practices I have mentioned established an "official religion" in violation of the Constitution. And I do not believe the State of New York has done so in this case. What each has done has been to recognize and to follow the deeply entrenched and highly cherished spiritual traditions of our Nation - traditions which come down to us from those who almost two hundred years ago avowed their "firm Reliance on the Protection of divine Providence" when they proclaimed the freedom and independence of this brave new world. I dissent.

## II. The *Lemon* Test and Its Discontents

### *Lemon v. Kurtzman*

403 U.S. 602 (1971)

[*Lemon v. Kurtzman*, Case No. 89, involved the Pennsylvania statute; it was decided together with No. 569, *Earley v. DiCenso* and No. 570, *Robinson, Commissioner of Education of Rhode Island, v. DiCenso*, both of which involved the Rhode Island statute].

BURGER, C. J., DELIVERED THE OPINION OF THE COURT, IN WHICH BLACK, DOUGLAS, HARLAN, STEWART, MARSHALL (AS TO NOS. 569 AND 570), AND BLACKMUN, JJ., JOINED. DOUGLAS, J., FILED A CONCURRING OPINION, IN WHICH BLACK, J., JOINED, AND IN WHICH MARSHALL, J. (AS TO NOS. 569 AND 570), JOINED, FILING A SEPARATE STATEMENT. BRENNAN, J., FILED A CONCURRING OPINION. WHITE, J., FILED AN OPINION CONCURRING IN THE JUDGMENT IN NO. 89 AND DISSENTING IN NOS. 569 AND 570. MARSHALL, J., TOOK NO PART IN THE CONSIDERATION OR DECISION OF NO. 89.

CHIEF JUSTICE BURGER DELIVERED THE OPINION OF THE COURT.

These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

Pennsylvania has adopted a statutory program that provides financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary. Under each statute state aid has been given to church-related educational institutions. We hold that both statutes are unconstitutional.

#### I

##### *The Rhode Island Statute*

The Rhode Island Salary Supplement Act 1 was enacted in 1969. It rests on the legislative finding that the quality of education available in nonpublic elementary schools has been jeopardized by the rapidly rising salaries needed to attract competent and dedicated teachers. The Act authorizes state officials to supplement the salaries of teachers of secular subjects in nonpublic elementary schools by paying directly to a teacher an amount not in excess of 15% of his current annual salary. As supplemented, however, a nonpublic school teacher's salary cannot exceed the maximum paid to teachers in the State's public schools, and the recipient must be certified by the state board of education in substantially the same manner as public school teachers.

In order to be eligible for the Rhode Island salary supplement, the recipient must teach in a nonpublic school at which the average per-pupil expenditure on secular education is less than the average in the State's public schools

during a specified period. Appellant State Commissioner of Education also requires eligible schools to submit financial data. If this information indicates a per-pupil expenditure in excess of the statutory limitation, the records of the school in question must be examined in order to assess how much of the expenditure is attributable to secular education and how much to religious activity.

The Act also requires that teachers eligible for salary supplements must teach only those subjects that are offered in the State's public schools. They must use "only teaching materials which are used in the public schools." Finally, any teacher applying for a salary supplement must first agree in writing "not to teach a course in religion for so long as or during such time as he or she receives any salary supplements" under the Act.

Appellees are citizens and taxpayers of Rhode Island. They brought this suit to have the Rhode Island Salary Supplement Act declared unconstitutional and its operation enjoined on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment. Appellants are state officials charged with administration of the Act, teachers eligible for salary supplements under the Act, and parents of children in church-related elementary schools whose teachers would receive state salary assistance.

A three-judge federal court was convened pursuant to 28 U.S.C. 2281, 2284. It found that Rhode Island's nonpublic elementary schools accommodated approximately 25% of the State's pupils. About 95% of these pupils attended schools affiliated with the Roman Catholic church. To date some 250 teachers have applied for benefits under the Act. All of them are employed by Roman Catholic schools.

The court held a hearing at which extensive evidence was introduced concerning the nature of the secular instruction offered in the Roman Catholic schools whose teachers would be eligible for salary assistance under the Act. Although the court found that concern for religious values does not necessarily affect the content of secular subjects, it also found that the parochial school system was "an integral part of the religious mission of the Catholic Church."

The District Court concluded that the Act violated the Establishment Clause, holding that it fostered "excessive entanglement" between government and religion. In addition two judges thought that the Act had the impermissible effect of giving "significant aid to a religious enterprise." We affirm.

#### *The Pennsylvania Statute*

Pennsylvania has adopted a program that has some but not all of the features of the Rhode Island program. The Pennsylvania Nonpublic Elementary and Secondary Education Act was passed in 1968 in response to a crisis that the Pennsylvania Legislature found existed in the State's nonpublic schools due to rapidly rising costs. The statute affirmatively reflects the legislative conclusion that the State's educational goals could appropriately be fulfilled by government support of "those purely secular educational objectives achieved through nonpublic education . . . ."

The statute authorizes appellee state Superintendent of Public Instruction to "purchase" specified "secular educational services" from nonpublic schools.

Under the "contracts" authorized by the statute, the State directly reimburses nonpublic schools solely for their actual expenditures for teachers' salaries, textbooks, and instructional materials. A school seeking reimbursement must maintain prescribed accounting procedures that identify the "separate" cost of the "secular educational service." These accounts are subject to state audit. The funds for this program were originally derived from a new tax on horse and harness racing, but the Act is now financed by a portion of the state tax on cigarettes.

There are several significant statutory restrictions on state aid. Reimbursement is limited to courses "presented in the curricula of the public schools." It is further limited "solely" to courses in the following "secular" subjects: mathematics, modern foreign languages, physical science, and physical education. Textbooks and instructional materials included in the program must be approved by the state Superintendent of Public Instruction. Finally, the statute prohibits reimbursement for any course that contains "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."

The Act went into effect on July 1, 1968, and the first reimbursement payments to schools were made on September 2, 1969. It appears that some \$5 million has been expended annually under the Act. The State has now entered into contracts with some 1,181 nonpublic elementary and secondary schools with a student population of some 535,215 pupils - more than 20% of the total number of students in the State. More than 96% of these pupils attend church-related schools, and most of these schools are affiliated with the Roman Catholic church.

Appellants brought this action in the District Court to challenge the constitutionality of the Pennsylvania statute. The organizational plaintiffs-appellants are associations of persons resident in Pennsylvania declaring belief in the separation of church and state; individual plaintiffs-appellants are citizens and taxpayers of Pennsylvania. Appellant Lemon, in addition to being a citizen and a taxpayer, is a parent of a child attending public school in Pennsylvania. Lemon also alleges that he purchased a ticket at a race track and thus had paid the specific tax that supports the expenditures under the Act. Appellees are state officials who have the responsibility for administering the Act. In addition seven church-related schools are defendants-appellees.

A three-judge federal court \*\*\*held that the individual plaintiffs-appellants had standing to challenge the Act. The organizational plaintiffs-appellants were denied standing under *Flast v. Cohen* (1968).

The court granted appellees' motion to dismiss the complaint for failure to state a claim for relief. It held that the Act violated neither the Establishment nor the Free Exercise Clause, Chief Judge Hastie dissenting. We reverse.

## II

In *Everson v. Board of Education* (1947), this Court upheld a state statute that reimbursed the parents of parochial school children for bus transportation expenses. There JUSTICE BLACK, writing for the majority, suggested that the decision carried to "the verge" of forbidden territory under the Religion Clauses. Candor compels acknowledgment, moreover, that we can only dimly perceive

the lines of demarcation in this extraordinarily sensitive area of constitutional law.

The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be "no law respecting an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not establish a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission* (1970).

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen* (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz*.

Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else. A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate. \*\*\*

The legislatures of Rhode Island and Pennsylvania have concluded that secular and religious education are identifiable and separable. In the abstract we have no quarrel with this conclusion.

The two legislatures, however, have also recognized that church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities is religiously oriented. They have therefore sought to create statutory restrictions designed to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former. All these provisions are precautions taken in candid recognition that these programs approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses. We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses, for we conclude that the cumulative impact of the entire

relationship arising under the statutes in each State involves excessive entanglement between government and religion.

### III

In *Walz v. Tax Commission* (1970) the Court upheld state tax exemptions for real property owned by religious organizations and used for religious worship. That holding, however, tended to confine rather than enlarge the area of permissible state involvement with religious institutions by calling for close scrutiny of the degree of entanglement involved in the relationship. The objective is to prevent, as far as possible, the intrusion of either into the precincts of the other.

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts. Indeed, under the statutory exemption before us in *Walz*, the State had a continuing burden to ascertain that the exempt property was in fact being used for religious worship. Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.

This is not to suggest, however, that we are to engage in a legalistic minuet in which precise rules and forms must govern. A true minuet is a matter of pure form and style, the observance of which is itself the substantive end. Here we examine the form of the relationship for the light that it casts on the substance.

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. \*\*\* Here we find that both statutes foster an impermissible degree of entanglement.

#### *(a) Rhode Island program*

The District Court made extensive findings on the grave potential for excessive entanglement that inheres in the religious character and purpose of the Roman Catholic elementary schools of Rhode Island, to date the sole beneficiaries of the Rhode Island Salary Supplement Act.

The church schools involved in the program are located close to parish churches. This understandably permits convenient access for religious exercises since instruction in faith and morals is part of the total educational process. The school buildings contain identifying religious symbols such as crosses on the exterior and crucifixes, and religious paintings and statues either in the classrooms or hallways. Although only approximately 30 minutes a day are devoted to direct religious instruction, there are religiously oriented extracurricular activities. Approximately two-thirds of the teachers in these schools are nuns of various religious orders. Their dedicated efforts provide an atmosphere in which religious instruction and religious vocations are natural and proper parts of life in such schools. Indeed, as the District Court found, the role of teaching nuns in enhancing the religious atmosphere has led the

parochial school authorities to attempt to maintain a one-to-one ratio between nuns and lay teachers in all schools rather than to permit some to be staffed almost entirely by lay teachers.

On the basis of these findings the District Court concluded that the parochial schools constituted "an integral part of the religious mission of the Catholic Church." The various characteristics of the schools make them "a powerful vehicle for transmitting the Catholic faith to the next generation." This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly. In short, parochial schools involve substantial religious activity and purpose.

The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid. Although the District Court found that concern for religious values did not inevitably or necessarily intrude into the content of secular subjects, the considerable religious activities of these schools led the legislature to provide for careful governmental controls and surveillance by state authorities in order to ensure that state aid supports only secular education.

The dangers and corresponding entanglements are enhanced by the particular form of aid that the Rhode Island Act provides. Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause. We note that the dissenters in *Allen* seemed chiefly concerned with the pragmatic difficulties involved in ensuring the truly secular content of the textbooks provided at state expense.

In *Allen* the Court refused to make assumptions, on a meager record, about the religious content of the textbooks that the State would be asked to provide. We cannot, however, refuse here to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education. The conflict of functions inheres in the situation.

In our view the record shows these dangers are present to a substantial degree. The Rhode Island Roman Catholic elementary schools are under the general supervision of the Bishop of Providence and his appointed representative, the Diocesan Superintendent of Schools. In most cases, each individual parish, however, assumes the ultimate financial responsibility for the school, with the parish priest authorizing the allocation of parish funds. \*\*\*

The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith. These controls are not lessened by the fact that most of the lay teachers are of the Catholic faith. Inevitably some of a teacher's responsibilities hover on the border between secular and religious orientation.

We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion. Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions.

We do not assume, however, that parochial school teachers will be unsuccessful in their attempts to segregate their religious beliefs from their secular educational responsibilities. But the potential for impermissible fostering of religion is present. The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion - indeed the State here has undertaken to do so. To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions. An eligible recipient must teach only those courses that are offered in the public schools and use only those texts and materials that are found in the public schools. In addition the teacher must not engage in teaching any course in religion.

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church

There is another area of entanglement in the Rhode Island program that gives concern. The statute excludes teachers employed by nonpublic schools whose average per-pupil expenditures on secular education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. \*\*\*

*(b) Pennsylvania program*

The Pennsylvania statute also provides state aid to church-related schools for teachers' salaries. The complaint describes an educational system that is very

similar to the one existing in Rhode Island. According to the allegations, the church-related elementary and secondary schools are controlled by religious organizations, have the purpose of propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose. Since this complaint was dismissed for failure to state a claim for relief, we must accept these allegations as true for purposes of our review.

As we noted earlier, the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state. The Pennsylvania statute, like that of Rhode Island, fosters this kind of relationship. Reimbursement is not only limited to courses offered in the public schools and materials approved by state officials, but the statute excludes "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." In addition, schools seeking reimbursement must maintain accounting procedures that require the State to establish the cost of the secular as distinguished from the religious instruction.

The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related school. \*\*\*

The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state.

#### IV

A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process. To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to

permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.

\*\*\* The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow. The Rhode Island District Court found that the parochial school system's "monumental and deepening financial crisis" would "inescapably" require larger annual appropriations subsidizing greater percentages of the salaries of lay teachers. Although no facts have been developed in this respect in the Pennsylvania case, it appears that such pressures for expanding aid have already required the state legislature to include a portion of the state revenues from cigarette taxes in the program.

## V

In *Walz* it was argued that a tax exemption for places of religious worship would prove to be the first step in an inevitable progression leading to the establishment of state churches and state religion. That claim could not stand up against more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present.

The progression argument, however, is more persuasive here. We have no long history of state aid to church-related educational institutions comparable to 200 years of tax exemption for churches. Indeed, the state programs before us today represent something of an innovation. We have already noted that modern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support. Nor can we fail to see that in constitutional adjudication some steps, which when taken were thought to approach "the verge," have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a "downhill thrust" easily set in motion but difficult to retard or stop. Development by momentum is not invariably bad; indeed, it is the way the common law has grown, but it is a force to be recognized and reckoned with. The dangers are increased by the difficulty of perceiving in advance exactly where the "verge" of the precipice lies. As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal.

Finally, nothing we have said can be construed to disparage the role of church-related elementary and secondary schools in our national life. Their contribution has been and is enormous. Nor do we ignore their economic plight in a period of rising costs and expanding need. Taxpayers generally have been spared vast sums by the maintenance of these educational institutions by religious organizations, largely by the gifts of faithful adherents.

The merit and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.

The judgment of the Rhode Island District Court in No. 569 and No. 570 is affirmed. The judgment of the Pennsylvania District Court in No. 89 is reversed, and the case is remanded for further proceedings consistent with this opinion.

JUSTICE DOUGLAS, WHOM JUSTICE BLACK JOINS, CONCURRING.

\*\*\* Yet in spite of this long and consistent history there are those who have the courage to announce that a State may nonetheless finance the secular part of a sectarian school's educational program. That, however, makes a grave constitutional decision turn merely on cost accounting and bookkeeping entries. A history class, a literature class, or a science class in a parochial school is not a separate institute; it is part of the organic whole which the State subsidizes. The funds are used in these cases to pay or help pay the salaries of teachers in parochial schools; and the presence of teachers is critical to the essential purpose of the parochial school, viz., to advance the religious endeavors of the particular church. It matters not that the teacher receiving taxpayers' money only teaches religion a fraction of the time. Nor does it matter that he or she teaches no religion. The school is an organism living on one budget. What the taxpayers give for salaries of those who teach only the humanities or science without any trace of proselytizing enables the school to use all of its own funds for religious training. \*\*\*

In my view the taxpayers' forced contribution to the parochial schools in the present cases violates the First Amendment.

JUSTICE BRENNAN, CONCURRING [OMITTED]

JUSTICE WHITE, CONCURRING IN THE JUDGMENTS IN NO. 153 AND NO. 89 AND DISSENTING IN NOS. 569 AND 570.

It is our good fortune that the States of this country long ago recognized that instruction of the young and old ranks high on the scale of proper governmental functions and not only undertook secular education as a public responsibility but also required compulsory attendance at school by their young. Having recognized the value of educated citizens and assumed the task of educating them, the States now before us assert a right to provide for the secular education of children whether they attend public schools or choose to enter private institutions, even when those institutions are church-related. \*\*\*

But, while the decision of the Court is legitimate, it is surely quite wrong in overturning the Pennsylvania and Rhode Island statutes on the ground that they amount to an establishment of religion forbidden by the First Amendment.

No one in these cases questions the constitutional right of parents to satisfy their state-imposed obligation to educate their children by sending them to private schools, sectarian or otherwise, as long as those schools meet minimum standards established for secular instruction. The States are not only permitted, but required by the Constitution, to free students attending private schools from any public school attendance obligation. *Pierce v. Society of Sisters* (1925). The States may also furnish transportation for students, *Everson v. Board of Education* (1947), and books for teaching secular subjects to students attending parochial and other private as well as public schools, *Board of Education v. Allen* (1968); we have also upheld arrangements whereby students are released from public school classes so that they may attend religious instruction. *Zorach v. Clauson* (1952). Outside the field of education, we have upheld Sunday closing laws, *McGowan v. Maryland* (1961), state and federal laws exempting church property and church activity from taxation, *Walz v. Tax Commission* (1970), and governmental grants to religious organizations for the purpose of financing improvements in the facilities of hospitals managed and controlled by religious orders, *Bradfield v. Roberts* (1899).

Our prior cases have recognized the dual role of parochial schools in American society: they perform both religious and secular functions. \*\*\*

It is enough for me that the States and the Federal Government are financing a separable secular function of overriding importance in order to sustain the legislation here challenged. That religion and private interests other than education may substantially benefit does not convert these laws into impermissible establishments of religion.

\*\*\* The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught - a promise the school and its teachers are quite willing and on this record able to give - and enforces it, it is then entangled in the "no entanglement" aspect of the Court's Establishment Clause jurisprudence. \*\*\*

## Notes

1. *Lemon v. Kurtzman* is the source of what becomes known as the *Lemon* Test for Establishment Clause challenges, both within the educational realm and in the "public square" as discussed in the next chapter. Be sure that you can articulate the *Lemon* test.
2. There are many critiques of the *Lemon* Test, including Justice White's criticism that it sets up an "insoluble paradox" in the entanglement prong. Is one answer to this criticism the observation by Justice Jackson in *Everson* that religious schools (and presumably other entities) want it "both ways"?
3. Does the *Lemon* test cause you to reconsider *Everson*? *Pierce v. Society of Sisters*?

4. In all Establishment Clause cases after *Lemon* (1971), a central question is how - - - and whether - - - *Lemon* and its test are treated.

## *Lee v. Weisman*

505 U.S. 577 (1992)

KENNEDY, J., DELIVERED THE OPINION OF THE COURT, IN WHICH BLACKMUN, STEVENS, O'CONNOR, AND SOUTER, JJ., JOINED. BLACKMUN, J., AND SOUTER, J., FILED CONCURRING OPINIONS, IN WHICH STEVENS AND O'CONNOR, JJ., JOINED. SCALIA, J., FILED A DISSENTING OPINION, IN WHICH REHNQUIST, C.J., AND WHITE AND THOMAS, JJ., JOINED.

JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

School principals in the public school system of the city of Providence, Rhode Island, are permitted to invite members of the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies for middle schools and for high schools. The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment, provisions the Fourteenth Amendment makes applicable with full force to the States and their school districts.

### I A

Deborah Weisman graduated from Nathan Bishop Middle School, a public school in Providence, at a formal ceremony in June, 1989. She was about 14 years old. For many years, it has been the policy of the Providence School Committee and the Superintendent of Schools to permit principals to invite members of the clergy to give invocations and benedictions at middle school and high school graduations. Many, but not all, of the principals elected to include prayers as part of the graduation ceremonies. Acting for himself and his daughter, Deborah's father, Daniel Weisman, objected to any prayers at Deborah's middle school graduation, but to no avail. The school principal, petitioner Robert E. Lee, invited a rabbi to deliver prayers at the graduation exercises for Deborah's class. Rabbi Leslie Gutterman, of the Temple Beth El in Providence, accepted.

It has been the custom of Providence school officials to provide invited clergy with a pamphlet entitled "Guidelines for Civic Occasions," prepared by the National Conference of Christians and Jews. The Guidelines recommend that public prayers at nonsectarian civic ceremonies be composed with "inclusiveness and sensitivity," though they acknowledge that "[p]rayer of any kind may be inappropriate on some civic occasions." The principal gave Rabbi Gutterman the pamphlet before the graduation, and advised him the invocation and benediction should be nonsectarian.

Rabbi Gutterman's prayers were as follows:

"INVOCATION

"God of the Free, Hope of the Brave:

"For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

"For the liberty of America, we thank You. May these new graduates grow up to guard it.

"For the political process of America in which all its citizens may participate, for its court system where all may seek justice, we thank You. May those we honor this morning always turn to it in trust.

"For the destiny of America, we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

"May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN"

"BENEDICTION

"O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

"Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

"The graduates now need strength and guidance for the future; help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: to do justly, to love mercy, to walk humbly.

"We give thanks to You, Lord, for keeping us alive, sustaining us, and allowing us to reach this special, happy occasion.

AMEN"

The record in this case is sparse in many respects, and we are unfamiliar with any fixed custom or practice at middle school graduations, referred to by the school district as "promotional exercises." We are not so constrained with reference to high schools, however. High school graduations are such an integral part of American cultural life that we can with confidence describe their customary features, confirmed by aspects of the record and by the parties' representations at oral argument. In the Providence school system, most high school graduation ceremonies are conducted away from the school, while most middle school ceremonies are held on school premises. Classical High School, which Deborah now attends, has conducted its graduation ceremonies on school premises. The parties stipulate that attendance at graduation ceremonies is voluntary. The graduating students enter as a group in a processional, subject to the direction of teachers and school officials, and sit together, apart from their families. We assume the clergy's participation in any high school graduation exercise would be about what it was at Deborah's middle school ceremony. There the students stood for the Pledge of Allegiance and remained standing during the rabbi's prayers. Even on the assumption that there was a respectful moment of silence both before and after the prayers, the rabbi's two presentations must not have extended much beyond a minute each, if that. We do not know whether he remained on stage during the whole ceremony, or whether the students received individual diplomas on stage, or if he helped to congratulate them.

The school board (and the United States, which supports it as *amicus curiae*) argued that these short prayers and others like them at graduation exercises are of profound meaning to many students and parents throughout this country who consider that due respect and acknowledgment for divine guidance and for the deepest spiritual aspirations of our people ought to be expressed at an event as important in life as a graduation. We assume this to be so in addressing the difficult case now before us, for the significance of the prayers lies also at the heart of Daniel and Deborah Weisman's case.

## B

Deborah's graduation was held on the premises of Nathan Bishop Middle School on June 29, 1989. Four days before the ceremony, Daniel Weisman, in his individual capacity as a Providence taxpayer and as next friend of Deborah, sought a temporary restraining order in the United States District Court for the District of Rhode Island to prohibit school officials from including an invocation or benediction in the graduation ceremony. The court denied the motion for lack of adequate time to consider it. Deborah and her family attended the graduation, where the prayers were recited. In July, 1989, Daniel Weisman filed an amended complaint seeking a permanent injunction barring petitioners, various officials of the Providence public schools, from inviting the clergy to deliver invocations and benedictions at future graduations. We find it unnecessary to address Daniel Weisman's taxpayer standing, for a live and justiciable controversy is before us. Deborah Weisman is enrolled as a student at Classical High School in Providence and from the record it appears likely, if not certain, that an invocation and benediction will be conducted at her high school graduation.

The case was submitted on stipulated facts. The District Court held that petitioners' practice of including invocations and benedictions in public school graduations violated the Establishment Clause of the First Amendment, and it enjoined petitioners from continuing the practice. The court applied the three-part Establishment Clause test set forth in *Lemon v. Kurtzman* (1971). Under that test as described in our past cases, to satisfy the Establishment Clause, a governmental practice must (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion. The District Court held that petitioners' actions violated the second part of the test, and so did not address either the first or the third. \*\*\*

On appeal, the United States Court of Appeals for the First Circuit affirmed. The majority opinion by Judge Torruella adopted the opinion of the District Court. Judge Bownes joined the majority, but wrote a separate concurring opinion in which he decided that the practices challenged here violated all three parts of the *Lemon* test. \*\*\* He concluded by suggesting that, under Establishment Clause rules, no prayer, even one excluding any mention of the Deity, could be offered at a public school graduation ceremony. Judge Campbell dissented\*\*\* [and] reasoned that, if the prayers delivered were nonsectarian, and if school officials ensured that persons representing a variety of beliefs and ethical systems were invited to present invocations and benedictions, there was no violation of the Establishment Clause. We granted certiorari and now affirm.

## II

These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are, in a fair and real sense, obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

This case does not require us to revisit the difficult questions dividing us in recent cases, questions of the definition and full scope of the principles governing the extent of permitted accommodation by the State for the religious beliefs and practices of many of its citizens. For without reference to those principles in other contexts, the controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of the city of Providence is an unconstitutional one. We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. Thus, we do not accept the invitation of petitioners and amicus the United States to reconsider our decision in *Lemon v. Kurtzman*. The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school. Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine the question before us.

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so." The State's involvement in the school prayers challenged today violates these central principles.

That involvement is as troubling as it is undenied. A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and, from a constitutional perspective, it is as if a state statute decreed that the prayers must occur. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the State. The reason for the choice of a rabbi is not disclosed by the record, but the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent.

Divisiveness, of course, can attend any state decision respecting religions, and neither its existence nor its potential necessarily invalidates the State's attempts to accommodate religion in all cases. The potential for divisiveness is of particular relevance here, though, because it centers around an overt religious exercise in a secondary school environment where subtle coercive pressures exist, and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation.

The State's role did not end with the decision to include a prayer and with the choice of clergyman. Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions" and advised him that his prayers should be nonsectarian. Through these means, the principal directed and controlled the content of the prayers. Even if the only sanction for ignoring the instructions were that the rabbi would not be invited back, we think no religious representative who valued his or her continued reputation and effectiveness in the community would incur the State's displeasure in this regard. It is a cornerstone principle of our Establishment Clause jurisprudence that it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government, *Engel v. Vitale* (1962), and that is what the school officials attempted to do.

Petitioners argue, and we find nothing in the case to refute it, that the directions for the content of the prayers were a good-faith attempt by the school to ensure that the sectarianism which is so often the flashpoint for religious animosity be removed from the graduation ceremony. The concern is understandable, as a prayer which uses ideas or images identified with a particular religion may foster a different sort of sectarian rivalry than an invocation or benediction in terms more neutral. The school's explanation, however, does not resolve the dilemma caused by its participation. The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes are obliged to attend.

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. There may be some support, as an empirical observation \*\*\* that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.

The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten, then, that, while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference. James Madison, the principal author of the Bill of Rights, did not rest his opposition to a religious establishment on the sole ground of its effect on the minority. A principal ground for his view was: [E]xperience witnesseth that ecclesiastical

establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. *Memorial and Remonstrance Against Religious Assessments* (1785).

These concerns have particular application in the case of school officials, whose effort to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject. Though the efforts of the school officials in this case to find common ground appear to have been a good faith attempt to recognize the common aspects of religions, and not the divisive ones, our precedents do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students. *Engel v. Vitale*. And these same precedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated, and none favored. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.

The degree of school involvement here made it clear that the graduation prayers bore the imprint of the State, and thus put school-age children who objected in an untenable position. We turn our attention now to consider the position of the students, both those who desired the prayer and she who did not.

\*\*\* The lessons of the First Amendment are as urgent in the modern world as in the 18th century, when it was written. One timeless lesson is that, if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people. To compromise that principle today would be to deny our own tradition and forfeit our standing to urge others to secure the protections of that tradition for themselves.

As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. Our decisions recognize that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

We need not look beyond the circumstances of this case to see the phenomenon at work. The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our culture, standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her

conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that, for her, the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.

Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention. Brittain, Adolescent Choices and Parent-Peer Cross-Pressures, 28 *Am. Sociological Rev.* 385 (June 1963); Clasen & Brown, The Multidimensionality of Peer Pressure in Adolescence, 14 *J. of Youth and Adolescence* 451 (Dec. 1985); Brown, Clasen, & Eicher, Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self-Reported Behavior Among Adolescents, 22 *Developmental Psychology* 521 (July 1986). To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means.

The injury caused by the government's action, and the reason why Daniel and Deborah Weisman object to it, is that the State, in a school setting, in effect required participation in a religious exercise. It is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a *de minimis* character. To do so would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority. \*\*\*

The importance of the event is the point the school district and the United States rely upon to argue that a formal prayer ought to be permitted, but it becomes one of the principal reasons why their argument must fail. Their contention, one of considerable force were it not for the constitutional constraints applied to state action, is that the prayers are an essential part of these ceremonies because, for many persons, an occasion of this significance lacks meaning if there is no recognition, however brief, that human achievements cannot be understood apart from their spiritual essence. We think the Government's position that this interest suffices to force students to choose between compliance or forfeiture demonstrates fundamental inconsistency in its argumentation. It fails to acknowledge that what for many of Deborah's classmates and their parents was a spiritual imperative was, for Daniel and Deborah Weisman, religious conformance compelled by the State. While in some societies the wishes of the majority might prevail, the

Establishment Clause of the First Amendment is addressed to this contingency, and rejects the balance urged upon us. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands.

The Government's argument gives insufficient recognition to the real conflict of conscience faced by the young student. The essence of the Government's position is that, with regard to a civic, social occasion of this importance, it is the objector, not the majority, who must take unilateral and private action to avoid compromising religious scruples, hereby electing to miss the graduation exercise. This turns conventional First Amendment analysis on its head. It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice. To say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity in an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high. \*\*\*

We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity. But, by any reading of our cases, the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause. The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid.

Our jurisprudence in this area is of necessity one of line-drawing, of determining at what point a dissenter's rights of religious freedom are infringed by the State. \*\*\*

Our society would be less than true to its heritage if it lacked abiding concern for the values of its young people, and we acknowledge the profound belief of adherents to many faiths that there must be a place in the student's life for precepts of a morality higher even than the law we today enforce. We express no hostility to those aspirations, nor would our oath permit us to do so. A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution. We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students. But these matters, often questions of accommodation of religion, are not before us. The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.

For the reasons we have stated, the judgment of the Court of Appeals is

*Affirmed.*

JUSTICE BLACKMUN, WITH WHOM JUSTICE STEVENS AND JUSTICE O'CONNOR JOIN, CONCURRING.

Nearly half a century of review and refinement of Establishment Clause jurisprudence has distilled one clear understanding: Government may neither promote nor affiliate itself with any religious doctrine or organization, nor may it obtrude itself in the internal affairs of any religious institution. The application of these principles to the present case mandates the decision reached today by the Court.

## I

This Court first reviewed a challenge to state law under the Establishment Clause in *Everson v. Board of Ed. of Ewing* (1947). \*\*\*

The question then is whether the government has "plac[ed] its official stamp of approval" on the prayer. As the Court ably demonstrates, when the government "compose[s] official prayers," selects the member of the clergy to deliver the prayer, has the prayer delivered at a public school event that is planned, supervised, and given by school officials, and pressures students to attend and participate in the prayer, there can be no doubt that the government is advancing and promoting religion. As our prior decisions teach us, it is this that the Constitution prohibits.

## II

I join the Court's opinion today because I find nothing in it inconsistent with the essential precepts of the Establishment Clause developed in our precedents. The Court holds that the graduation prayer is unconstitutional because the State "in effect required participation in a religious exercise." Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.

But it is not enough that the government restrain from compelling religious practices: It must not engage in them either. The Court repeatedly has recognized that a violation of the Establishment Clause is not predicated on coercion. The Establishment Clause proscribes public schools from "conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred," *County of Allegheny v. American Civil Liberties Union, Greater Pittsburg Chapter* (1989), even if the schools do not actually "impos[e] pressure upon a student to participate in a religious activity."

The scope of the Establishment Clause's prohibitions developed in our case law derives from the Clause's purposes. The First Amendment encompasses two distinct guarantees - the government shall make no law respecting an establishment of religion or prohibiting the free exercise thereof - both with the common purpose of securing religious liberty. \*\*\*

There is no doubt that attempts to aid religion through government coercion jeopardize freedom of conscience. Even subtle pressure diminishes the right of each individual to choose voluntarily what to believe. Representative Carroll explained during congressional debate over the Establishment Clause: "[T]he rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand." I ANNALS OF CONG. 757 (1789).

Our decisions have gone beyond prohibiting coercion, however, because the Court has recognized that "the fullest possible scope of religious liberty," entails more than freedom from coercion. The Establishment Clause protects religious liberty on a grand scale; it is a social compact that guarantees for generations a democracy and a strong religious community - both essential to safeguarding religious liberty. "Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more religious, by keeping their respective functions entirely separate." *Religious Liberty*, in ESSAYS AND SPEECHES OF JEREMIAH S. BLACK 53 (C. Black ed. 1885) (Chief Justice of the Commonwealth of Pennsylvania).

The mixing of government and religion can be a threat to free government, even if no one is forced to participate. When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some. \*\*\*

When the government arrogates to itself a role in religious affairs, it abandons its obligation as guarantor of democracy. Democracy requires the nourishment of dialog and dissent, while religious faith puts its trust in an ultimate divine authority above all human deliberation. \*\*\*

Madison warned that government officials who would use religious authority to pursue secular ends "exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves nor by an authority derived from them, and are slaves." *Memorial and Remonstrance against Religious Assessments* (1785). Democratic government will not last long when proclamation replaces persuasion as the medium of political exchange.

Likewise, we have recognized that "[r]eligion flourishes in greater purity, without than with the aid of Gov[ernment]." To "make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary," *Zorach v. Clauson* (1952), the government must not align itself with any one of them. When the government favors a particular religion or sect, the disadvantage to all others is obvious, but even the favored religion may fear being "taint[ed] . . . with a corrosive secularism." The favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation. Keeping religion in the hands of private groups minimizes state intrusion on religious choice, and best enables each religion to "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach*.

It is these understandings and fears that underlie our Establishment Clause jurisprudence. We have believed that religious freedom cannot exist in the absence of a free democratic government, and that such a government cannot

endure when there is fusion between religion and the political regime. We have believed that religious freedom cannot thrive in the absence of a vibrant religious community, and that such a community cannot prosper when it is bound to the secular. And we have believed that these were the animating principles behind the adoption of the Establishment Clause. To that end, our cases have prohibited government endorsement of religion, its sponsorship, and active involvement in religion, whether or not citizens were coerced to conform.

I remain convinced that our jurisprudence is not misguided, and that it requires the decision reached by the Court today. Accordingly, I join the Court in affirming the judgment of the Court of Appeals.

JUSTICE SOUTER, WITH WHOM JUSTICE STEVENS AND JUSTICE O'CONNOR, JOIN, CONCURRING.

I join the whole of the Court's opinion, and fully agree that prayers at public school graduation ceremonies indirectly coerce religious observance. I write separately nonetheless on two issues of Establishment Clause analysis that underlie my independent resolution of this case: whether the Clause applies to governmental practices that do not favor one religion or denomination over others, and whether state coercion of religious conformity, over and above state endorsement of religious exercise or belief, is a necessary element of an Establishment Clause violation.

#### I

Forty-five years ago, this Court announced a basic principle of constitutional law from which it has not strayed: the Establishment Clause forbids not only state practices that "aid one religion . . . or prefer one religion over another," but also those that "aid all religions." *Everson v. Board of Ed. of Ewing* (1947). Today we reaffirm that principle, holding that the Establishment Clause forbids state-sponsored prayers in public school settings no matter how nondenominational the prayers may be. In barring the State from sponsoring generically theistic prayers where it could not sponsor sectarian ones, we hold true to a line of precedent from which there is no adequate historical case to depart.

#### A

Since *Everson*, we have consistently held the Clause applicable no less to governmental acts favoring religion generally than to acts favoring one religion over others. \*\*\*

#### B

Some have challenged this precedent by reading the Establishment Clause to permit "nonpreferential" state promotion of religion. The challengers argue that, as originally understood by the Framers, "[t]he Establishment Clause did not require government neutrality between religion and irreligion, nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion." *Wallace* (Rehnquist, J., dissenting). While a case has been made for this position, it is not so convincing as to warrant reconsideration of our settled law; indeed, I find in the history of the Clause's textual development a more powerful argument supporting the Court's jurisprudence following *Everson*.

\*\*\* Thus, on balance, history neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some.

## C

While these considerations are, for me, sufficient to reject the nonpreferentialist position, one further concern animates my judgment. In many contexts, including this one, nonpreferentialism requires some distinction between "sectarian" religious practices and those that would be, by some measure, ecumenical enough to pass Establishment Clause muster. Simply by requiring the enquiry, nonpreferentialists invite the courts to engage in comparative theology. I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible. \*\*\*

This case is nicely in point. \*\*\*

Nor does it solve the problem to say that the State should promote a "diversity" of religious views; that position would necessarily compel the government and, inevitably, the courts to make wholly inappropriate judgments about the number of religions the State should sponsor and the relative frequency with which it should sponsor each. In fact, the prospect would be even worse than that. As Madison observed in criticizing religious presidential proclamations, the practice of sponsoring religious messages tends, over time, "to narrow the recommendation to the standard of the predominant sect." Madison's "Detached Memoranda," 3 Wm. & Mary Q. 534, 561 (E. Fleet ed. 1946) (hereinafter Madison's "Detached Memoranda"). We have not changed much since the days of Madison, and the judiciary should not willingly enter the political arena to battle the centripetal force leading from religious pluralism to official preference for the faith with the most votes.

## II

Petitioners rest most of their argument on a theory that, whether or not the Establishment Clause permits extensive nonsectarian support for religion, it does not forbid the state to sponsor affirmations of religious belief that coerce neither support for religion nor participation in religious observance. I appreciate the force of some of the arguments supporting a "coercion" analysis of the Clause. But we could not adopt that reading without abandoning our settled law, a course that, in my view, the text of the Clause would not readily permit. Nor does the extratextual evidence of original meaning stand so unequivocally at odds with the textual premise inherent in existing precedent that we should fundamentally reconsider our course.

## A

Over the years, this Court has declared the invalidity of many noncoercive state laws and practices conveying a message of religious endorsement. For example, in *County of Allegheny*, we forbade the prominent display of a nativity scene on public property; without contesting the dissent's observation that the creche coerced no one into accepting or supporting whatever message it proclaimed, five Members of the Court found its display unconstitutional as a state endorsement of Christianity. Likewise, in *Wallace v. Jaffree* (1985), we struck down a state law requiring a moment of silence in public classrooms not because the statute coerced students to participate in prayer (for it did not), but

because the manner of its enactment "convey[ed] a message of state approval of prayer activities in the public schools."

In *Epperson v. Arkansas* (1968), we invalidated a state law that barred the teaching of Darwin's theory of evolution because, even though the statute obviously did not coerce anyone to support religion or participate in any religious practice, it was enacted for a singularly religious purpose. See also *Edwards v. Aguillard* (1987) (statute requiring instruction in "creation science" "endorses religion in violation of the First Amendment"). And in *School Dist. of Grand Rapids v. Ball* (1985), we invalidated a program whereby the State sent public school teachers to parochial schools to instruct students on ostensibly nonreligious matters; while the scheme clearly did not coerce anyone to receive or subsidize religious instruction, we held it invalid because, among other things, "[t]he symbolic union of church and state inherent in the [program] threatens to convey a message of state support for religion to students and to the general public.

Our precedents may not always have drawn perfectly straight lines. They simply cannot, however, support the position that a showing of coercion is necessary to a successful Establishment Clause claim.

## B

Like the provisions about "due" process and "unreasonable" searches and seizures, the constitutional language forbidding laws "respecting an establishment of religion" is not pellucid. But virtually everyone acknowledges that the Clause bans more than formal establishments of religion in the traditional sense, that is, massive state support for religion through, among other means, comprehensive schemes of taxation. This much follows from the Framers' explicit rejection of simpler provisions prohibiting either the establishment of a religion or laws "establishing religion" in favor of the broader ban on laws "respecting an establishment of religion."

While some argue that the Framers added the word "respecting" simply to foreclose federal interference with state establishments of religion, the language sweeps more broadly than that. In Madison's words, the Clause in its final form forbids "everything like" a national religious establishment, see Madison's "Detached Memoranda" and, after incorporation, it forbids "everything like" a state religious establishment. The sweep is broad enough that Madison himself characterized congressional provisions for legislative and military chaplains as unconstitutional "establishments." Madison's "Detached Memoranda."

While petitioners insist that the prohibition extends only to the "coercive" features and incident of establishment, they cannot easily square that claim with the constitutional text. The First Amendment forbids not just laws "respecting an establishment of religion," but also those "prohibiting the free exercise thereof." Yet laws that coerce nonadherents to "support or participate in any religion or its exercise," *County of Allegheny* (opinion of KENNEDY, J.), would, virtually by definition, violate their right to religious free exercise. Thus, a literal application of the coercion test would render the Establishment Clause a virtual nullity, as petitioners' counsel essentially conceded at oral argument.

Our cases presuppose as much; \*\*\* While one may argue that the Framers meant the Establishment Clause simply to ornament the First Amendment, that

must be a reading of last resort. Without compelling evidence to the contrary, we should presume that the Framers meant the Clause to stand for something more than petitioners attribute to it.

### C

Petitioners argue from the political setting in which the Establishment Clause was framed, and from the Framers' own political practices following ratification, that government may constitutionally endorse religion so long as it does not coerce religious conformity. The setting and the practices warrant canvassing, but while they yield some evidence for petitioners' argument, they do not reveal the degree of consensus in early constitutional thought that would raise a threat to stare decisis by challenging the presumption that the Establishment Clause adds something to the Free Exercise Clause that follows it. \*\*\*

To be sure, the leaders of the young Republic engaged in some of the practices that separationists like Jefferson and Madison criticized. The First Congress did hire institutional chaplains, and Presidents Washington and Adams unapologetically marked days of "public thanksgiving and prayer." Yet in the face of the separationist dissent, those practices prove, at best, that the Framers simply did not share a common understanding of the Establishment Clause, and, at worst, that they, like other politicians, could raise constitutional ideals one day and turn their backs on them the next. "Indeed, by 1787, the provisions of the state bills of rights had become what Madison called mere "paper parchments" - expressions of the most laudable sentiments, observed as much in the breach as in practice." Sometimes the National Constitution fared no better. Ten years after proposing the First Amendment, Congress passed the Alien and Sedition Acts, measures patently unconstitutional by modern standards. If the early Congress's political actions were determinative, and not merely relevant, evidence of constitutional meaning, we would have to gut our current First Amendment doctrine to make room for political censor. While we may be unable to know for certain what the Framers meant by the Clause, we do know that, around the time of its ratification, a respectable body of opinion supported a considerably broader reading than petitioners urge upon us. This consistency with the textual considerations is enough to preclude fundamentally reexamining our settled law, and I am accordingly left with the task of considering whether the state practice at issue here violates our traditional understanding of the Clause's proscriptions.

### III

While the Establishment Clause's concept of neutrality is not self-revealing, our recent cases have invested it with specific content: the State may not favor or endorse either religion generally over nonreligion or one religion over others. \*\*\*

#### A

[omitted]

#### B

\*\*\* Religious students cannot complain that omitting prayers from their graduation ceremony would, in any realistic sense, "burden" their spiritual callings. To be sure, many of them invest this rite of passage with spiritual significance, but they may express their religious feelings about it before and after the ceremony. They may even organize a privately sponsored baccalaureate if they desire the company of like-minded students. Because they

accordingly have no need for the machinery of the State to affirm their beliefs, the government's sponsorship of prayer at the graduation ceremony is most reasonably understood as an official endorsement of religion and, in this instance, of theistic religion. One may fairly say, as one commentator has suggested, that the government brought prayer into the ceremony "precisely because some people want a symbolic affirmation that government approves and endorses their religion, and because many of the people who want this affirmation place little or no value on the costs to religious minorities."

Petitioners would deflect this conclusion by arguing that graduation prayers are no different from presidential religious proclamations and similar official "acknowledgments" of religion in public life. But religious invocations in Thanksgiving Day addresses and the like, rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular, inhabit a pallid zone worlds apart from official prayers delivered to a captive audience of public school students and their families. Madison himself respected the difference between the trivial and the serious in constitutional practice. Realizing that his contemporaries were unlikely to take the Establishment Clause seriously enough to forgo a legislative chaplainship, he suggested that, "[r]ather than let this step beyond the landmarks of power have the effect of a legitimate precedent, it will be better to apply to it the legal aphorism *de minimis non curat lex*. . . ." Madison's "Detached Memoranda" 559; see also Letter from J. Madison to E. Livingston (July 10, 1822). But that logic permits no winking at the practice in question here. When public school officials, armed with the State's authority, convey an endorsement of religion to their students, they strike near the core of the Establishment Clause. However "ceremonial" their messages may be, they are flatly unconstitutional.

JUSTICE SCALIA, WITH WHOM THE CHIEF JUSTICE, JUSTICE WHITE, AND JUSTICE THOMAS JOIN, DISSENTING.

\*\*\* In holding that the Establishment Clause prohibits invocations and benedictions at public school graduation ceremonies, the Court - with nary a mention that it is doing so - lays waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally. As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion, which promises to do for the Establishment Clause what the Durham rule did for the insanity defense. Today's opinion shows more forcefully than volumes of argumentation why our Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.

#### I

Justice Holmes' aphorism that "a page of history is worth a volume of logic," *New York Trust Co. v. Eisner* (1921), applies with particular force to our Establishment Clause jurisprudence. \*\*\*

The history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition. Illustrations of this point have

been amply provided in our prior opinions, but since the Court is so oblivious to our history as to suggest that the Constitution restricts "preservation and transmission of religious beliefs . . . to the private sphere," it appears necessary to provide another brief account.

From our Nation's origin, prayer has been a prominent part of governmental ceremonies and proclamations. \*\*\*

In addition to this general tradition of prayer at public ceremonies, there exists a more specific tradition of invocations and benedictions at public school graduation exercises. By one account, the first public high school graduation ceremony took place in Connecticut in July 1868 - the very month, as it happens, that the Fourteenth Amendment (the vehicle by which the Establishment Clause has been applied against the States) was ratified - when "15 seniors from the Norwich Free Academy marched in their best Sunday suits and dresses into a church hall and waited through majestic music and long prayers." Brodinsky, *Commencement Rites Obsolete? Not At All, A 10 Week Study Shows*, 10 *Updating School Board Policies*, No. 4, p. 3 (Apr. 1979). As the Court obliquely acknowledges in describing the "customary features" of high school graduations, and as respondents do not contest, the invocation and benediction have long been recognized to be "as traditional as any other parts of the [school] graduation program and are widely established."

## II

The Court presumably would separate graduation invocations and benedictions from other instances of public "preservation and transmission of religious beliefs" on the ground that they involve "psychological coercion." \*\*\*

The Court identifies two "dominant facts" that it says dictate its ruling that invocations and benedictions at public school graduation ceremonies violate the Establishment Clause. Neither of them is, in any relevant sense, true.

## A

The Court declares that students' "attendance and participation in the [invocation and benediction] are, in a fair and real sense, obligatory." But what exactly is this "fair and real sense"? According to the Court, students at graduation who want "to avoid the fact or appearance of participation" in the invocation and benediction are psychologically obligated by "public pressure, as well as peer pressure, . . . to stand as a group or, at least, maintain respectful silence" during those prayers. This assertion - the very linchpin of the Court's opinion - is almost as intriguing for what it does not say as for what it says. It does not say, for example, that students are psychologically coerced to bow their heads, place their hands in a Durer-like prayer position, pay attention to the prayers, utter "Amen," or in fact pray. (Perhaps further intensive psychological research remains to be done on these matters.) It claims only that students are psychologically coerced "to stand . . . or, at least, maintain respectful silence." Both halves of this disjunctive (both of which must amount to the fact or appearance of participation in prayer if the Court's analysis is to survive on its own terms) merit particular attention.

To begin with the latter: the Court's notion that a student who simply sits in "respectful silence" during the invocation and benediction (when all others are standing) has somehow joined - or would somehow be perceived as having

joined - in the prayers is nothing short of ludicrous. We indeed live in a vulgar age. But surely "our social conventions" have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence. \*\*\*

But let us assume the very worst, that the nonparticipating graduate is "subtly coerced" . . . to stand! Even that half of the disjunctive does not remotely establish a "participation" (or an "appearance of participation") in a religious exercise. The Court acknowledges that, "in our culture, standing . . . can signify adherence to a view or simple respect for the views of others." (Much more often the latter than the former, I think, except perhaps in the proverbial town meeting, where one votes by standing.) \*\*\*

The opinion manifests that the Court itself has not given careful consideration to its test of psychological coercion. For if it had, how could it observe, with no hint of concern or disapproval, that students stood for the Pledge of Allegiance, which immediately preceded Rabbi Gutterman's invocation? The government can, of course, no more coerce political orthodoxy than religious orthodoxy. *West Virginia Bd. of Ed. v. Barnette* (1943). Moreover, since the Pledge of Allegiance has been revised since *Barnette* to include the phrase "under God," recital of the Pledge would appear to raise the same Establishment Clause issue as the invocation and benediction. If students were psychologically coerced to remain standing during the invocation, they must also have been psychologically coerced, moments before, to stand for (and thereby, in the Court's view, take part in or appear to take part in) the Pledge. Must the Pledge therefore be barred from the public schools (both from graduation ceremonies and from the classroom)? In *Barnette*, we held that a public school student could not be compelled to recite the Pledge; we did not even hint that she could not be compelled to observe respectful silence - indeed, even to stand in respectful silence - when those who wished to recite it did so. Logically, that ought to be the next project for the Court's bulldozer.

I also find it odd that the Court concludes that high school graduates may not be subjected to this supposed psychological coercion, yet refrains from addressing whether "mature adults" may. I had thought that the reason graduation from high school is regarded as so significant an event is that it is generally associated with transition from adolescence to young adulthood. Many graduating seniors, of course, are old enough to vote. Why, then, does the Court treat them as though they were first-graders? Will we soon have a jurisprudence that distinguishes between mature and immature adults?

## B

The other "dominant fac[t]" identified by the Court is that "[s]tate officials direct the performance of a formal religious exercise" at school graduation ceremonies. "Direct[ing] the performance of a formal religious exercise" has a sound of liturgy to it, summoning up images of the principal directing acolytes where to carry the cross, or showing the rabbi where to unroll the Torah. A Court professing to be engaged in a "delicate and fact-sensitive" line-drawing would better describe what it means as "prescribing the content of an invocation and benediction." But even that would be false. All the record shows is that principals of the Providence public schools, acting within their delegated authority, have invited clergy to deliver invocations and benedictions at

graduations; and that Principal Lee invited Rabbi Gutterman, provided him a two-page pamphlet, prepared by the National Conference of Christians and Jews, giving general advice on inclusive prayer for civic occasions, and advised him that his prayers at graduation should be nonsectarian. How these facts can fairly be transformed into the charges that Principal Lee "directed and controlled the content of [Rabbi Gutterman's] prayer," that school officials "monitor prayer," and attempted to "compose official prayers," and that the "government involvement with religious activity in this case is pervasive," is difficult to fathom. The Court identifies nothing in the record remotely suggesting that school officials have ever drafted, edited, screened, or censored graduation prayers, or that Rabbi Gutterman was a mouthpiece of the school officials.

These distortions of the record are, of course, not harmless error: without them, the Court's solemn assertion that the school officials could reasonably be perceived to be "enforc[ing] a religious orthodoxy," would ring as hollow, as it ought.

### III

The deeper flaw in the Court's opinion does not lie in its wrong answer to the question whether there was state-induced "peer-pressure" coercion; it lies, rather, in the Court's making violation of the Establishment Clause hinge on such a precious question. The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty. Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. Thus, for example, in the colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches.

The Establishment Clause was adopted to prohibit such an establishment of religion at the federal level (and to protect state establishments of religion from federal interference). I will further acknowledge for the sake of argument that, as some scholars have argued, by 1790, the term "establishment" had acquired an additional meaning - "financial support of religion generally, by public taxation" - that reflected the development of "general or multiple" establishments, not limited to a single church. But that would still be an establishment coerced by force of law. \*\*\*

Voluntary prayer at graduation - a one-time ceremony at which parents, friends, and relatives are present - can hardly be thought to raise the same concerns.

### IV

Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test, see *Lemon v. Kurtzman* (1971), which has received well-earned criticism from many Members of this Court. The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it, see ante,

at 587, and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision. Unfortunately, however, the Court has replaced *Lemon* with its psycho-coercion test, which suffers the double disability of having no roots whatever in our people's historic practice and being as infinitely expandable as the reasons for psychotherapy itself.

Another happy aspect of the case is that it is only a jurisprudential disaster, and not a practical one. Given the odd basis for the Court's decision, invocations and benedictions will be able to be given at public school graduations next June, as they have for the past century and a half, so long as school authorities make clear that anyone who abstains from screaming in protest does not necessarily participate in the prayers. All that is seemingly needed is an announcement, or perhaps a written insertion at the beginning of the graduation program, to the effect that, while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so. That obvious fact recited, the graduates and their parents may proceed to thank God, as Americans have always done, for the blessings He has generously bestowed on them and on their country.

The reader has been told much in this case about the personal interest of Mr. Weisman and his daughter, and very little about the personal interests on the other side. They are not inconsequential. Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most believers, it is not that, and has never been. Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the "protection of divine Providence," as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington's first Thanksgiving Proclamation put it, the "Great Lord and Ruler of Nations." One can believe in the effectiveness of such public worship, or one can deprecate and deride it. But the longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it.

The narrow context of the present case involves a community's celebration of one of the milestones in its young citizens' lives, and it is a bold step for this Court to seek to banish from that occasion, and from thousands of similar celebrations throughout this land, the expression of gratitude to God that a majority of the community wishes to make. The issue before us today is not the abstract philosophical question whether the alternative of frustrating this desire of a religious majority is to be preferred over the alternative of imposing "psychological coercion," or a feeling of exclusion, upon nonbelievers. Rather, the question is whether a mandatory choice in favor of the former has been imposed by the United States Constitution. As the age-old practices of our people show, the answer to that question is not at all in doubt.

I must add one final observation: the Founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration - no, an

affection - for one another than voluntarily joining in prayer together, to the God whom they all worship and seek. Needless to say, no one should be compelled to do that, but it is a shame to deprive our public culture of the opportunity, and indeed the encouragement, for people to do it voluntarily. The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this official and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that cannot be replicated. To deprive our society of that important unifying mechanism in order to spare the nonbeliever what seems to me the minimal inconvenience of standing, or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.

For the foregoing reasons, I dissent.

## *Santa Fe Independent School District v. Doe*

530 U.S. 290 (2000)

STEVENS, J., DELIVERED THE OPINION OF THE COURT, IN WHICH O'CONNOR, KENNEDY, SOUTER, GINSBURG, AND BREYER, JJ., JOINED. REHNQUIST, C. J., FILED A DISSENTING OPINION, IN WHICH SCALIA AND THOMAS, JJ., JOINED.

JUSTICE STEVENS DELIVERED THE OPINION OF THE COURT.

Prior to 1995, the Santa Fe High School student who occupied the school's elective office of student council chaplain delivered a prayer over the public address system before each varsity football game for the entire season. This practice, along with others, was challenged in District Court as a violation of the Establishment Clause of the First Amendment. While these proceedings were pending in the District Court, the school district adopted a different policy that permits, but does not require, prayer initiated and led by a student at all home games. The District Court entered an order modifying that policy to permit only nonsectarian, nonproselytizing prayer. The Court of Appeals held that, even as modified by the District Court, the football prayer policy was invalid. We granted the school district's petition for certiorari to review that holding.

### I

The Santa Fe Independent School District (District) is a political subdivision of the State of Texas, responsible for the education of more than 4,000 students in a small community in the southern part of the State. The District includes the Santa Fe High School, two primary schools, an intermediate school and the junior high school. Respondents are two sets of current or former students and their respective mothers. One family is Mormon and the other is Catholic. The District Court permitted respondents (Does) to litigate anonymously to protect them from intimidation or harassment.

Respondents commenced this action in April 1995 and moved for a temporary restraining order to prevent the District from violating the Establishment Clause at the imminent graduation exercises. In their complaint the Does alleged that the District had engaged in several proselytizing practices, such as

promoting attendance at a Baptist revival meeting, encouraging membership in religious clubs, chastising children who held minority religious beliefs, and distributing Gideon Bibles on school premises. They also alleged that the District allowed students to read Christian invocations and benedictions from the stage at graduation ceremonies, and to deliver overtly Christian prayers over the public address system at home football games.

On May 10, 1995, the District Court entered an interim order addressing a number of different issues. With respect to the impending graduation, the order provided that "non-denominational prayer" consisting of "an invocation and/or benediction" could be presented by a senior student or students selected by members of the graduating class. The text of the prayer was to be determined by the students, without scrutiny or preapproval by school officials. References to particular religious figures "such as Mohammed, Jesus, Buddha, or the like" would be permitted "as long as the general thrust of the prayer is non-proselytizing."

In response to that portion of the order, the District adopted a series of policies over several months dealing with prayer at school functions. The policies enacted in May and July for graduation ceremonies provided the format for the August and October policies for football games. The May policy provided:

"The board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be part of the graduation exercise. If so chosen the class shall elect by secret ballot, from a list of student volunteers, students to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies."

\*\*\* In July, the District enacted another policy eliminating the requirement that invocations and benedictions be "nonsectarian and nonproselytizing," but also providing that if the District were to be enjoined from enforcing that policy, the May policy would automatically become effective.

The August policy, which was titled "Prayer at Football Games," was similar to the July policy for graduations. It also authorized two student elections, the first to determine whether "invocations" should be delivered, and the second to select the spokesperson to deliver them. Like the July policy, it contained two parts, an initial statement that omitted any requirement that the content of the invocation be "nonsectarian and nonproselytizing," and a fallback provision that automatically added that limitation if the preferred policy should be enjoined. On August 31, 1995, according to the parties' stipulation, "the district's high school students voted to determine whether a student would deliver prayer at varsity football games.... The students chose to allow a student to say a prayer at football games." A week later, in a separate election, they selected a student "to deliver the prayer at varsity football games."

The final policy (October policy) is essentially the same as the August policy, though it omits the word "prayer" from its title, and refers to "messages" and "statements" as well as "invocations." It is the validity of that policy that is before us.

The District Court did enter an order precluding enforcement of the first, open-ended policy. Relying on our decision in *Lee v. Weisman* (1992), it held that the

school's "action must not `coerce anyone to support or participate in' a religious exercise." Applying that test, it concluded that the graduation prayers appealed "to distinctively Christian beliefs," and that delivering a prayer "over the school's public address system prior to each football and baseball game coerces student participation in religious events." Both parties appealed, the District contending that the enjoined portion of the October policy was permissible and the Does contending that both alternatives violated the Establishment Clause. The Court of Appeals majority agreed with the Does.

\*\*\* We granted the District's petition for certiorari, limited to the following question: "Whether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause." We conclude, as did the Court of Appeals, that it does.

## II

The first Clause in the First Amendment to the Federal Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Fourteenth Amendment imposes those substantive limitations on the legislative power of the States and their political subdivisions. In *Lee v. Weisman* (1992), we held that a prayer delivered by a rabbi at a middle school graduation ceremony violated that Clause. Although this case involves student prayer at a different type of school function, our analysis is properly guided by the principles that we endorsed in *Lee*.

\*\*\* In this case the District first argues that this principle is inapplicable to its October policy because the messages are private student speech, not public speech. It reminds us that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, (1990) (opinion of O'Connor, J.). We certainly agree with that distinction, but we are not persuaded that the pregame invocations should be regarded as "private speech."

These invocations are authorized by a government policy and take place on government property at government-sponsored school-related events. Of course, not every message delivered under such circumstances is the government's own. We have held, for example, that an individual's contribution to a government-created forum was not government speech. See *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995). Although the District relies heavily on *Rosenberger* and similar cases involving such forums, it is clear that the pregame ceremony is not the type of forum discussed in those cases. The Santa Fe school officials simply do not "evinced either 'by policy or by practice,' any intent to open the [pregame ceremony] to 'indiscriminate use,' . . . by the student body generally." *Hazelwood School Dist. v. Kuhlmeier* (1988) (quoting *Perry Ed. Assn. v. Perry Local Educators' Assn.* (1983)). Rather, the school allows only one student, the same student for the entire season, to give the invocation. The statement or invocation, moreover, is subject to particular regulations that confine the content and topic of the student's message.

Granting only one student access to the stage at a time does not, of course, necessarily preclude a finding that a school has created a limited public forum.

Here, however, Santa Fe's student election system ensures that only those messages deemed "appropriate" under the District's policy may be delivered. That is, the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.

Recently, in *Board of Regents of Univ. of Wis. System v. Southworth* (2000), we explained why student elections that determine, by majority vote, which expressive activities shall receive or not receive school benefits are constitutionally problematic. \*\*\*

Like the student referendum for funding in *Southworth*, this student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority. Because "fundamental rights may not be submitted to vote; they depend on the outcome of no elections," *West Virginia Bd. of Ed. v. Barnette* (1943), the District's elections are insufficient safeguards of diverse student speech.

Moreover, the District has failed to divorce itself from the religious content in the invocations. It has not succeeded in doing so, either by claiming that its policy is "one of neutrality rather than endorsement" or by characterizing the individual student as the "circuit-breaker" in the process. Contrary to the District's repeated assertions that it has adopted a "hands-off" approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion. In this case, as we found in *Lee*, the "degree of school involvement" makes it clear that the pregame prayers bear "the imprint of the State and thus put school-age children who objected in an untenable position."

The District has attempted to disentangle itself from the religious messages by developing the two-step student election process. The text of the October policy, however, exposes the extent of the school's entanglement. The elections take place at all only because the school "board has chosen to permit students to deliver a brief invocation and/or message." The elections thus "shall" be conducted "by the high school student council" and "[u]pon advice and direction of the high school principal." The decision whether to deliver a message is first made by majority vote of the entire student body, followed by a choice of the speaker in a separate, similar majority election. Even though the particular words used by the speaker are not determined by those votes, the policy mandates that the "statement or invocation" be "consistent with the goals and purposes of this policy," which are "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition."

In addition to involving the school in the selection of the speaker, the policy, by its terms, invites and encourages religious messages. The policy itself states that the purpose of the message is "to solemnize the event." A religious message is the most obvious method of solemnizing an event. Moreover, the requirements that the message "promote good citizenship" and "establish the appropriate environment for competition" further narrow the types of message deemed appropriate, suggesting that a solemn, yet nonreligious, message, such as commentary on United States foreign policy, would be prohibited. Indeed,

the only type of message that is expressly endorsed in the text is an "invocation"--a term that primarily describes an appeal for divine assistance. In fact, as used in the past at Santa Fe High School, an "invocation" has always entailed a focused religious message. Thus, the expressed purposes of the policy encourage the selection of a religious message, and that is precisely how the students understand the policy. The results of the elections described in the parties' stipulation make it clear that the students understood that the central question before them was whether prayer should be a part of the pregame ceremony. We recognize the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of various occasions so as to mark those occasions' significance. But such religious activity in public schools, as elsewhere, must comport with the First Amendment.

The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy. Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school's public address system, which remains subject to the control of school officials. It is fair to assume that the pregame ceremony is clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school's name is likely written in large print across the field and on banners and flags. The crowd will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the school name. It is in a setting such as this that "[t]he board has chosen to permit" the elected student to rise and give the "statement or invocation."

In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. \*\*\* Regardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.

The text and history of this policy, moreover, reinforce our objective student's perception that the prayer is, in actuality, encouraged by the school. When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to "distinguis[h] a sham secular purpose from a sincere one." *Wallace* (O'Connor, J., concurring in judgment).

According to the District, the secular purposes of the policy are to "foste[r] free expression of private persons ... as well [as to] solemniz[e] sporting events, promot[e] good sportsmanship and student safety, and establis[h] an appropriate environment for competition." We note, however, that the District's approval of only one specific kind of message, an "invocation," is not necessary to further any of these purposes. Additionally, the fact that only one student is permitted to give a content-limited message suggests that this policy does little to "foste[r] free expression." Furthermore, regardless of whether one considers a

sporting event an appropriate occasion for solemnity, the use of an invocation to foster such solemnity is impermissible when, in actuality, it constitutes prayer sponsored by the school. And it is unclear what type of message would be both appropriately "solemnizing" under the District's policy and yet non-religious.

Most striking to us is the evolution of the current policy from the long-sanctioned office of "Student Chaplain" to the candidly titled "Prayer at Football Games" regulation. This history indicates that the District intended to preserve the practice of prayer before football games. The conclusion that the District viewed the October policy simply as a continuation of the previous policies is dramatically illustrated by the fact that the school did not conduct a new election, pursuant to the current policy, to replace the results of the previous election, which occurred under the former policy. Given these observations, and in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular "state-sponsored religious practice." *Lee*.

School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly* (1984) (O'Connor, J., concurring). The delivery of such a message--over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer--is not properly characterized as "private" speech.

### III

The District next argues that its football policy is distinguishable from the graduation prayer in *Lee* because it does not coerce students to participate in religious observances. Its argument has two parts: first, that there is no impermissible government coercion because the pregame messages are the product of student choices; and second, that there is really no coercion at all because attendance at an extracurricular event, unlike a graduation ceremony, is voluntary.

The reasons just discussed explaining why the alleged "circuit-breaker" mechanism of the dual elections and student speaker do not turn public speech into private speech also demonstrate why these mechanisms do not insulate the school from the coercive element of the final message. In fact, this aspect of the District's argument exposes anew the concerns that are created by the majoritarian election system. \*\*\*

The District further argues that attendance at the commencement ceremonies at issue in *Lee* "differs dramatically" from attendance at high school football games, which it contends "are of no more than passing interest to many students" and are "decidedly extracurricular," thus dissipating any coercion. Attendance at a high school football game, unlike showing up for class, is certainly not required in order to receive a diploma. Moreover, we may assume that the District is correct in arguing that the informal pressure to attend an

athletic event is not as strong as a senior's desire to attend her own graduation ceremony.

There are some students, however, such as cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments mandate their attendance, sometimes for class credit. The District also minimizes the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience. As we noted in *Lee*, "[l]aw reaches past formalism." To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is "formalistic in the extreme." We stressed in *Lee* the obvious observation that "adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention." High school home football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause. Undoubtedly, the games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between whether to attend these games or to risk facing a personally offensive religious ritual is in no practical sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon these students for "[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice."

Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship. For "the government may no more use social pressure to enforce orthodoxy than it may use more direct means." As in *Lee*, "[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." The constitutional command will not permit the District "to exact religious conformity from a student as the price" of joining her classmates at a varsity football game.

The Religion Clauses of the First Amendment prevent the government from making any law respecting the establishment of religion or prohibiting the free exercise thereof. By no means do these commands impose a prohibition on all religious activity in our public schools. \*\*\* Thus, nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.

#### IV

Finally, the District argues repeatedly that the Does have made a premature facial challenge to the October policy that necessarily must fail. The District emphasizes, quite correctly, that until a student actually delivers a solemnizing message under the latest version of the policy, there can be no certainty that

any of the statements or invocations will be religious. Thus, it concludes, the October policy necessarily survives a facial challenge.

This argument, however, assumes that we are concerned only with the serious constitutional injury that occurs when a student is forced to participate in an act of religious worship because she chooses to attend a school event. But the Constitution also requires that we keep in mind "the myriad, subtle ways in which Establishment Clause values can be eroded," and that we guard against other different, yet equally important, constitutional injuries. One is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion. Another is the implementation of a governmental electoral process that subjects the issue of prayer to a majoritarian vote.

\*\*\* Our examination of those circumstances above leads to the conclusion that this policy does not provide the District with the constitutional safe harbor it sought. The policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events.

The judgment of the Court of Appeals is, accordingly, affirmed.

*It is so ordered.*

CHIEF JUSTICE REHNQUIST, WITH WHOM JUSTICE SCALIA AND JUSTICE THOMAS JOIN, DISSENTING.

The Court distorts existing precedent to conclude that the school district's student-message program is invalid on its face under the Establishment Clause. But even more disturbing than its holding is the tone of the Court's opinion; it bristles with hostility to all things religious in public life. Neither the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause, when it is recalled that George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God." Presidential Proclamation, 1 Messages and Papers of the Presidents, 1789-1897.

We do not learn until late in the Court's opinion that respondents in this case challenged the district's student-message program at football games before it had been put into practice. \*\*\*

The Court, venturing into the realm of prophesy, decides that it "need not wait for the inevitable" and invalidates the district's policy on its face. To do so, it applies the most rigid version of the oft-criticized test of *Lemon v. Kurtzman* (1971).

*Lemon* has had a checkered career in the decisional law of this Court. See, e.g., *Lamb's Chapel v. Center Moriches Union Free School Dist.* (1993) (Scalia, J., concurring in judgment) (collecting opinions criticizing *Lemon*); *Wallace v. Jaffree* (1985) (Rehnquist, J., dissenting) (stating that *Lemon's* "three-part test represents a determined effort to craft a workable rule from a historically faulty

doctrine; but the rule can only be as sound as the doctrine it attempts to service" (internal quotation marks omitted)); *Committee for Public Ed. and Religious Liberty v. Regan* (1980) (Stevens, J., dissenting) (deriding "the sisyphian task of trying to patch together the blurred, indistinct, and variable barrier described in *Lemon*"). We have even gone so far as to state that it has never been binding on us. *Lynch v. Donnelly* (1984). Indeed, in *Lee v. Weisman* (1992), an opinion upon which the Court relies heavily today, we mentioned but did not feel compelled to apply the *Lemon* test. See also *Agostini v. Felton* (1997) (stating that *Lemon*'s entanglement test is merely "an aspect of the inquiry into a statute's effect"); *Hunt v. McNair* (1973) (stating that the *Lemon* factors are "no more than helpful signposts").

Even if it were appropriate to apply the *Lemon* test here, the district's student-message policy should not be invalidated on its face. The Court applies *Lemon* and holds that the "policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events." The Court's reliance on each of these conclusions misses the mark.

First, the Court misconstrues the nature of the "majoritarian election" permitted by the policy as being an election on "prayer" and "religion." \*\*\* [It] is possible that the students might vote not to have a pregame speaker, in which case there would be no threat of a constitutional violation. It is also possible that the election would not focus on prayer, but on public speaking ability or social popularity. And if student campaigning did begin to focus on prayer, the school might decide to implement reasonable campaign restrictions.

\*\*\* Second, with respect to the policy's purpose, the Court holds that "the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation." But the policy itself has plausible secular purposes: "[T]o solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." \*\*\* The Court grants no deference to--and appears openly hostile toward--the policy's stated purposes, and wastes no time in concluding that they are a sham.

\*\*\* But it is easy to think of solemn messages that are not religious in nature, for example urging that a game be fought fairly. And sporting events often begin with a solemn rendition of our national anthem, with its concluding verse "And this be our motto: 'In God is our trust.'" Under the Court's logic, a public school that sponsors the singing of the national anthem before football games violates the Establishment Clause. Although the Court apparently believes that solemnizing football games is an illegitimate purpose, the voters in the school district seem to disagree. Nothing in the Establishment Clause prevents them from making this choice.

\*\*\* Finally, the Court seems to demand that a government policy be completely neutral as to content or be considered one that endorses religion. This is undoubtedly a new requirement, as our Establishment Clause jurisprudence simply does not mandate "content neutrality." That concept is found in our First Amendment speech cases and is used as a guide for determining when we

apply strict scrutiny. \*\*\* The Court seems to think that the fact that the policy is not content neutral somehow controls the Establishment Clause inquiry. But even our speech jurisprudence would not require that all public school actions with respect to student speech be content neutral. See, e.g., *Bethel School Dist. No. 403 v. Fraser* (1986) (allowing the imposition of sanctions against a student speaker who, in nominating a fellow student for elective office during an assembly, referred to his candidate in terms of an elaborate sexually explicit metaphor). Schools do not violate the First Amendment every time they restrict student speech to certain categories. But under the Court's view, a school policy under which the student body president is to solemnize the graduation ceremony by giving a favorable introduction to the guest speaker would be facially unconstitutional. Solemnization "invites and encourages" prayer and the policy's content limitations prohibit the student body president from giving a solemn, yet non-religious, message like "commentary on United States foreign policy."

The policy at issue here may be applied in an unconstitutional manner, but it will be time enough to invalidate it if that is found to be the case. I would reverse the judgment of the Court of Appeals.

### ***Note: Elk Grove Unified Sch. Dist. v. Newdow***

The Court seemed poised to consider whether the phrase "Under God" that was added to the Pledge of Allegiance in 1954 violated the Establishment Clause. Writing for the Court in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004), Justice Stevens began the opinion thusly:

Each day elementary school teachers in the Elk Grove Unified School District (School District) lead their classes in a group recitation of the Pledge of Allegiance. Respondent, Michael A. Newdow, is an atheist whose daughter participates in that daily exercise. Because the Pledge contains the words "under God," he views the School District's policy as a religious indoctrination of his child that violates the First Amendment. A divided panel of the Court of Appeals for the Ninth Circuit agreed with Newdow. In light of the obvious importance of that decision, we granted certiorari to review the First Amendment issue and, preliminarily, the question whether Newdow has standing to invoke the jurisdiction of the federal courts. We conclude that Newdow lacks standing and therefore reverse the Court of Appeals' decision.

The Court therefore deflected the First Amendment issue by finding that Michael Newdow as a noncustodial father did not have standing. Chief Justice Rehnquist, joined by O'Connor and Thomas, dissented in part, criticizing the majority for reaching its decision on "a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim." These Justices would have reversed the Ninth Circuit on the First Amendment merits and held "Under God" in the Pledge of Allegiance does not violate the Establishment Clause's prohibition.

### III. Private Choice and Public Support of Religious Schools

#### *Zelman v. Simmons-Harris*

536 U.S. 639 (2002)

REHNQUIST, C. J., DELIVERED THE OPINION OF THE COURT, IN WHICH O'CONNOR, SCALIA, KENNEDY, AND THOMAS, JJ., JOINED. O'CONNOR, J., AND THOMAS, J., FILED CONCURRING OPINIONS. STEVENS, J., FILED A DISSENTING OPINION. SOUTER, J., FILED A DISSENTING OPINION, IN WHICH STEVENS, GINSBURG, AND BREYER, JJ., JOINED. BREYER, J., FILED A DISSENTING OPINION, IN WHICH STEVENS AND SOUTER, JJ., JOINED.

CHIEF JUSTICE REHNQUIST DELIVERED THE OPINION OF THE COURT.

The State of Ohio has established a pilot program designed to provide educational choices to families with children who reside in the Cleveland City School District. The question presented is whether this program offends the Establishment Clause of the United States Constitution. We hold that it does not.

There are more than 75,000 children enrolled in the Cleveland City School District. The majority of these children are from low-income and minority families. Few of these families enjoy the means to send their children to any school other than an inner-city public school. For more than a generation, however, Cleveland's public schools have been among the worst performing public schools in the Nation. In 1995, a Federal District Court declared a "crisis of magnitude" and placed the entire Cleveland school district under state control. Shortly thereafter, the state auditor found that Cleveland's public schools were in the midst of a "crisis that is perhaps unprecedented in the history of American education." The district had failed to meet any of the 18 state standards for minimal acceptable performance. Only 1 in 10 ninth graders could pass a basic proficiency examination, and students at all levels performed at a dismal rate compared with students in other Ohio public schools. More than two-thirds of high school students either dropped or failed out before graduation. Of those students who managed to reach their senior year, one of every four still failed to graduate. Of those students who did graduate, few could read, write, or compute at levels comparable to their counterparts in other cities.

It is against this backdrop that Ohio enacted, among other initiatives, its Pilot Project Scholarship Program, Ohio Rev. Code Ann. §§3313.974-3313.979 (Anderson 1999 and Supp. 2000) (program). The program provides financial assistance to families in any Ohio school district that is or has been "under federal court order requiring supervision and operational management of the district by the state superintendent." Cleveland is the only Ohio school district to fall within that category.

The program provides two basic kinds of assistance to parents of children in a covered district. First, the program provides tuition aid for students in

kindergarten through third grade, expanding each year through eighth grade, to attend a participating public or private school of their parent's choosing. Second, the program provides tutorial aid for students who choose to remain enrolled in public school.

The tuition aid portion of the program is designed to provide educational choices to parents who reside in a covered district. Any private school, whether religious or nonreligious, may participate in the program and accept program students so long as the school is located within the boundaries of a covered district and meets statewide educational standards. Participating private schools must agree not to discriminate on the basis of race, religion, or ethnic background, or to "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." Any public school located in a school district adjacent to the covered district may also participate in the program. Adjacent public schools are eligible to receive a \$2,250 tuition grant for each program student accepted in addition to the full amount of per-pupil state funding attributable to each additional student. All participating schools, whether public or private, are required to accept students in accordance with rules and procedures established by the state superintendent.

Tuition aid is distributed to parents according to financial need. Families with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of private school tuition up to \$2,250. For these lowest-income families, participating private schools may not charge a parental co-payment greater than \$250. For all other families, the program pays 75% of tuition costs, up to \$1,875, with no co-payment cap. These families receive tuition aid only if the number of available scholarships exceeds the number of low-income children who choose to participate. Where tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child. If parents choose a private school, checks are made payable to the parents who then endorse the checks over to the chosen school.

The tutorial aid portion of the program provides tutorial assistance through grants to any student in a covered district who chooses to remain in public school.\*\*\*

The program has been in operation within the Cleveland City School District since the 1996-1997 school year. In the 1999-2000 school year, 56 private schools participated in the program, 46 (or 82%) of which had a religious affiliation. None of the public schools in districts adjacent to Cleveland have elected to participate. More than 3,700 students participated in the scholarship program, most of whom (96%) enrolled in religiously affiliated schools. Sixty percent of these students were from families at or below the poverty line. In the 1998-1999 school year, approximately 1,400 Cleveland public school students received tutorial aid. This number was expected to double during the 1999-2000 school year.

The program is part of a broader undertaking by the State to enhance the educational options of Cleveland's schoolchildren in response to the 1995 takeover. That undertaking includes programs governing community and magnet schools. Community schools are funded under state law but are run by

their own school boards, not by local school districts. These schools enjoy academic independence to hire their own teachers and to determine their own curriculum. They can have no religious affiliation and are required to accept students by lottery. During the 1999-2000 school year, there were 10 start-up community schools in the Cleveland City School District with more than 1,900 students enrolled. For each child enrolled in a community school, the school receives state funding of \$4,518, twice the funding a participating program school may receive.

Magnet schools are public schools operated by a local school board that emphasize a particular subject area, teaching method, or service to students. For each student enrolled in a magnet school, the school district receives \$7,746, including state funding of \$4,167, the same amount received per student enrolled at a traditional public school. As of 1999, parents in Cleveland were able to choose from among 23 magnet schools, which together enrolled more than 13,000 students in kindergarten through eighth grade. These schools provide specialized teaching methods, such as Montessori, or a particularized curriculum focus, such as foreign language, computers, or the arts.

In 1996, respondents, a group of Ohio taxpayers, challenged the Ohio program in state court on state and federal grounds. The Ohio Supreme Court rejected respondents' federal claims, but held that the enactment of the program violated certain procedural requirements of the Ohio Constitution. The state legislature immediately cured this defect, leaving the basic provisions discussed above intact.

In July 1999, respondents filed this action in United States District Court, seeking to enjoin the reenacted program on the ground that it violated the Establishment Clause of the United States Constitution. In August 1999, the District Court issued a preliminary injunction barring further implementation of the program, which we stayed pending review by the Court of Appeals, 528 U.S. 983 (1999). In December 1999, the District Court granted summary judgment for respondents. In December 2000, a divided panel of the Court of Appeals affirmed the judgment of the District Court, finding that the program had the "primary effect" of advancing religion in violation of the Establishment Clause. The Court of Appeals stayed its mandate pending disposition in this Court. We granted certiorari and now reverse the Court of Appeals.

The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the "purpose" or "effect" of advancing or inhibiting religion. There is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system. Thus, the question presented is whether the Ohio program nonetheless has the forbidden "effect" of advancing or inhibiting religion.

To answer that question, our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private

individuals. While our jurisprudence with respect to the constitutionality of direct aid programs has "changed significantly" over the past two decades, our jurisprudence with respect to true private choice programs has remained consistent and unbroken. Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.

In *Mueller v. Allen* (1983) we rejected an Establishment Clause challenge to a Minnesota program authorizing tax deductions for various educational expenses, including private school tuition costs, even though the great majority of the program's beneficiaries (96%) were parents of children in religious schools. \*\*\* That the program was one of true private choice, with no evidence that the State deliberately skewed incentives toward religious schools, was sufficient for the program to survive scrutiny under the Establishment Clause.

In *Witters v. Washington Dept. Services for Blind* (1986), we used identical reasoning to reject an Establishment Clause challenge to a vocational scholarship program that provided tuition aid to a student studying at a religious institution to become a pastor. Looking at the program as a whole, we observed that "[a]ny aid ... that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." \*\*\*

Five Members of the Court, in separate opinions, emphasized the general rule from *Mueller* that the amount of government aid channeled to religious institutions by individual aid recipients was not relevant to the constitutional inquiry. Our holding thus rested not on whether few or many recipients chose to expend government aid at a religious school but, rather, on whether recipients generally were empowered to direct the aid to schools or institutions of their own choosing.

Finally, in *Zobrest v. Catalina Foothills School Dist.* (1993), we applied *Mueller* and *Witters* to reject an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools. Reviewing our earlier decisions, we stated that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge." \*\*\*

*Mueller*, *Witters*, and *Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits. \*\*\*

[W]e have never found a program of true private choice to offend the Establishment Clause.

We believe that the program challenged here is a program of true private choice, consistent with *Mueller*, *Witters*, and *Zobrest*, and thus constitutional. As was true in those cases, the Ohio program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion, i.e., any parent of a school-age child who resides in the Cleveland City School District. The program permits the participation of all schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion. The only preference stated anywhere in the program is a preference for low-income families, who receive greater assistance and are given priority for admission at participating schools.

There are no "financial incentive[s]" that "ske[w]" the program toward religious schools. \*\*\* The program here in fact creates financial disincentives for religious schools, with private schools receiving only half the government assistance given to community schools and one-third the assistance given to magnet schools. Adjacent public schools, should any choose to accept program students, are also eligible to receive two to three times the state funding of a private religious school. Families too have a financial disincentive to choose a private religious school over other schools. Parents that choose to participate in the scholarship program and then to enroll their children in a private school (religious or nonreligious) must copay a portion of the school's tuition. Families that choose a community school, magnet school, or traditional public school pay nothing. Although such features of the program are not necessary to its constitutionality, they clearly dispel the claim that the program "creates ... financial incentive[s] for parents to choose a sectarian school."

Respondents suggest that even without a financial incentive for parents to choose a religious school, the program creates a "public perception that the State is endorsing religious practices and beliefs." But we have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the imprimatur of government endorsement. \*\*\* Any objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.

There also is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children. Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school. That 46 of the 56 private schools now participating in the program are religious schools does not

condemn it as a violation of the Establishment Clause. The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating all options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school.

Justice Souter [dissenting] speculates that because more private religious schools currently participate in the program, the program itself must somehow discourage the participation of private nonreligious schools. But Cleveland's preponderance of religiously affiliated private schools certainly did not arise as a result of the program; it is a phenomenon common to many American cities. See U.S. Dept. of Ed., National Center for Education Statistics, Private School Universe Survey: 1999-2000, pp.2-4 (NCES 2001-330, 2001) (hereinafter Private School Universe Survey) (cited in Brief for United States as Amicus Curiae). Indeed, by all accounts the program has captured a remarkable cross-section of private schools, religious and nonreligious. It is true that 82% of Cleveland's participating private schools are religious schools, but it is also true that 81% of private schools in Ohio are religious schools. See Brief for State of Florida et al. as Amici Curiae 16 (citing Private School Universe Survey). To attribute constitutional significance to this figure, moreover, would lead to the absurd result that a neutral school-choice program might be permissible in some parts of Ohio, such as Columbus, where a lower percentage of private schools are religious schools, but not in inner-city Cleveland, where Ohio has deemed such programs most sorely needed, but where the preponderance of religious schools happens to be greater. Likewise, an identical private choice program might be constitutional in some States, such as Maine or Utah, where less than 45% of private schools are religious schools, but not in other States, such as Nebraska or Kansas, where over 90% of private schools are religious schools.

Respondents and Justice Souter claim that even if we do not focus on the number of participating schools that are religious schools, we should attach constitutional significance to the fact that 96% of scholarship recipients have enrolled in religious schools. They claim that this alone proves parents lack genuine choice, even if no parent has ever said so. We need not consider this argument in detail, since it was flatly rejected in *Mueller*, where we found it irrelevant that 96% of parents taking deductions for tuition expenses paid tuition at religious schools. \*\*\*

[Moreover] The 96% figure upon which respondents and Justice Souter rely discounts entirely (1) the more than 1,900 Cleveland children enrolled in alternative community schools, (2) the more than 13,000 children enrolled in alternative magnet schools, and (3) the more than 1,400 children enrolled in traditional public schools with tutorial assistance. Including some or all of these children in the denominator of children enrolled in nontraditional schools during the 1999-2000 school year drops the percentage enrolled in religious schools from 96% to under 20%. The 96% figure also represents but a snapshot of one particular school year. In the 1997-1998 school year, by contrast, only 78% of scholarship recipients attended religious schools. The difference was attributable to two private nonreligious schools that had accepted 15% of all scholarship students electing instead to register as community schools, in light

of larger per-pupil funding for community schools and the uncertain future of the scholarship program generated by this litigation. Many of the students enrolled in these schools as scholarship students remained enrolled as community school students, thus demonstrating the arbitrariness of counting one type of school but not the other to assess primary effect. In spite of repeated questioning from the Court at oral argument, respondents offered no convincing justification for their approach, which relies entirely on such arbitrary classifications.

Respondents finally claim that we should look to *Committee for Public Ed. & Religious Liberty v. Nyquist* (1973), to decide these cases. We disagree for two reasons. First, the program in *Nyquist* was quite different from the program challenged here. *Nyquist* involved a New York program that gave a package of benefits exclusively to private schools and the parents of private school enrollees. Although the program was enacted for ostensibly secular purposes, we found that its "function" was "unmistakably to provide desired financial support for nonpublic, sectarian institutions." Its genesis, we said, was that private religious schools faced "increasingly grave fiscal problems." The program thus provided direct money grants to religious schools. \*\*\* Indeed, the program flatly prohibited the participation of any public school, or parent of any public school enrollee. Ohio's program shares none of these features.

Second, were there any doubt that the program challenged in *Nyquist* is far removed from the program challenged here, we expressly reserved judgment with respect to "a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." That, of course, is the very question now before us, and it has since been answered, first in *Mueller*, then in *Witters* and again in *Zobrest*. To the extent the scope of *Nyquist* has remained an open question in light of these later decisions, we now hold that *Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion.

In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.

The judgment of the Court of Appeals is *reversed*.

JUSTICE O'CONNOR, CONCURRING. [OMITTED]

JUSTICE THOMAS, CONCURRING.

Frederick Douglass once said that "[e]ducation ... means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free." Today

many of our inner-city public schools deny emancipation to urban minority students. Despite this Court's observation nearly 50 years ago in *Brown v. Board of Education*, that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education," urban children have been forced into a system that continually fails them. These cases present an example of such failures. Besieged by escalating financial problems and declining academic achievement, the Cleveland City School District was in the midst of an academic emergency when Ohio enacted its scholarship program.

The dissents and respondents wish to invoke the Establishment Clause of the First Amendment, as incorporated through the Fourteenth, to constrain a State's neutral efforts to provide greater educational opportunity for underprivileged minority students. Today's decision properly upholds the program as constitutional, and I join it in full.

\*\*\* Whatever the textual and historical merits of incorporating the Establishment Clause, I can accept that the Fourteenth Amendment protects religious liberty rights. But I cannot accept its use to oppose neutral programs of school choice through the incorporation of the Establishment Clause. There would be a tragic irony in converting the Fourteenth Amendment's guarantee of individual liberty into a prohibition on the exercise of educational choice.

## II

The wisdom of allowing States greater latitude in dealing with matters of religion and education can be easily appreciated in this context. \*\*\*

Although one of the purposes of public schools was to promote democracy and a more egalitarian culture, failing urban public schools disproportionately affect minority children most in need of educational opportunity. At the time of Reconstruction, blacks considered public education "a matter of personal liberation and a necessary function of a free society." Today, however, the promise of public school education has failed poor inner-city blacks. While in theory providing education to everyone, the quality of public schools varies significantly across districts. Just as blacks supported public education during Reconstruction, many blacks and other minorities now support school choice programs because they provide the greatest educational opportunities for their children in struggling communities. Opponents of the program raise formalistic concerns about the Establishment Clause but ignore the core purposes of the Fourteenth Amendment.

While the romanticized ideal of universal public education resonates with the cognoscenti who oppose vouchers, poor urban families just want the best education for their children, who will certainly need it to function in our high-tech and advanced society. As Thomas Sowell noted 30 years ago: "Most black people have faced too many grim, concrete problems to be romantics. They want and need certain tangible results, which can be achieved only by developing certain specific abilities." *Black Education: Myths and Tragedies* 228 (1972). The same is true today. An individual's life prospects increase dramatically with each successfully completed phase of education. For instance, a black high school dropout earns just over \$13,500, but with a high school degree the average income is almost \$21,000. Blacks with a bachelor's degree have an

average annual income of about \$37,500, and \$75,500 with a professional degree. See U.S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 140 (2001) (Table 218). Staying in school and earning a degree generates real and tangible financial benefits, whereas failure to obtain even a high school degree essentially relegates students to a life of poverty and, all too often, of crime. The failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation that continues for the remainder of their lives. If society cannot end racial discrimination, at least it can arm minorities with the education to defend themselves from some of discrimination's effects.

Ten States have enacted some form of publicly funded private school choice as one means of raising the quality of education provided to underprivileged urban children. These programs address the root of the problem with failing urban public schools that disproportionately affect minority students. Society's other solution to these educational failures is often to provide racial preferences in higher education. Such preferences, however, run afoul of the Fourteenth Amendment's prohibition against distinctions based on race. See *Plessy* (Harlan, J., dissenting). By contrast, school choice programs that involve religious schools appear unconstitutional only to those who would twist the Fourteenth Amendment against itself by expansively incorporating the Establishment Clause. Converting the Fourteenth Amendment from a guarantee of opportunity to an obstacle against education reform distorts our constitutional values and disserves those in the greatest need.

As Frederick Douglass poignantly noted "no greater benefit can be bestowed upon a long benighted people, than giving to them, as we are here earnestly this day endeavoring to do, the means of an education."

JUSTICE STEVENS, DISSENTING. [OMITTED]

JUSTICE SOUTER, WITH WHOM JUSTICE STEVENS, JUSTICE GINSBURG, AND JUSTICE BREYER JOIN, DISSENTING.

The Court's majority holds that the Establishment Clause is no bar to Ohio's payment of tuition at private religious elementary and middle schools under a scheme that systematically provides tax money to support the schools' religious missions. The occasion for the legislation thus upheld is the condition of public education in the city of Cleveland. The record indicates that the schools are failing to serve their objective, and the vouchers in issue here are said to be needed to provide adequate alternatives to them. If there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here. But there is no excuse. Constitutional limitations are placed on government to preserve constitutional values in hard cases, like these. "[C]onstitutional lines have to be drawn, and on one side of every one of them is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But constitutional lines are the price of constitutional government." *Agostini v. Felton* (1997) (Souter, J., dissenting). I therefore respectfully dissent.

The applicability of the Establishment Clause to public funding of benefits to religious schools was settled in *Everson v. Board of Ed. of Ewing* (1947), which inaugurated the modern era of establishment doctrine. \*\*\*

Today, however, the majority holds that the Establishment Clause is not offended by Ohio's Pilot Project Scholarship Program, under which students may be eligible to receive as much as \$2,250 in the form of tuition vouchers transferable to religious schools. In the city of Cleveland the overwhelming proportion of large appropriations for voucher money must be spent on religious schools if it is to be spent at all, and will be spent in amounts that cover almost all of tuition. The money will thus pay for eligible students' instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension. Public tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools, to speak only of major religious groupings in the Republic.

How can a Court consistently leave *Everson* on the books and approve the Ohio vouchers? The answer is that it cannot. It is only by ignoring *Everson* that the majority can claim to rest on traditional law in its invocation of neutral aid provisions and private choice to sanction the Ohio law. It is, moreover, only by ignoring the meaning of neutrality and private choice themselves that the majority can even pretend to rest today's decision on those criteria.

#### I

The majority's statements of Establishment Clause doctrine cannot be appreciated without some historical perspective on the Court's announced limitations on government aid to religious education, and its repeated repudiation of limits previously set. \*\*\*

Viewed with the necessary generality, the cases can be categorized in three groups. In the period from 1947 to 1968, the basic principle of no aid to religion through school benefits was unquestioned. Thereafter for some 15 years, the Court termed its efforts as attempts to draw a line against aid that would be divertible to support the religious, as distinct from the secular, activity of an institutional beneficiary. Then, starting in 1983, concern with divertibility was gradually lost in favor of approving aid in amounts unlikely to afford substantial benefits to religious schools, when offered evenhandedly without regard to a recipient's religious character, and when channeled to a religious institution only by the genuinely free choice of some private individual. Now, the three stages are succeeded by a fourth, in which the substantial character of government aid is held to have no constitutional significance, and the espoused criteria of neutrality in offering aid, and private choice in directing it, are shown to be nothing but examples of verbal formalism.

#### A

[omitted]

#### B

[omitted]

## C

Hence it seems fair to say that it was not until today that substantiality of aid has clearly been rejected as irrelevant by a majority of this Court, just as it has not been until today that a majority, not a plurality, has held purely formal criteria to suffice for scrutinizing aid that ends up in the coffers of religious schools. Today's cases are notable for their stark illustration of the inadequacy of the majority's chosen formal analysis.

## II

Although it has taken half a century since *Everson* to reach the majority's twin standards of neutrality and free choice, the facts show that, in the majority's hands, even these criteria cannot convincingly legitimize the Ohio scheme.

## A

Consider first the criterion of neutrality. \*\*\*

Neutrality in this sense refers, of course, to evenhandedness in setting eligibility as between potential religious and secular recipients of public money. Thus, for example, the aid scheme in *Witters* provided an eligible recipient with a scholarship to be used at any institution within a practically unlimited universe of schools; it did not tend to provide more or less aid depending on which one the scholarship recipient chose, and there was no indication that the maximum scholarship amount would be insufficient at secular schools. Neither did any condition of *Zobrest*'s interpreter's subsidy favor religious education.

In order to apply the neutrality test, then, it makes sense to focus on a category of aid that may be directed to religious as well as secular schools, and ask whether the scheme favors a religious direction. Here, one would ask whether the voucher provisions, allowing for as much as \$2,250 toward private school tuition (or a grant to a public school in an adjacent district), were written in a way that skewed the scheme toward benefiting religious schools.

This, however, is not what the majority asks. The majority looks not to the provisions for tuition vouchers, but to every provision for educational opportunity. The majority then finds confirmation that "participation of all schools" satisfies neutrality by noting that the better part of total state educational expenditure goes to public schools, thus showing there is no favor of religion.

The illogic is patent. If regular, public schools (which can get no voucher payments) "participate" in a voucher scheme with schools that can, and public expenditure is still predominantly on public schools, then the majority's reasoning would find neutrality in a scheme of vouchers available for private tuition in districts with no secular private schools at all. "Neutrality" as the majority employs the term is, literally, verbal and nothing more. This, indeed, is the only way the majority can gloss over the very nonneutral feature of the total scheme covering "all schools": public tutors may receive from the State no more than \$324 per child to support extra tutoring (that is, the State's 90% of a total amount of \$360), whereas the tuition voucher schools (which turn out to be mostly religious) can receive up to \$2,250.

Why the majority does not simply accept the fact that the challenge here is to the more generous voucher scheme and judge its neutrality in relation to

religious use of voucher money seems very odd. It seems odd, that is, until one recognizes that comparable schools for applying the criterion of neutrality are also the comparable schools for applying the other majority criterion, whether the immediate recipients of voucher aid have a genuinely free choice of religious and secular schools to receive the voucher money. And in applying this second criterion, the consideration of "all schools" is ostensibly helpful to the majority position.

## B

The majority addresses the issue of choice the same way it addresses neutrality, by asking whether recipients or potential recipients of voucher aid have a choice of public schools among secular alternatives to religious schools. Again, however, the majority asks the wrong question and misapplies the criterion. The majority has confused choice in spending scholarships with choice from the entire menu of possible educational placements, most of them open to anyone willing to attend a public school. I say "confused" because the majority's new use of the choice criterion, which it frames negatively as "whether Ohio is coercing parents into sending their children to religious schools," ignores the reason for having a private choice enquiry in the first place. Cases since *Mueller* have found private choice relevant under a rule that aid to religious schools can be permissible so long as it first passes through the hands of students or parents. The majority's view that all educational choices are comparable for purposes of choice thus ignores the whole point of the choice test: it is a criterion for deciding whether indirect aid to a religious school is legitimate because it passes through private hands that can spend or use the aid in a secular school. The question is whether the private hand is genuinely free to send the money in either a secular direction or a religious one. The majority now has transformed this question about private choice in channeling aid into a question about selecting from examples of state spending (on education) including direct spending on magnet and community public schools that goes through no private hands and could never reach a religious school under any circumstance. When the choice test is transformed from where to spend the money to where to go to school, it is cut loose from its very purpose.

Defining choice as choice in spending the money or channeling the aid is, moreover, necessary if the choice criterion is to function as a limiting principle at all. If "choice" is present whenever there is any educational alternative to the religious school to which vouchers can be endorsed, then there will always be a choice and the voucher can always be constitutional, even in a system in which there is not a single private secular school as an alternative to the religious school. And because it is unlikely that any participating private religious school will enroll more pupils than the generally available public system, it will be easy to generate numbers suggesting that aid to religion is not the significant intent or effect of the voucher scheme.

That is, in fact, just the kind of rhetorical argument that the majority accepts in these cases. \*\*\*

It is not, of course, that I think even a genuine choice criterion is up to the task of the Establishment Clause when substantial state funds go to religious teaching. \*\*\* The point is simply that if the majority wishes to claim that choice

is a criterion, it must define choice in a way that can function as a criterion with a practical capacity to screen something out.

If, contrary to the majority, we ask the right question about genuine choice to use the vouchers, the answer shows that something is influencing choices in a way that aims the money in a religious direction: of 56 private schools in the district participating in the voucher program (only 53 of which accepted voucher students in 1999-2000), 46 of them are religious; 96.6% of all voucher recipients go to religious schools, only 3.4% to nonreligious ones. \*\*\*

Of course, the obvious fix would be to increase the value of vouchers so that existing nonreligious private and non-Catholic religious schools would be able to enroll more voucher students, and to provide incentives for educators to create new such schools given that few presently exist. Private choice, if as robust as that available to the seminarian in *Witters*, would then be "true private choice" under the majority's criterion. But it is simply unrealistic to presume that parents of elementary and middle schoolchildren in Cleveland will have a range of secular and religious choices even arguably comparable to the statewide program for vocational and higher education in *Witters*. And to get to that hypothetical point would require that such massive financial support be made available to religion as to disserve every objective of the Establishment Clause even more than the present scheme does.

There is, in any case, no way to interpret the 96.6% of current voucher money going to religious schools as reflecting a free and genuine choice by the families that apply for vouchers. The 96.6% reflects, instead, the fact that too few nonreligious school desks are available and few but religious schools can afford to accept more than a handful of voucher students. And contrary to the majority's assertion, public schools in adjacent districts hardly have a financial incentive to participate in the Ohio voucher program, and none has. For the overwhelming number of children in the voucher scheme, the only alternative to the public schools is religious. And it is entirely irrelevant that the State did not deliberately design the network of private schools for the sake of channeling money into religious institutions. The criterion is one of genuinely free choice on the part of the private individuals who choose, and a Hobson's choice is not a choice, whatever the reason for being Hobsonian.

### III

I do not dissent merely because the majority has misapplied its own law, for even if I assumed *arguendo* that the majority's formal criteria were satisfied on the facts, today's conclusion would be profoundly at odds with the Constitution. Proof of this is clear on two levels. The first is circumstantial, in the now discarded symptom of violation, the substantial dimension of the aid. The second is direct, in the defiance of every objective supposed to be served by the bar against establishment.

#### A

The scale of the aid to religious schools approved today is unprecedented, both in the number of dollars and in the proportion of systemic school expenditure supported. \*\*\*

The Cleveland voucher program has cost Ohio taxpayers \$33 million since its implementation in 1996 (\$28 million in voucher payments, \$5 million in

administrative costs), and its cost was expected to exceed \$8 million in the 2001-2002 school year. People for the American Way Foundation, *Five Years and Counting: A Closer Look at the Cleveland Voucher Program 1-2* (Sept. 25, 2001) (hereinafter *Cleveland Voucher Program*) (cited in Brief for National School Boards Association et al. as *Amici Curiae* at 9). These tax-raised funds are on top of the textbooks, reading and math tutors, laboratory equipment, and the like that Ohio provides to private schools, worth roughly \$600 per child.

The gross amounts of public money contributed are symptomatic of the scope of what the taxpayers' money buys for a broad class of religious-school students. In paying for practically the full amount of tuition for thousands of qualifying students, the scholarships purchase everything that tuition purchases, be it instruction in math or indoctrination in faith. \*\*\*

## B

It is virtually superfluous to point out that every objective underlying the prohibition of religious establishment is betrayed by this scheme, but something has to be said about the enormity of the violation. \*\*\* [The first objective,] Madison's objection to three pence has simply been lost in the majority's formalism.

As for the second objective, to save religion from its own corruption, Madison wrote of the "experience ... that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." *Memorial and Remonstrance*. In Madison's time, the manifestations were "pride and indolence in the Clergy; ignorance and servility in the laity[,] in both, superstition, bigotry and persecution," in the 21st century, the risk is one of "corrosive secularism" to religious schools, and the specific threat is to the primacy of the schools' mission to educate the children of the faithful according to the unaltered precepts of their faith. Even "[t]he favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation."

The risk is already being realized. In Ohio, for example, a condition of receiving government money under the program is that participating religious schools may not "discriminate on the basis of ... religion," which means the school may not give admission preferences to children who are members of the patron faith; children of a parish are generally consigned to the same admission lotteries as non-believers. This indeed was the exact object of a 1999 amendment repealing the portion of a predecessor statute that had allowed an admission preference for "[c]hildren ... whose parents are affiliated with any organization that provides financial support to the school, at the discretion of the school." Nor is the State's religious antidiscrimination restriction limited to student admission policies: by its terms, a participating religious school may well be forbidden to choose a member of its own clergy to serve as teacher or principal over a layperson of a different religion claiming equal qualification for the job. Indeed, a separate condition that "[t]he school ... not ... teach hatred of any person or group on the basis of ... religion," could be understood (or subsequently broadened) to prohibit religions from teaching traditionally legitimate articles of faith as to the error, sinfulness, or ignorance of others, if they want government money for their schools.

For perspective on this foot-in-the-door of religious regulation, it is well to remember that the money has barely begun to flow. \*\*\* But given the figures already involved here, there is no question that religious schools in Ohio are on the way to becoming bigger businesses with budgets enhanced to fit their new stream of tax-raised income. The administrators of those same schools are also no doubt following the politics of a move in the Ohio State Senate to raise the current maximum value of a school voucher from \$2,250 to the base amount of current state spending on each public school student (\$4,814 for the 2001 fiscal year). Ohio, in fact, is merely replicating the experience in Wisconsin, where a similar increase in the value of educational vouchers in Milwaukee has induced the creation of some 23 new private schools, Public Policy Forum, Research Brief, vol. 90, no. 1, p.3 (Jan. 23, 2002), some of which, we may safely surmise, are religious. New schools have presumably pegged their financial prospects to the government from the start, and the odds are that increases in government aid will bring the threshold voucher amount closer to the tuition at even more expensive religious schools.

When government aid goes up, so does reliance on it; the only thing likely to go down is independence. \*\*\* A day will come when religious schools will learn what political leverage can do, just as Ohio's politicians are now getting a lesson in the leverage exercised by religion.

Increased voucher spending is not, however, the sole portent of growing regulation of religious practice in the school, for state mandates to moderate religious teaching may well be the most obvious response to the third concern behind the ban on establishment, its inextricable link with social conflict. As appropriations for religious subsidy rise, competition for the money will tap sectarian religion's capacity for discord. \*\*\*

Religious teaching at taxpayer expense simply cannot be cordoned from taxpayer politics, and every major religion currently espouses social positions that provoke intense opposition. Not all taxpaying Protestant citizens, for example, will be content to underwrite the teaching of the Roman Catholic Church condemning the death penalty. Nor will all of America's Muslims acquiesce in paying for the endorsement of the religious Zionism taught in many religious Jewish schools, which combines "a nationalistic sentiment" in support of Israel with a "deeply religious" element. Nor will every secular taxpayer be content to support Muslim views on differential treatment of the sexes, or, for that matter, to fund the espousal of a wife's obligation of obedience to her husband, presumably taught in any schools adopting the articles of faith of the Southern Baptist Convention. Views like these, and innumerable others, have been safe in the sectarian pulpits and classrooms of this Nation not only because the Free Exercise Clause protects them directly, but because the ban on supporting religious establishment has protected free exercise, by keeping it relatively private. With the arrival of vouchers in religious schools, that privacy will go, and along with it will go confidence that religious disagreement will stay moderate.

If the divisiveness permitted by today's majority is to be avoided in the short term, it will be avoided only by action of the political branches at the state and national levels. Legislatures not driven to desperation by the problems of public education may be able to see the threat in vouchers negotiable in sectarian

schools. Perhaps even cities with problems like Cleveland's will perceive the danger, now that they know a federal court will not save them from it.

My own course as a judge on the Court cannot, however, simply be to hope that the political branches will save us from the consequences of the majority's decision. *Everson's* statement is still the touchstone of sound law, even though the reality is that in the matter of educational aid the Establishment Clause has largely been read away. True, the majority has not approved vouchers for religious schools alone, or aid earmarked for religious instruction. But no scheme so clumsy will ever get before us, and in the cases that we may see, like these, the Establishment Clause is largely silenced. I do not have the option to leave it silent, and I hope that a future Court will reconsider today's dramatic departure from basic Establishment Clause principle.

JUSTICE BREYER, WITH WHOM JUSTICE STEVENS AND JUSTICE SOUTER JOIN, DISSENTING.

I join Justice Souter's opinion, and I agree substantially with Justice Stevens. I write separately, however, to emphasize the risk that publicly financed voucher programs pose in terms of religiously based social conflict. I do so because I believe that the Establishment Clause concern for protecting the Nation's social fabric from religious conflict poses an overriding obstacle to the implementation of this well-intentioned school voucher program. And by explaining the nature of the concern, I hope to demonstrate why, in my view, "parental choice" cannot significantly alleviate the constitutional problem. \*\*\*

## Notes

1. In addition to voucher systems that have revolutionized public education, the charter school movement has also had a great effect. As one law review article notes, "religiously affiliated charter schools have become fertile ground for cultivating church-state tension."

In 2014, the U.S. Department of Education issued non-regulatory guidance that discusses six commonly identified entanglement issues at charter schools including: 1) leasing buildings from churches; 2) contracting with religious organizations for secular programming and teaching; 3) marketing charter schools at churches; 4) marketing church events at charter schools; 5) reopening private, parochial schools as charter schools; and 6) teaching religiously related concepts.

Janet R. Decker, Kari A. Carr, *Church-State Entanglement at Religiously Affiliated Charter Schools*, 2015 B.Y.U. Educ. & L.J. 77, 85 (2015).

Moreover, whether faith-based or not, charter schools can insulate themselves from other First Amendment challenges. As another article argues, charter schools want to "have it both ways": obtaining the benefits of public funding while circumventing constitutional rights and protections for employees and students that apply to traditional public

schools. See Preston C. Green III et. al., *Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 EMORY L.J. 303 (2013).

Given these views, is a voucher system preferable to a charter school system?

2. As we have seen, Establishment Clause doctrine had its genesis in public education with robust development, including the *Lemon* test. The next chapter considers Establishment Clause doctrine in other public spheres, but the division between schools and other public places is not a stark one. What principles would you expect from the *Lemon* test or other doctrines to be less applicable to non-school contexts?

# Chapter Thirteen: THE ESTABLISHMENT CLAUSE IN THE PUBLIC SQUARE

This Chapter considers the boundary between “church and state” in the public square. Section one focuses on the problem of “history” in Sunday “blue laws” and prayer in legislative bodies. Section two considers “religious” symbols in the public square, including the holiday displays, the Ten Commandments cases, and crosses. The final section highlights the question of standing in Establishment Clause cases.

## Chapter Outline

### I. Historical Practices

McGowan v. Maryland

Marsh v. Chambers

Town of Greece, New York v. Galloway

Notes

### II. Displays of Religious Symbols

Allegheny County v. Greater Pittsburgh ACLU

Note

McCreary County, Kentucky v. ACLU of Kentucky

Van Orden v. Perry

Notes

Note: Salazar v. Buono

### III. The Problem of Establishment Clause Standing

Arizona Christian School Tuition Organization v. Winn

Notes

## I. Historical Practices

Recall Justice Rutledge’s statement, dissenting in the Court’s first Establishment Clause case, *Everson v. Board of Education* (1947) (Chapter 12), that “No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history.”

Consider the relevance of history - - - and which histories - - - in the interpretation of the Establishment Clause challenges to religion in the “public square” as it relates to accepted practices and “slippery slopes.”

### *McGowan v. Maryland*

366 U.S. 420 (1961)

CHIEF JUSTICE WARREN DELIVERED THE OPINION OF THE COURT IN WHICH BLACK, CLARK, BRENNAN, WHITTAKER, AND STEWART, J.J. JOINED. FRANKFURTER FILED A CONCURRING OPINION IN WHICH HARLAN, J., JOINED. DOUGLAS, J., FILED A DISSENTING OPINION.

CHIEF JUSTICE WARREN DELIVERED THE OPINION OF THE COURT.

The issues in this case concern the constitutional validity of Maryland criminal statutes, commonly known as Sunday Closing Laws or Sunday Blue Laws. These statutes, with exceptions to be noted hereafter, generally proscribe all labor, business and other commercial activities on Sunday. The questions presented are whether the classifications within the statutes bring about a denial of equal protection of the law, whether the laws are so vague as to fail to give reasonable notice of the forbidden conduct and therefore violate due process, and whether the statutes are laws respecting an establishment of religion or prohibiting the free exercise thereof.

Appellants are seven employees of a large discount department store located on a highway in Anne Arundel County, Maryland. They were indicted for the Sunday sale of a three-ring loose-leaf binder, a can of floor wax, a stapler and staples, and a toy submarine in violation of Md. Ann. Code. Art. 27, 521. Generally, this section prohibited, throughout the State, the Sunday sale of all merchandise except the retail sale of tobacco products, confectioneries, milk, bread, fruits, gasoline, oils, greases, drugs and medicines, and newspapers and periodicals. Recently amended, this section also now excepts from the general prohibition the retail sale in Anne Arundel County of all foodstuffs, automobile and boating accessories, flowers, toilet goods, hospital supplies and souvenirs. It now further provides that any retail establishment in Anne Arundel County which does not employ more than one person other than the owner may operate on Sunday.

Although appellants were indicated only under 521, in order properly to consider several of the broad constitutional contentions, we must examine the whole body of Maryland Sunday laws. Several sections of the Maryland statutes are particularly relevant to evaluation of the issues presented. Section 492 of Md. Ann. Code, Art. 27, forbids all persons from doing any work or bodily labor on Sunday and forbids permitting children or servants to work on that day or to engage in fishing, hunting and unlawful pastimes or recreations. The section excepts all works of necessity and charity. Section 522 of Md. Ann. Code, Art. 27, disallows the opening or use of any dancing saloon, opera house, bowling alley or barber shop on Sunday. However, in addition to the exceptions noted above, Md. Ann. Code, Art. 27, 509, exempts, for Anne Arundel County, the Sunday operation of any bathing beach, bathhouse, dancing saloon and amusement park, and activities incident thereto and retail sales of merchandise customarily sold at, or incidental to, the operation of the aforesaid occupations and businesses. Section 90 of Md. Ann. Code, Art. 2B, makes generally unlawful the sale of alcoholic beverages on Sunday. However, this section, and immediately succeeding ones, provide various immunities for the Sunday sale of different kinds of alcoholic beverages, at different hours during the day, by vendors holding different types of licenses, in different political divisions of the State - particularly in Anne Arundel County.

The remaining statutory sections concern a myriad of exceptions for various counties, districts of counties, cities and towns throughout the State. Among the activities allowed in certain areas on Sunday are such sports as football, baseball, golf, tennis, bowling, croquet, basketball, lacrosse, soccer, hockey, swimming, softball, boating, fishing, skating, horseback riding, stock car racing and pool or billiards. Other immunized activities permitted in some regions of the State include group singing or playing of musical instruments; the exhibition of motion pictures; dancing; the operation of recreation centers, picnic grounds, swimming pools, skating rinks and miniature golf courses. The taking of oysters and the hunting or killing of game is generally forbidden, but shooting conducted by organized rod and gun clubs is permitted in one county. In some of the subdivisions within the State, the exempted Sunday activities are sanctioned throughout the day; in others, they may not commence until early afternoon or evening; in many, the activities may only be conducted during the afternoon and late in the evening. Certain localities do not permit the allowed Sunday activity to be carried on within one hundred yards of any church where religious services are being held. Local ordinances and regulations concerning certain limited activities supplement the State's statutory scheme. In Anne Arundel County, for example, slot machines, pinball machines and bingo may be played on Sunday.

Among other things, appellants contended at the trial that the Maryland statutes under which they were charged were contrary to the Fourteenth Amendment for the reasons stated at the outset of this opinion. Appellants were convicted and each was fined five dollars and costs. The Maryland Court of Appeals affirmed; on appeal brought under 28 U.S.C. 1257 (2), we noted probable jurisdiction.

I.

[omitted: The Court rejected the Equal Protection challenge]

## II.

[omitted: The Court rejected the vagueness challenge]

## III.

The final questions for decision are whether the Maryland Sunday Closing Laws conflict with the Federal Constitution's provisions for religious liberty. First, appellants contend here that the statutes applicable to Anne Arundel County violate the constitutional guarantee of freedom of religion in that the statutes' effect is to prohibit the free exercise of religion in contravention of the First Amendment, made applicable to the States by the Fourteenth Amendment. But appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing. In fact, the record is silent as to what appellants' religious beliefs are. \*\*\*

Secondly, appellants contend that the statutes violate the guarantee of separation of church and state in that the statutes are laws respecting an establishment of religion contrary to the First Amendment, made applicable to the States by the Fourteenth Amendment. If the purpose of the "establishment" clause was only to insure protection for the "free exercise" of religion, then what we have said above concerning appellants' standing to raise the "free exercise" contention would appear to be true here. However, the writings of Madison, who was the First Amendment's architect, demonstrate that the establishment of a religion was equally feared because of its tendencies to political tyranny and subversion of civil authority. Thus, in *Everson v. Board of Education* (1947) the Court permitted a district taxpayer to challenge, on "establishment" grounds, a state statute which authorized district boards of education to reimburse parents for fares paid for the transportation of their children to both public and Catholic schools. Appellants here concededly have suffered direct economic injury, allegedly due to the imposition on them of the tenets of the Christian religion. We find that, in these circumstances, these appellants have standing to complain that the statutes are laws respecting an establishment of religion.

The essence of appellants' "establishment" argument is that Sunday is the Sabbath day of the predominant Christian sects; that the purpose of the enforced stoppage of labor on that day is to facilitate and encourage church attendance; that the purpose of setting Sunday as a day of universal rest is to induce people with no religion or people with marginal religious beliefs to join the predominant Christian sects; that the purpose of the atmosphere of tranquility created by Sunday closing is to aid the conduct of church services and religious observance of the sacred day. In substantiating their "establishment" argument, appellants rely on the wording of the present Maryland statutes, on earlier versions of the current Sunday laws and on prior judicial characterizations of these laws by the Maryland Court of Appeals. Although only the constitutionality of 521, the section under which appellants have been convicted, is immediately before us in this litigation, inquiry into the history of Sunday Closing Laws in our country, in addition to an examination of the Maryland Sunday closing statutes in their entirety and of their history, is relevant to the decision of whether the Maryland Sunday law in question is one respecting an establishment of religion. There is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces. But

what we must decide is whether present Sunday legislation, having undergone extensive changes from the earliest forms, still retains its religious character.

Sunday Closing Laws go far back into American history, having been brought to the colonies with a background of English legislation dating to the thirteenth century. In 1237, Henry III forbade the frequenting of markets on Sunday; the Sunday showing of wools at the staple was banned by Edward III in 1354; in 1409, Henry IV prohibited the playing of unlawful games on Sunday; Henry VI proscribed Sunday fairs in churchyards in 1444 and, four years later, made unlawful all fairs and markets and all showings of any goods or merchandise; Edward VI disallowed Sunday bodily labor by several injunctions in the mid-sixteenth century; various Sunday sports and amusements were restricted in 1625 by Charles I. Lewis, *A Critical History of Sunday Legislation*, 82-108; Johnson and Yost, *Separation of Church and State*, 221. The law of the colonies to the time of the Revolution and the basis of the Sunday laws in the States was 29 CHARLES II, C. 7 (1677). It provided, in part:

"For the better observation and keeping holy the Lord's day, commonly called Sunday: be it enacted . . . that all the laws enacted and in force concerning the observation of the day, and repairing to the church thereon, be carefully put in execution; and that all and every person and persons whatsoever shall upon every Lord's day apply themselves to the observation of the same, by exercising themselves thereon in the duties of piety and true religion, publicly and privately; and that no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor or business or work of their ordinary callings upon the Lord's day, or any part thereof (works of necessity and charity only excepted); . . . and that no person or persons whatsoever shall publicly cry, show forth, or expose for sale any wares, merchandise, fruit, herbs, goods, or chattels, whatsoever, upon the Lord's day, or any part thereof. . . ." (Emphasis added.)

Observation of the above language, and of that of the prior mandates, reveals clearly that the English Sunday legislation was in aid of the established church.

The American colonial Sunday restrictions arose soon after settlement. Starting in 1650, the Plymouth Colony proscribed servile work, unnecessary travelling, sports, and the sale of alcoholic beverages on the Lord's day and enacted laws concerning church attendance. The Massachusetts Bay Colony and the Connecticut and New Haven Colonies enacted similar prohibitions, some even earlier in the seventeenth century. The religious orientation of the colonial statutes was equally apparent. For example, a 1629 Massachusetts Bay instruction began, "And to the end the Sabbath may be celebrated in a religious manner. . . ." A 1653 enactment spoke of Sunday activities "which things tend much to the dishonor of God, the reproach of religion, and the profanation of his holy Sabbath, the sanctification whereof is sometimes put for all duties immediately respecting the service of God. . . ." These laws persevered after the Revolution and, at about the time of the First Amendment's adoption, each of the colonies had laws of some sort restricting Sunday labor.

But, despite the strongly religious origin of these laws, beginning before the eighteenth century, nonreligious arguments for Sunday closing began to be heard more distinctly and the statutes began to lose some of their totally religious flavor. In the middle 1700's, Blackstone wrote, "[T]he keeping one day

in the seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes; which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness." A 1788 English statute dealing with chimney sweeps, 28 Geo. III, c. 48, in addition to providing for their Sunday religious affairs, also regulated their hours of work. The preamble to a 1679 Rhode Island enactment stated that the reason for the ban on Sunday employment was that "persons being evill minded, have presumed to employ in servile labor, more than necessity requireth, their servants. . . ." The New York law of 1788 omitted the term "Lord's day" and substituted "the first day of the week commonly called Sunday." Similar changes marked the Maryland statutes, discussed below. With the advent of the First Amendment, the colonial provisions requiring church attendance were soon repealed.

More recently, further secular justifications have been advanced for making Sunday a day of rest, a day when people may recover from the labors of the week just passed and may physically and mentally prepare for the week's work to come. In England, during the First World War, a committee investigating the health conditions of munitions workers reported that "if the maximum output is to be secured and maintained for any length of time, a weekly period of rest must be allowed. . . . On economic and social grounds alike this weekly period of rest is best provided on Sunday."

The proponents of Sunday closing legislation are no longer exclusively representatives of religious interests. Recent New Jersey Sunday legislation was supported by labor groups and trade associations; modern English Sunday legislation was promoted by the National Federation of Grocers and supported by the National Chamber of Trade, the Drapers' Chamber of Trade, and the National Union of Shop Assistants.

Throughout the years, state legislatures have modified, deleted from and added to their Sunday statutes. As evidenced by the New Jersey laws mentioned above, current changes are commonplace. Almost every State in our country presently has some type of Sunday regulation and over forty possess a relatively comprehensive system. Some of our States now enforce their Sunday legislation through Departments of Labor. Thus have Sunday laws evolved from the wholly religious sanctions that originally were enacted.

Moreover, litigation over Sunday closing laws is not novel. Scores of cases may be found in the state appellate courts relating to sundry phases of Sunday enactments. Religious objections have been raised there on numerous occasions but sustained only once, in *Ex parte Newman*, 9 Cal. 502 (1858); and that decision was overruled three years later, in *Ex parte Andrews*, 18 Cal. 678. A substantial number of cases in varying postures bearing on state Sunday legislation have reached this Court. 13 Although none raising the issues now presented have gained plenary hearing, language used in some of these cases further evidences the evolution of Sunday laws as temporal statutes. Mr. Justice Field wrote in *Soon Hing v. Crowley* (1885)

"Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States."

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Before turning to the Maryland legislation now here under attack, an investigation of what historical position Sunday Closing Laws have occupied with reference to the First Amendment should be undertaken, *Everson v. Board of Education*.

This Court has considered the happenings surrounding the Virginia General Assembly's enactment of "An act for establishing religious freedom," written by Thomas Jefferson and sponsored by James Madison, as best reflecting the long and intensive struggle for religious freedom in America, as particularly relevant in the search for the First Amendment's meaning. See *Everson v. Board of Education*. In 1776, nine years before the bill's passage, Madison co-authored Virginia's Declaration of Rights which provided, inter alia, that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience. . . ." Virginia had had Sunday legislation since early in the seventeenth century; in 1776, the laws penalizing "maintaining any opinions in matters of religion, forbearing to repair to church, or the exercising any mode of worship whatsoever" (emphasis added), were repealed, and all dissenters were freed from the taxes levied for the support of the established church. The Sunday labor prohibitions remained; apparently, they were not believed to be inconsistent with the newly enacted Declaration of Rights. Madison had sought also to have the Declaration expressly condemn the existing Virginia establishment. This hope was finally realized when "A Bill for Establishing Religious Freedom" was passed in 1785. In this same year, Madison presented to Virginia legislators "A Bill for Punishing . . . Sabbath Breakers" which provided, in part:

"If any person on Sunday shall himself be found labouring at his own or any other trade or calling, or shall employ his apprentices, servants or slaves in labour, or other business, except it be in the ordinary household offices of daily necessity, or other work of necessity or charity, he shall forfeit the sum of ten shillings for every such offence, deeming every apprentice, servant, or slave so employed, and every day he shall be so employed as constituting a distinct offence."

This became law the following year and remained during the time that Madison fought for the First Amendment in the Congress. \*\*\*

In the case at bar, we find the place of Sunday Closing Laws in the First Amendment's history both enlightening and persuasive.

But in order to dispose of the case before us, we must consider the standards by which the Maryland statutes are to be measured. \*\*\*

Thus, this Court has given the Amendment a "broad interpretation . . . in the light of its history and the evils it was designed forever to suppress. . . ."

*Everson v. Board of Education*. It has found that the First and Fourteenth Amendments afford protection against religious establishment far more extensive than merely to forbid a national or state church. Thus, in *McCollum v. Board of Education*, the Court held that the action of a board of education, permitting religious instruction during school hours in public school buildings and requiring those children who chose not to attend to remain in their classrooms, to be contrary to the "Establishment" Clause.

However, it is equally true that the "Establishment" Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy. The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.

Thus, these broad principles have been set forth by this Court. Those cases dealing with the specific problems arising under the "Establishment" Clause which have reached this Court are few in number. The most extensive discussion of the "Establishment" Clause's latitude is to be found in *Everson v. Board of Education* (1947). \*\*\*

In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States.

Throughout this century and longer, both the federal and state governments have oriented their activities very largely toward improvement of the health, safety, recreation and general well-being of our citizens. Numerous laws affecting public health, safety factors in industry, laws affecting hours and conditions of labor of women and children, week-end diversion at parks and beaches, and cultural activities of various kinds, now point the way toward the good life for all. Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.

We now reach the Maryland statutes under review. The title of the major series of sections of the Maryland Code dealing with Sunday closing - Art. 27, 492-534C - is "Sabbath Breaking"; 492 proscribes work or bodily labor on the

"Lord's day," and forbids persons to "profane the Lord's day" by gaming, fishing et cetera; 522 refers to Sunday as the "Sabbath day." As has been mentioned above, many of the exempted Sunday activities in the various localities of the State may only be conducted during the afternoon and late evening; most Christian church services, of course, are held on Sunday morning and early Sunday evening. Finally, as previously noted, certain localities do not permit the allowed Sunday activities to be carried on within one hundred yards of any church where religious services are being held. This is the totality of the evidence of religious purpose which may be gleaned from the face of the present statute and from its operative effect.

The predecessors of the existing Maryland Sunday laws are undeniably religious in origin. The first Maryland statute dealing with Sunday activities, enacted in 1649, was entitled "An Act concerning Religion." \*\*\*

Considering the language and operative effect of the current statutes, we no longer find the blanket prohibition against Sunday work or bodily labor. To the contrary, we find that 521 of Art. 27, the section which appellants violated, permits the Sunday sale of tobaccos and sweets and a long list of sundry articles which we have enumerated above; we find that 509 of Art. 27 permits the Sunday operation of bathing beaches, amusement parks and similar facilities; we find that Art. 2B, 28, permits the Sunday sale of alcoholic beverages, products strictly forbidden by predecessor statutes; we are told that Anne Arundel County allows Sunday bingo and the Sunday playing of pinball machines and slot machines, activities generally condemned by prior Maryland Sunday legislation. Certainly, these are not works of charity or necessity. Section 521's current stipulation that shops with only one employee may remain open on Sunday does not coincide with a religious purpose. These provisions, along with those which permit various sports and entertainments on Sunday, seem clearly to be fashioned for the purpose of providing a Sunday atmosphere of recreation, cheerfulness, repose and enjoyment. Coupled with the general proscription against other types of work, we believe that the air of the day is one of relaxation rather than one of religion.

The existing Maryland Sunday laws are not simply verbatim re-enactments of their religiously oriented antecedents. Only 492 retains the appellation of "Lord's day" and even that section no longer makes recitation of religious purpose. It does talk in terms of "profan[ing] the Lord's day," but other sections permit the activities previously thought to be profane. Prior denunciation of Sunday drunkenness is now gone. Contemporary concern with these statutes is evidenced by the dozen changes made in 1959 and by the recent enactment of a majority of the exceptions.

Finally, the relevant pronouncements of the Maryland Court of Appeals dispel any argument that the statutes' announced purpose is religious. \*\*\*

And the Maryland court declared in its decision in the instant case: "The legislative plan is plain. It is to compel a day of rest from work, permitting only activities which are necessary or recreational."

After engaging in the close scrutiny demanded of us when First Amendment liberties are at issue, we accept the State Supreme Court's determination that

the statutes' present purpose and effect is not to aid religion but to set aside a day of rest and recreation.

But this does not answer all of appellants' contentions. We are told that the State has other means at its disposal to accomplish its secular purpose, other courses that would not even remotely or incidentally give state aid to religion. On this basis, we are asked to hold these statutes invalid on the ground that the State's power to regulate conduct in the public interest may only be executed in a way that does not unduly or unnecessarily infringe upon the religious provisions of the First Amendment. However relevant this argument may be, we believe that the factual basis on which it rests is not supportable. It is true that if the State's interest were simply to provide for its citizens a periodic respite from work, a regulation demanding that everyone rest one day in seven, leaving the choice of the day to the individual, would suffice.

However, the State's purpose is not merely to provide a one-day-in-seven work stoppage. In addition to this, the State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility - a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day on which people may visit friends and relatives who are not available during working days.

Obviously, a State is empowered to determine that a rest-one-day-in-seven statute would not accomplish this purpose; that it would not provide for a general cessation of activity, a special atmosphere of tranquility, a day which all members of the family or friends and relatives might spend together. Furthermore, it seems plain that the problems involved in enforcing such a provision would be exceedingly more difficult than those in enforcing a common-day-of-rest provision.

Moreover, it is common knowledge that the first day of the week has come to have special significance as a rest day in this country. People of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainments, for dining out, and the like. "Vast masses of our people, in fact, literally millions, go out into the countryside on fine Sunday afternoons in the Summer. . . ." Sunday is a day apart from all others. The cause is irrelevant; the fact exists. It would seem unrealistic for enforcement purposes and perhaps detrimental to the general welfare to require a State to choose a common day of rest other than that which most persons would select of their own accord. For these reasons, we hold that the Maryland statutes are not laws respecting an establishment of religion.

The distinctions between the statutes in the case before us and the state action in *McCullum v. Board of Education*, the only case in this Court finding a violation of the "Establishment" Clause, lend further substantiation to our conclusion. In *McCullum*, state action permitted religious instruction in public school buildings during school hours and required students not attending the religious instruction to remain in their classrooms during that time. The Court found that this system had the effect of coercing the children to attend religious classes; no such coercion to attend church services is present in the situation

at bar. In *McCullum*, the only alternative available to the nonattending students was to remain in their classrooms; the alternatives open to nonlaboring persons in the instant case are far more diverse. In *McCullum*, there was direct cooperation between state officials and religious ministers; no such direct participation exists under the Maryland laws. In *McCullum*, tax-supported buildings were used to aid religion; in the instant case, no tax monies are being used in aid of religion.

Finally, we should make clear that this case deals only with the constitutionality of 521 of the Maryland statute before us. We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose - evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect - is to use the State's coercive power to aid religion.

Accordingly, the decision is

*Affirmed.*

SEPARATE OPINION OF JUSTICE FRANKFURTER, WHOM JUSTICE HARLAN JOINS.

For me considerations are determinative here which call for separate statement. The long history of Sunday legislation, so decisive if we are to view the statutes now attacked in a perspective wider than that which is furnished by our own necessarily limited outlook, cannot be conveyed by a partial recital of isolated instances or events. The importance of that history derives from its continuity and fullness - from the massive testimony which it bears to the evolution of statutes controlling Sunday labor and to the forces which have, during three hundred years of Anglo-American history at the least, changed those laws, transmuted them, made them the vehicle of mixed and complicated aspirations. Since I find in the history of these statutes insights controllingly relevant to the constitutional issues before us, I am constrained to set that history forth in detail. \*\*\*

JUSTICE DOUGLAS, DISSENTING.

The question is not whether one day out of seven can be imposed by a State as a day of rest. The question is not whether Sunday can by force of custom and habit be retained as a day of rest. The question is whether a State can impose criminal sanctions on those who, unlike the Christian majority that makes up our society, worship on a different day or do not share the religious scruples of the majority.

\*\*\* I do not see how a State can make protesting citizens refrain from doing innocent acts on Sunday because the doing of those acts offends sentiments of their Christian neighbors.

The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect. The Declaration of Independence [provides] \*\*\*

The Puritan influence helped shape our constitutional law and our common law as Dean Pound has said: The Puritan "put individual conscience and individual judgment in the first place." THE SPIRIT OF THE COMMON LAW (1921). For these reasons we stated in *Zorach v. Clauston*, "We are a religious people whose institutions presuppose a Supreme Being."

But those who fashioned the First Amendment decided that if and when God is to be served, His service will not be motivated by coercive measures of government. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" - \*\*\* This means, as I understand it, that if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government. This necessarily means, first, that the dogma, creed, scruples, or practices of no religious group or sect are to be preferred over those of any others; second, that no one shall be interfered with by government for practicing the religion of his choice; third, that the State may not require anyone to practice a religion or even any religion; and fourth, that the State cannot compel one so to conduct himself as not to offend the religious scruples of another. The idea, as I understand it, was to limit the power of government to act in religious matters, not to limit the freedom of religious men to act religiously nor to restrict the freedom of atheists or agnostics.

The First Amendment commands government to have no interest in theology or ritual; it admonishes government to be interested in allowing religious freedom to flourish - whether the result is to produce Catholics, Jews, or Protestants, or to turn the people toward the path of Buddha, or to end in a predominantly Moslem nation, or to produce in the long run atheists or agnostics. On matters of this kind government must be neutral. This freedom plainly includes freedom from religion with the right to believe, speak, write, publish and advocate antireligious programs. Certainly the "free exercise" clause does not require that everyone embrace the theology of some church or of some faith, or observe the religious practices of any majority or minority sect. The First Amendment by its "establishment" clause prevents, of course, the selection by government of an "official" church. Yet the ban plainly extends farther than that. \*\*\*

The "establishment" clause protects citizens also against any law which selects any religious custom, practice, or ritual, puts the force of government behind it, and fines, imprisons, or otherwise penalizes a person for not observing it. The Government plainly could not join forces with one religious group and decree a universal and symbolic circumcision. Nor could it require all children to be baptized or give tax exemptions only to those whose children were baptized.

Could it require a fast from sunrise to sunset throughout the Moslem month of Ramadan? I should think not. Yet why then can it make criminal the doing of other acts, as innocent as eating, during the day that Christians revere?

Sunday is a word heavily overlaid with connotations and traditions deriving from the Christian roots of our civilization that color all judgments concerning it. This is what the philosophers call "word magic." \*\*\*

The issue of these cases would therefore be in better focus if we imagined that a state legislature, controlled by orthodox Jews and Seventh-Day Adventists, passed a law making it a crime to keep a shop open on Saturdays. Would a

Baptist, Catholic, Methodist, or Presbyterian be compelled to obey that law or go to jail or pay a fine? Or suppose Moslems grew in political strength here and got a law through a state legislature making it a crime to keep a shop open on Fridays. Would the rest of us have to submit under the fear of criminal sanctions?

\*\*\* This religious influence has extended far, far back of the First and Fourteenth Amendments. Every Sunday School student knows the Fourth Commandment:

"Remember the sabbath day, to keep it holy.

\*\*\* The State can, of course, require one day of rest a week: one day when every shop or factory is closed. Quite a few States make that requirement. Then the "day of rest" becomes purely and simply a health measure. But the Sunday laws operate differently. They force minorities to obey the majority's religious feelings of what is due and proper for a Christian community; they provide a coercive spur to the "weaker brethren," to those who are indifferent to the claims of a Sabbath through apathy or scruple. Can there be any doubt that Christians, now aligned vigorously in favor of these laws, would be as strongly opposed if they were prosecuted under a Moslem law that forbade them from engaging in secular activities on days that violated Moslem scruples?

There is an "establishment" of religion in the constitutional sense if any practice of any religious group has the sanction of law behind it. There is an interference with the "free exercise" of religion if what in conscience one can do or omit doing is required because of the religious scruples of the community. Hence I would declare each of those laws unconstitutional as applied to the complaining parties, whether or not they are members of a sect which observes as its Sabbath a day other than Sunday. \*\*\*

## *Marsh v. Chambers*

463 U.S. 783 (1983)

BURGER, C. J., DELIVERED THE OPINION OF THE COURT, IN WHICH WHITE, BLACKMUN, POWELL, REHNQUIST, AND O'CONNOR, JJ., JOINED. BRENNAN, J., FILED A DISSENTING OPINION, IN WHICH MARSHALL, J., JOINED. STEVENS, J., FILED A DISSENTING OPINION.

CHIEF JUSTICE BURGER DELIVERED THE OPINION OF THE COURT.

The question presented is whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause of the First Amendment.

### I

The Nebraska Legislature begins each of its sessions with a prayer offered by a chaplain who is chosen biennially by the Executive Board of the Legislative Council and paid out of public funds. Robert E. Palmer, a Presbyterian minister, has served as chaplain since 1965 at a salary of \$319.75 per month for each month the legislature is in session.

Ernest Chambers is a member of the Nebraska Legislature and a taxpayer of Nebraska. Claiming that the Nebraska Legislature's chaplaincy practice violates the Establishment Clause of the First Amendment, he brought this action under 42 U.S.C. 1983, seeking to enjoin enforcement of the practice. After denying a motion to dismiss on the ground of legislative immunity, the District Court held that the Establishment Clause was not breached by the prayers, but was violated by paying the chaplain from public funds. It therefore enjoined the legislature from using public funds to pay the chaplain; it declined to enjoin the policy of beginning sessions with prayers. Cross-appeals were taken.

The Court of Appeals for the Eighth Circuit rejected arguments that the case should be dismissed on Tenth Amendment, legislative immunity, standing, or federalism grounds. On the merits of the chaplaincy issue, the court refused to treat respondent's challenges as separable issues as the District Court had done. Instead, the Court of Appeals assessed the practice as a whole because "[p]arsing out [the] elements" would lead to "an incongruous result."

Applying the three-part test of *Lemon v. Kurtzman* (1971) \*\*\* the court held that the chaplaincy practice violated all three elements of the test: the purpose and primary effect of selecting the same minister for 16 years and publishing his prayers was to promote a particular religious expression; use of state money for compensation and publication led to entanglement. Accordingly, the Court of Appeals modified the District Court's injunction and prohibited the State from engaging in any aspect of its established chaplaincy practice.

We granted certiorari limited to the challenge to the practice of opening sessions with prayers by a state-employed clergyman and we reverse.

## II

The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court.

The tradition in many of the Colonies was, of course, linked to an established church, but the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain. Although prayers were not offered during the Constitutional Convention, the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer. \*\*\*

On September 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights. Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress. It has also been followed consistently in most of the states, including Nebraska, where the

institution of opening legislative sessions with prayer was adopted even before the State attained statehood.

Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress - their actions reveal their intent. \*\*\*

No more is Nebraska's practice of over a century, consistent with two centuries of national practice, to be cast aside. It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable. \*\*\*

This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged. We conclude that legislative prayer presents no more potential for establishment than the provision of school transportation, *Everson v. Board of Education* (1947), beneficial grants for higher education, *Tilton v. Richardson* (1971), or tax exemptions for religious organizations, *Walz v. Tax Commission of City of New York* (1970).

\*\*\* We do not agree that evidence of opposition to a measure weakens the force of the historical argument; indeed it infuses it with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society. Jay and Rutledge specifically grounded their objection on the fact that the delegates to the Congress "were so divided in religious sentiments . . . that [they] could not join in the same act of worship." Their objection was met by Samuel Adams, who stated that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country."

This interchange emphasizes that the delegates did not consider opening prayers as a proselytizing activity or as symbolically placing the government's "official seal of approval on one religious view." Rather, the Founding Fathers looked at invocations as "conduct whose . . . effect . . . harmonize[d] with the tenets of some or all religions." *McGowan v. Maryland* (1961). The Establishment Clause does not always bar a state from regulating conduct simply because it "harmonizes with religious canons." Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to "religious indoctrination" or peer pressure.

In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of

this country. As Justice Douglas observed, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson* (1952).

### III

We turn then to the question of whether any features of the Nebraska practice violate the Establishment Clause. Beyond the bare fact that a prayer is offered, three points have been made: first, that a clergyman of only one denomination - Presbyterian - has been selected for 16 years; second, that the chaplain is paid at public expense; and third, that the prayers are in the Judeo-Christian tradition. Weighed against the historical background, these factors do not serve to invalidate Nebraska's practice.

The Court of Appeals was concerned that Palmer's long tenure has the effect of giving preference to his religious views. We cannot, any more than Members of the Congresses of this century, perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church. To the contrary, the evidence indicates that Palmer was reappointed because his performance and personal qualities were acceptable to the body appointing him. Palmer was not the only clergyman heard by the legislature; guest chaplains have officiated at the request of various legislators and as substitutes during Palmer's absences. Absent proof that the chaplain's reappointment stemmed from an impermissible motive, we conclude that his long tenure does not in itself conflict with the Establishment Clause.

Nor is the compensation of the chaplain from public funds a reason to invalidate the Nebraska Legislature's chaplaincy; remuneration is grounded in historic practice initiated, as we noted earlier, by the same Congress that drafted the Establishment Clause of the First Amendment. The Continental Congress paid its chaplain, as did some of the states. Currently, many state legislatures and the United States Congress provide compensation for their chaplains. Nebraska has paid its chaplain for well over a century. The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

We do not doubt the sincerity of those, who like respondent, believe that to have prayer in this context risks the beginning of the establishment the Founding Fathers feared. But this concern is not well founded\*\*\*

The unbroken practice for two centuries in the National Congress and for more than a century in Nebraska and in many other states gives abundant assurance that there is no real threat "while this Court sits."

The judgment of the Court of Appeals is

*Reversed.*

JUSTICE BRENNAN, WITH WHOM JUSTICE MARSHALL JOINS, DISSENTING.

The Court today has written a narrow and, on the whole, careful opinion. In effect, the Court holds that officially sponsored legislative prayer, primarily on account of its "unique history," is generally exempted from the First

Amendment's prohibition against "an establishment of religion." The Court's opinion is consistent with dictum in at least one of our prior decisions, and its limited rationale should pose little threat to the overall fate of the Establishment Clause. Moreover, disagreement with the Court requires that I confront the fact that some 20 years ago, in a concurring opinion in one of the cases striking down official prayer and ceremonial Bible reading in the public schools, I came very close to endorsing essentially the result reached by the Court today. [*Abington School Dist. v. Schempp* (1963)]. Nevertheless, after much reflection, I have come to the conclusion that I was wrong then and that the Court is wrong today. I now believe that the practice of official invitational prayer, as it exists in Nebraska and most other state legislatures, is unconstitutional. It is contrary to the doctrine as well the underlying purposes of the Establishment Clause, and it is not saved either by its history or by any of the other considerations suggested in the Court's opinion.

I respectfully dissent.

## I

The most commonly cited formulation of prevailing Establishment Clause doctrine is found in *Lemon v. Kurtzman* (1971):

"Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute [at issue] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster `an excessive government entanglement with religion.'"

That the "purpose" of legislative prayer is pre-eminently religious rather than secular seems to me to be self-evident. "To invoke Divine guidance on a public body entrusted with making the laws," is nothing but a religious act. Moreover, whatever secular functions legislative prayer might play - formally opening the legislative session, getting the members of the body to quiet down, and imbuing them with a sense of seriousness and high purpose - could so plainly be performed in a purely nonreligious fashion that to claim a secular purpose for the prayer is an insult to the perfectly honorable individuals who instituted and continue the practice.

The "primary effect" of legislative prayer is also clearly religious. As we said in the context of officially sponsored prayers in the public schools, "prescribing a particular form of religious worship," even if the individuals involved have the choice not to participate, places "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion . . . ." *Engel v. Vitale* (1962). More importantly, invocations in Nebraska's legislative halls explicitly link religious belief and observance to the power and prestige of the State. "[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred."

Finally, there can be no doubt that the practice of legislative prayer leads to excessive "entanglement" between the State and religion. *Lemon* pointed out that "entanglement" can take two forms: First, a state statute or program might involve the state impermissibly in monitoring and overseeing religious affairs. In

the case of legislative prayer, the process of choosing a "suitable" chaplain, whether on a permanent or rotating basis, and insuring that the chaplain limits himself or herself to "suitable" prayers, involves precisely the sort of supervision that agencies of government should if at all possible avoid.

Second, excessive "entanglement" might arise out of "the divisive political potential" of a state statute or program. \*\*\* In this case, this second aspect of entanglement is also clear. The controversy between Senator Chambers and his colleagues, which had reached the stage of difficulty and rancor long before this lawsuit was brought, has split the Nebraska Legislature precisely on issues of religion and religious conformity. The record in this case also reports a series of instances, involving legislators other than Senator Chambers, in which invocations by Reverend Palmer and others led to controversy along religious lines. And in general, the history of legislative prayer has been far more eventful - and divisive - than a hasty reading of the Court's opinion might indicate.

In sum, I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.

## II

The path of formal doctrine, however, can only imperfectly capture the nature and importance of the issues at stake in this case. A more adequate analysis must therefore take into account the underlying function of the Establishment Clause, and the forces that have shaped its doctrine. \*\*\*

### A

[omitted]

### B

The imperatives of separation and neutrality are not limited to the relationship of government to religious institutions or denominations, but extend as well to the relationship of government to religious beliefs and practices. In *Torcaso v. Watkins* (1961), for example, we struck down a state provision requiring a religious oath as a qualification to hold office, not only because it violated principles of free exercise of religion, but also because it violated the principles of nonestablishment of religion. And, of course, in the pair of cases that hang over this one like a reproachful set of parents, we held that official prayer and prescribed Bible reading in the public schools represent a serious encroachment on the Establishment Clause. As we said in *Engel*, "[i]t is neither sacrilegious nor anti-religious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."

Nor should it be thought that this view of the Establishment Clause is a recent concoction of an overreaching judiciary. Even before the First Amendment was written, the Framers of the Constitution broke with the practice of the Articles of Confederation and many state constitutions, and did not invoke the name of God in the document. This "omission of a reference to the Deity was not inadvertent; nor did it remain unnoticed." Moreover, Thomas Jefferson and Andrew Jackson, during their respective terms as President, both refused on

Establishment Clause grounds to declare national days of thanksgiving or fasting. And James Madison, writing subsequent to his own Presidency on essentially the very issue we face today, stated:

"Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principle of religious freedom?"

"In strictness, the answer on both points must be in the negative. The Constitution of the U.S. forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, and conducted by Ministers of religion paid by the entire nation."

Fleet, Madison's "Detached Memoranda," 3 Wm. & Mary Quarterly 534, 558 (1946).

#### C

Legislative prayer clearly violates the principles of neutrality and separation that are embedded within the Establishment Clause. \*\*\*

#### D

[omitted]

#### III

[omitted]

#### IV

The argument is made occasionally that a strict separation of religion and state robs the Nation of its spiritual identity. I believe quite the contrary. It may be true that individuals cannot be "neutral" on the question of religion. But the judgment of the Establishment Clause is that neutrality by the organs of government on questions of religion is both possible and imperative. Alexis de Tocqueville wrote the following concerning his travels through this land in the early 1830's:

"The religious atmosphere of the country was the first thing that struck me on arrival in the United States. . . .

"In France I had seen the spirits of religion and of freedom almost always marching in opposite directions. In America I found them intimately linked together in joint reign over the same land.

"My longing to understand the reason for this phenomenon increased daily.

"To find this out, I questioned the faithful of all communions; I particularly sought the society of clergymen, who are the depositaries of the various creeds and have a personal interest in their survival. . . . I expressed my astonishment and revealed my doubts to each of them; I found that they all agreed with each other except about details; all thought that the main reason for the quiet sway of religion over their country was the complete separation of church and state. I have no hesitation in stating that throughout my stay in America I met nobody, lay or cleric, who did not agree about that."

DEMOCRACY IN AMERICA 295 (G. Lawrence trans., J. Mayer ed., 1969).

More recent history has only confirmed De Tocqueville's observations. If the Court had struck down legislative prayer today, it would likely have stimulated a furious reaction. But it would also, I am convinced, have invigorated both the "spirit of religion" and the "spirit of freedom."

I respectfully dissent.

JUSTICE STEVENS, DISSENTING.

In a democratically elected legislature, the religious beliefs of the chaplain tend to reflect the faith of the majority of the lawmakers' constituents. Prayers may be said by a Catholic priest in the Massachusetts Legislature and by a Presbyterian minister in the Nebraska Legislature, but I would not expect to find a Jehovah's Witness or a disciple of Mary Baker Eddy or the Reverend Moon serving as the official chaplain in any state legislature. Regardless of the motivation of the majority that exercises the power to appoint the chaplain, it seems plain to me that the designation of a member of one religious faith to serve as the sole official chaplain of a state legislature for a period of 16 years constitutes the preference of one faith over another in violation of the Establishment Clause of the First Amendment.

The Court declines to "embark on a sensitive evaluation or to parse the content of a particular prayer." Perhaps it does so because it would be unable to explain away the clearly sectarian content of some of the prayers given by Nebraska's chaplain. Or perhaps the Court is unwilling to acknowledge that the tenure of the chaplain must inevitably be conditioned on the acceptability of that content to the silent majority.

I would affirm the judgment of the Court of Appeals.

## *Town of Greece, New York v. Galloway*

572 U.S. \_\_\_ (2014)

KENNEDY, J., DELIVERED THE OPINION OF THE COURT, EXCEPT AS TO PART II–B. ROBERTS, C. J., AND ALITO, J., JOINED THE OPINION IN FULL, AND SCALIA AND THOMAS, JJ., JOINED EXCEPT AS TO PART II–B. ALITO, J., FILED A CONCURRING OPINION, IN WHICH SCALIA, J., JOINED. THOMAS, J., FILED AN OPINION CONCURRING IN PART AND CONCURRING IN THE JUDGMENT, IN WHICH SCALIA, J., JOINED AS TO PART II. BREYER, J., FILED A DISSENTING OPINION. KAGAN, J., FILED A DISSENTING OPINION, IN WHICH GINSBURG, BREYER, AND SOTOMAYOR, JJ., JOINED.

JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT, EXCEPT AS TO PART II–B.

The Court must decide whether the town of Greece, New York, imposes an impermissible establishment of religion by opening its monthly board meetings with a prayer. It must be concluded, consistent with the Court's opinion in *Marsh v. Chambers* (1983), that no violation of the Constitution has been shown.

Greece, a town with a population of 94,000, is in upstate New York. For some years, it began its monthly town board meetings with a moment of silence. In 1999, the newly elected town supervisor, John Auberger, decided to replicate the prayer practice he had found meaningful while serving in the county legislature. Following the roll call and recitation of the Pledge of Allegiance, Auberger would invite a local clergyman to the front of the room to deliver an invocation. After the prayer, Auberger would thank the minister for serving as the board's "chaplain for the month" and present him with a commemorative plaque. The prayer was intended to place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures.

The town followed an informal method for selecting prayer givers, all of whom were unpaid volunteers. A town employee would call the congregations listed in a local directory until she found a minister available for that month's meeting. The town eventually compiled a list of willing "board chaplains" who had accepted invitations and agreed to return in the future. The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation. But nearly all of the congregations in town were Christian; and from 1999 to 2007, all of the participating ministers were too.

Greece neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content, in the belief that exercising any degree of control over the prayers would infringe both the free exercise and speech rights of the ministers. The town instead left the guest clergy free to compose their own devotions. The resulting prayers often sounded both civic and religious themes. Typical were invocations that asked the divinity to abide at the meeting and bestow blessings on the community:

"Lord we ask you to send your spirit of servanthood upon all of us gathered here this evening to do your work for the benefit of all in our community. We ask you to bless our elected and appointed officials so they may deliberate with wisdom and act with courage. Bless the members of our community who come here to speak before the board so they may state their cause with honesty and humility.... Lord we ask you to bless us all, that everything we do here tonight will move you to welcome us one day into your kingdom as good and faithful servants. We ask this in the name of our brother Jesus. Amen."

Some of the ministers spoke in a distinctly Christian idiom; and a minority invoked religious holidays, scripture, or doctrine, as in the following prayer:

"Lord, God of all creation, we give you thanks and praise for your presence and action in the world. We look with anticipation to the celebration of Holy Week and Easter. It is in the solemn events of next week that we find the very heart and center of our Christian faith. We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength, vitality, and confidence from his resurrection at Easter.... We pray for peace in the world, an end to terrorism, violence, conflict, and war. We pray for stability, democracy, and good government in those countries in which our armed forces are now serving, especially in Iraq and Afghanistan.... Praise and glory be yours, O Lord, now and forever more. Amen."

Respondents Susan Galloway and Linda Stephens attended town board meetings to speak about issues of local concern, and they objected that the prayers violated their religious or philosophical views. At one meeting, Galloway admonished board members that she found the prayers "offensive," "intolerable," and an affront to a "diverse community." After respondents complained that Christian themes pervaded the prayers, to the exclusion of citizens who did not share those beliefs, the town invited a Jewish layman and the chairman of the local Baha'i temple to deliver prayers. A Wiccan priestess who had read press reports about the prayer controversy requested, and was granted, an opportunity to give the invocation.

Galloway and Stephens brought suit in the United States District Court for the Western District of New York. They alleged that the town violated the First Amendment's Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayers, such as those given "in Jesus' name." They did not seek an end to the prayer practice, but rather requested an injunction that would limit the town to "inclusive and ecumenical" prayers that referred only to a "generic God" and would not associate the government with any one faith or belief.

The District Court on summary judgment upheld the prayer practice as consistent with the First Amendment. It found no impermissible preference for Christianity, noting that the town had opened the prayer program to all creeds and excluded none. Although most of the prayer givers were Christian, this fact reflected only the predominantly Christian identity of the town's congregations, rather than an official policy or practice of discriminating against minority faiths. The District Court found no authority for the proposition that the First Amendment required Greece to invite clergy from congregations beyond its borders in order to achieve a minimum level of religious diversity.

The District Court also rejected the theory that legislative prayer must be nonsectarian. The court began its inquiry with the opinion in *Marsh v. Chambers* \*\*\*

The Court of Appeals for the Second Circuit reversed. It held that some aspects of the prayer program, viewed in their totality by a reasonable observer, conveyed the message that Greece was endorsing Christianity. The town's failure to promote the prayer opportunity to the public, or to invite ministers from congregations outside the town limits, all but "ensured a Christian viewpoint." Although the court found no inherent problem in the sectarian content of the prayers, it concluded that the "steady drumbeat" of Christian prayer, unbroken by invocations from other faith traditions, tended to affiliate the town with Christianity. Finally, the court found it relevant that guest clergy sometimes spoke on behalf of all present at the meeting, as by saying "let us pray," or by asking audience members to stand and bow their heads: "The invitation ... to participate in the prayer ... placed audience members who are nonreligious or adherents of non-Christian religion in the awkward position of either participating in prayers invoking beliefs they did not share or appearing to show disrespect for the invocation." That board members bowed their heads or made the sign of the cross further conveyed the message that the town endorsed Christianity. The Court of Appeals emphasized that it was the "interaction of the facts present in this case," rather than any single element,

that rendered the prayer unconstitutional.

Having granted certiorari to decide whether the town's prayer practice violates the Establishment Clause, the Court now reverses the judgment of the Court of Appeals.

## II

In *Marsh v. Chambers*, the Court found no First Amendment violation in the Nebraska Legislature's practice of opening its sessions with a prayer delivered by a chaplain paid from state funds. \*\*\*

*Marsh* is sometimes described as "carving out an exception" to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to "any of the formal 'tests' that have traditionally structured" this inquiry. The Court in *Marsh* found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause. \*\*\*

Yet *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted "by reference to historical practices and understandings." \*\*\* *Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change. A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent.

The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures. Respondents assert that the town's prayer exercise falls outside that tradition and transgresses the Establishment Clause for two independent but mutually reinforcing reasons. First, they argue that *Marsh* did not approve prayers containing sectarian language or themes, such as the prayers offered in Greece that referred to the "death, resurrection, and ascension of the Savior Jesus Christ," and the "saving sacrifice of Jesus Christ on the cross." Second, they argue that the setting and conduct of the town board meetings create social pressures that force nonadherents to remain in the room or even feign participation in order to avoid offending the representatives who sponsor the prayer and will vote on matters citizens bring before the board. The sectarian content of the prayers compounds the subtle coercive pressures, they argue, because the nonbeliever who might tolerate ecumenical prayer is forced to do the same for prayer that might be inimical to his or her beliefs.

## A

\*\*\*An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases. \*\*\*

To hold that invocations must be nonsectarian would force the legislatures that

sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact. \*\*\*

In rejecting the suggestion that legislative prayer must be nonsectarian, the Court does not imply that no constraints remain on its content. The relevant constraint derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.

\*\*\* The prayers delivered in the town of Greece do not fall outside the tradition this Court has recognized. A number of the prayers did invoke the name of Jesus, the Heavenly Father, or the Holy Spirit, but they also invoked universal themes, as by celebrating the changing of the seasons or calling for a "spirit of cooperation" among town leaders. Among numerous examples of such prayer in the record is the invocation given by the Rev. Richard Barbour at the September 2006 board meeting:

"Gracious God, you have richly blessed our nation and this community. Help us to remember your generosity and give thanks for your goodness. Bless the elected leaders of the Greece Town Board as they conduct the business of our town this evening. Give them wisdom, courage, discernment and a single-minded desire to serve the common good. We ask your blessing on all public servants, and especially on our police force, firefighters, and emergency medical personnel.... Respectful of every religious tradition, I offer this prayer in the name of God's only son Jesus Christ, the Lord, Amen."

Respondents point to other invocations that disparaged those who did not accept the town's prayer practice. One guest minister characterized objectors as a "minority" who are "ignorant of the history of our country," while another lamented that other towns did not have "God-fearing" leaders. Although these two remarks strayed from the rationale set out in *Marsh*, they do not despoil a practice that on the whole reflects and embraces our tradition. Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation. *Marsh*, indeed, requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer.

\*\*\* The town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one. That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the

part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. \*\*\*

## B

[plurality]

Respondents further seek to distinguish the town's prayer practice from the tradition upheld in *Marsh* on the ground that it coerces participation by nonadherents. They and some amici contend that prayer conducted in the intimate setting of a town board meeting differs in fundamental ways from the invocations delivered in Congress and state legislatures, where the public remains segregated from legislative activity and may not address the body except by occasional invitation. Citizens attend town meetings, on the other hand, to accept awards; speak on matters of local importance; and petition the board for action that may affect their economic interests, such as the granting of permits, business licenses, and zoning variances. Respondents argue that the public may feel subtle pressure to participate in prayers that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling. In their view the fact that board members in small towns know many of their constituents by name only increases the pressure to conform.

It is an elemental First Amendment principle that government may not coerce its citizens "to support or participate in any religion or its exercise." On the record in this case the Court is not persuaded that the town of Greece, through the act of offering a brief, solemn, and respectful prayer to open its monthly meetings, compelled its citizens to engage in a religious observance. The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.

The prayer opportunity in this case must be evaluated against the backdrop of historical practice. \*\*\*

To be sure, many members of the public find these prayers meaningful and wish to join them. But their purpose is largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers. For members of town boards and commissions, who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens. The prayer is an opportunity for them to show who and what they are without denying the right to dissent by those who disagree.

The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. No such thing occurred in the town of Greece. Although board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by the public. Respondents point to several occasions where audience members were asked to rise for the prayer. These requests, however, came not from town leaders but from the guest ministers, who presumably are accustomed to directing their congregations in this way and might have done so thinking the action was

inclusive, not coercive. ("Would you bow your heads with me as we invite the Lord's presence here tonight?"); ("Let us join our hearts and minds together in prayer"); ("Would you join me in a moment of prayer?"); ("Those who are willing may join me now in prayer"). Respondents suggest that constituents might feel pressure to join the prayers to avoid irritating the officials who would be ruling on their petitions, but this argument has no evidentiary support. Nothing in the record indicates that town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined. In no instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished. A practice that classified citizens based on their religious views would violate the Constitution, but that is not the case before this Court.

In their declarations in the trial court, respondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions. If circumstances arise in which the pattern and practice of ceremonial, legislative prayer is alleged to be a means to coerce or intimidate others, the objection can be addressed in the regular course. But the showing has not been made here, where the prayers neither chastised dissenters nor attempted lengthy disquisition on religious dogma. Courts remain free to review the pattern of prayers over time to determine whether they comport with the tradition of solemn, respectful prayer approved in *Marsh*, or whether coercion is a real and substantial likelihood. But in the general course legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate.

This case can be distinguished from the conclusions and holding of *Lee v. Weisman*. There the Court found that, in the context of a graduation where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony, a religious invocation was coercive as to an objecting student. Four Justices dissented in *Lee*, but the circumstances the Court confronted there are not present in this case and do not control its outcome. Nothing in the record suggests that members of the public are dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest. In this case, as in *Marsh*, board members and constituents are "free to enter and leave with little comment and for any number of reasons." Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy. And should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed. Neither choice represents an unconstitutional imposition as to mature adults, who "presumably" are "not readily susceptible to religious indoctrination or peer pressure."

In the town of Greece, the prayer is delivered during the ceremonial portion of

the town's meeting. Board members are not engaged in policymaking at this time, but in more general functions, such as swearing in new police officers, inducting high school athletes into the town hall of fame, and presenting proclamations to volunteers, civic groups, and senior citizens. It is a moment for town leaders to recognize the achievements of their constituents and the aspects of community life that are worth celebrating. By inviting ministers to serve as chaplain for the month, and welcoming them to the front of the room alongside civic leaders, the town is acknowledging the central place that religion, and religious institutions, hold in the lives of those present. Indeed, some congregations are not simply spiritual homes for town residents but also the provider of social services for citizens regardless of their beliefs. The inclusion of a brief, ceremonial prayer as part of a larger exercise in civic recognition suggests that its purpose and effect are to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers.

Ceremonial prayer is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs. The prayer in this case has a permissible ceremonial purpose. It is not an unconstitutional establishment of religion.

The town of Greece does not violate the First Amendment by opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents. The judgment of the U.S. Court of Appeals for the Second Circuit is reversed.

It is so ordered.

JUSTICE ALITO, WITH WHOM JUSTICE SCALIA JOINS, CONCURRING. [OMITTED]

JUSTICE THOMAS, WITH WHOM JUSTICE SCALIA JOINS AS TO PART II, CONCURRING IN PART AND CONCURRING IN THE JUDGMENT.

Except for Part II-B, I join the opinion of the Court, which faithfully applies *Marsh v. Chambers* (1983). I write separately to reiterate my view that the Establishment Clause is "best understood as a federalism provision," *Elk Grove Unified School Dist. v. Newdow* (2004) (Thomas, J., concurring in judgment), and to state my understanding of the proper "coercion" analysis. \*\*\*

JUSTICE BREYER, DISSENTING. [OMITTED]

JUSTICE KAGAN, WITH WHOM JUSTICE GINSBURG, JUSTICE BREYER, AND JUSTICE SOTOMAYOR JOIN, DISSENTING.

For centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom. Our Constitution promises that they may worship in their own way, without fear of penalty or danger, and

that in itself is a momentous offering. Yet our Constitution makes a commitment still more remarkable--that however those individuals worship, they will count as full and equal American citizens. A Christian, a Jew, a Muslim (and so forth)--each stands in the same relationship with her country, with her state and local communities, and with every level and body of government. So that when each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American.

I respectfully dissent from the Court's opinion because I think the Town of Greece's prayer practices violate that norm of religious equality--the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian. I do not contend that principle translates here into a bright separationist line. To the contrary, I agree with the Court's decision in *Marsh v. Chambers* (1983), upholding the Nebraska Legislature's tradition of beginning each session with a chaplain's prayer. And I believe that pluralism and inclusion in a town hall can satisfy the constitutional requirement of neutrality; such a forum need not become a religion-free zone. But still, the Town of Greece should lose this case. The practice at issue here differs from the one sustained in *Marsh* because Greece's town meetings involve participation by ordinary citizens, and the invocations given--directly to those citizens--were predominantly sectarian in content. Still more, Greece's Board did nothing to recognize religious diversity: In arranging for clergy members to open each meeting, the Town never sought (except briefly when this suit was filed) to involve, accommodate, or in any way reach out to adherents of non-Christian religions. So month in and month out for over a decade, prayers steeped in only one faith, addressed toward members of the public, commenced meetings to discuss local affairs and distribute government benefits. In my view, that practice does not square with the First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in her government.

## I

To begin to see what has gone wrong in the Town of Greece, consider several hypothetical scenarios in which sectarian prayer--taken straight from this case's record--infuses governmental activities. None involves, as this case does, a proceeding that could be characterized as a legislative session, but they are useful to elaborate some general principles. In each instance, assume (as was true in Greece) that the invocation is given pursuant to government policy and is representative of the prayers generally offered in the designated setting:

You are a party in a case going to trial; let's say you have filed suit against the government for violating one of your legal rights. The judge bangs his gavel to call the court to order, asks a minister to come to the front of the room, and instructs the 10 or so individuals present to rise for an opening prayer. The clergyman faces those in attendance and says: "Lord, God of all creation, .... We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength ... from his resurrection at Easter. Jesus Christ, who took away the sins of the world, destroyed our death, through his dying and in his rising, he has restored our life. Blessed are you, who has raised up the Lord Jesus, you who will raise us, in our turn, and put us by His side.... Amen." The judge then

asks your lawyer to begin the trial.

It's election day, and you head over to your local polling place to vote. As you and others wait to give your names and receive your ballots, an election official asks everyone there to join him in prayer. He says: "We pray this [day] for the guidance of the Holy Spirit as [we vote] .... Let's just say the Our Father together. 'Our Father, who art in Heaven, hallowed be thy name; thy Kingdom come, thy will be done, on earth as it is in Heaven....'" And after he concludes, he makes the sign of the cross, and appears to wait expectantly for you and the other prospective voters to do so too.

You are an immigrant attending a naturalization ceremony to finally become a citizen. The presiding official tells you and your fellow applicants that before administering the oath of allegiance, he would like a minister to pray for you and with you. The pastor steps to the front of the room, asks everyone to bow their heads, and recites: "[F]ather, son, and Holy Spirit--it is with a due sense of reverence and awe that we come before you [today] seeking your blessing .... You are ... a wise God, oh Lord, ... as evidenced even in the plan of redemption that is fulfilled in Jesus Christ. We ask that you would give freely and abundantly wisdom to one and to all... in the name of the Lord and Savior Jesus Christ, who lives with you and the Holy Spirit, one God for ever and ever. Amen."

I would hold that the government officials responsible for the above practices--that is, for prayer repeatedly invoking a single religion's beliefs in these settings--crossed a constitutional line. I have every confidence the Court would agree. And even Greece's attorney conceded that something like the first hypothetical (he was not asked about the others) would violate the First Amendment. Why?

The reason, of course, has nothing to do with Christianity as such. This opinion is full of Christian prayers, because those were the only invocations offered in the Town of Greece. But if my hypotheticals involved the prayer of some other religion, the outcome would be exactly the same. Suppose, for example, that government officials in a predominantly Jewish community asked a rabbi to begin all public functions with a chanting of the Sh'ma and V'ahavta. ("Hear O Israel! The Lord our God, the Lord is One.... Bind [these words] as a sign upon your hand; let them be a symbol before your eyes; inscribe them on the doorposts of your house, and on your gates.") Or assume officials in a mostly Muslim town requested a muezzin to commence such functions, over and over again, with a recitation of the Adhan. ("God is greatest, God is greatest. I bear witness that there is no deity but God. I bear witness that Muhammed is the Messenger of God.") In any instance, the question would be why such government-sponsored prayer of a single religion goes beyond the constitutional pale.

One glaring problem is that the government in all these hypotheticals has aligned itself with, and placed its imprimatur on, a particular religious creed. "The clearest command of the Establishment Clause," this Court has held, "is that one religious denomination cannot be officially preferred over another." *Larson v. Valente* (1982). \*\*\*

By authorizing and overseeing prayers associated with a single religion--to the

exclusion of all others--the government officials in my hypothetical cases (whether federal, state, or local does not matter) have violated that foundational principle. They have embarked on a course of religious favoritism anathema to the First Amendment.

And making matters still worse: They have done so in a place where individuals come to interact with, and participate in, the institutions and processes of their government. A person goes to court, to the polls, to a naturalization ceremony--and a government official or his hand-picked minister asks her, as the first order of official business, to stand and pray with others in a way conflicting with her own religious beliefs. Perhaps she feels sufficient pressure to go along--to rise, bow her head, and join in whatever others are saying: After all, she wants, very badly, what the judge or poll worker or immigration official has to offer. Or perhaps she is made of stronger mettle, and she opts not to participate in what she does not believe--indeed, what would, for her, be something like blasphemy. She then must make known her dissent from the common religious view, and place herself apart from other citizens, as well as from the officials responsible for the invocations. And so a civic function of some kind brings religious differences to the fore: That public proceeding becomes (whether intentionally or not) an instrument for dividing her from adherents to the community's majority religion, and for altering the very nature of her relationship with her government.

That is not the country we are, because that is not what our Constitution permits. Here, when a citizen stands before her government, whether to perform a service or request a benefit, her religious beliefs do not enter into the picture. See Thomas Jefferson, Virginia Act for Establishing Religious Freedom. The government she faces favors no particular religion, either by word or by deed. And that government, in its various processes and proceedings, imposes no religious tests on its citizens, sorts none of them by faith, and permits no exclusion based on belief. When a person goes to court, a polling place, or an immigration proceeding--I could go on: to a zoning agency, a parole board hearing, or the DMV--government officials do not engage in sectarian worship, nor do they ask her to do likewise. They all participate in the business of government not as Christians, Jews, Muslims (and more), but only as Americans--none of them different from any other for that civic purpose. Why not, then, at a town meeting?

## II

In both Greece's and the majority's view, everything I have discussed is irrelevant here because this case involves "the tradition of legislative prayer outlined" in *Marsh v. Chambers*. And before I dispute the Town and Court, I want to give them their due: They are right that, under *Marsh*, legislative prayer has a distinctive constitutional warrant by virtue of tradition. \*\*\* And so I agree with the majority that the issue here is "whether the prayer practice in the Town of Greece fits within the tradition long followed in Congress and the state legislatures."

Where I depart from the majority is in my reply to that question. The town hall here is a kind of hybrid. Greece's Board indeed has legislative functions, as Congress and state assemblies do--and that means some opening prayers are allowed there. But much as in my hypotheticals, the Board's meetings are also

occasions for ordinary citizens to engage with and petition their government, often on highly individualized matters. That feature calls for Board members to exercise special care to ensure that the prayers offered are inclusive--that they respect each and every member of the community as an equal citizen. But the Board, and the clergy members it selected, made no such effort. Instead, the prayers given in Greece, addressed directly to the Town's citizenry, were more sectarian, and less inclusive, than anything this Court sustained in Marsh. For those reasons, the prayer in Greece departs from the legislative tradition that the majority takes as its benchmark.

#### A

Start by comparing two pictures, drawn precisely from reality. The first is of Nebraska's (unicameral) Legislature, as this Court and the state senators themselves described it. The second is of town council meetings in Greece, as revealed in this case's record.

It is morning in Nebraska, and senators are beginning to gather in the State's legislative chamber: It is the beginning of the official workday, although senators may not yet need to be on the floor. The chaplain rises to give the daily invocation. That prayer, as the senators emphasized when their case came to this Court, is "directed only at the legislative membership, not at the public at large." Any members of the public who happen to be in attendance--not very many at this early hour--watch only from the upstairs visitors' gallery.

The longtime chaplain says something like the following (the excerpt is from his own amicus brief supporting Greece in this case): "O God, who has given all persons talents and varying capacities, Thou dost only require of us that we utilize Thy gifts to a maximum. In this Legislature to which Thou has entrusted special abilities and opportunities, may each recognize his stewardship for the people of the State." The chaplain is a Presbyterian minister, and "some of his earlier prayers" explicitly invoked Christian beliefs, but he "removed all references to Christ" after a single legislator complained. The chaplain also previously invited other clergy members to give the invocation, including local rabbis.

Now change the channel: It is evening in Greece, New York, and the Supervisor of the Town Board calls its monthly public meeting to order. Those meetings (so says the Board itself) are "the most important part of Town government." See Town of Greece, Town Board [website]. They serve assorted functions, almost all actively involving members of the public. The Board may swear in new Town employees and hand out awards for civic accomplishments; it always provides an opportunity (called a Public Forum) for citizens to address local issues and ask for improved services or new policies (for example, better accommodations for the disabled or actions to ameliorate traffic congestion; and it usually hears debate on individual applications from residents and local businesses to obtain special land-use permits, zoning variances, or other licenses.

The Town Supervisor, Town Clerk, Chief of Police, and four Board members sit at the front of the meeting room on a raised dais. But the setting is intimate: There are likely to be only 10 or so citizens in attendance. A few may be children or teenagers, present to receive an award or fulfill a high school civics requirement.

As the first order of business, the Town Supervisor introduces a local Christian clergy member--denominated the chaplain of the month--to lead the assembled persons in prayer. The pastor steps up to a lectern (emblazoned with the Town's seal) at the front of the dais, and with his back to the Town officials, he faces the citizens present. He asks them all to stand and to "pray as we begin this evening's town meeting." (He does not suggest that anyone should feel free not to participate.) And he says:

"The beauties of spring ... are an expressive symbol of the new life of the risen Christ. The Holy Spirit was sent to the apostles at Pentecost so that they would be courageous witnesses of the Good News to different regions of the Mediterranean world and beyond. The Holy Spirit continues to be the inspiration and the source of strength and virtue, which we all need in the world of today. And so ... [w]e pray this evening for the guidance of the Holy Spirit as the Greece Town Board meets."

After the pastor concludes, Town officials behind him make the sign of the cross, as do some members of the audience, and everyone says "Amen." The Supervisor then announces the start of the Public Forum, and a citizen stands up to complain about the Town's contract with a cable company.

#### B

Let's count the ways in which these pictures diverge. \*\*\*

#### C

Those three differences, taken together, remove this case from the protective ambit of *Marsh* and the history on which it relied. To recap: *Marsh* upheld prayer addressed to legislators alone, in a proceeding in which citizens had no role--and even then, only when it did not "proselytize or advance" any single religion. It was that legislative prayer practice (not every prayer in a body exercising any legislative function) that the Court found constitutional given its "unambiguous and unbroken history." But that approved practice, as I have shown, is not Greece's. None of the history *Marsh* cited--and none the majority details today--supports calling on citizens to pray, in a manner consonant with only a single religion's beliefs, at a participatory public proceeding, having both legislative and adjudicative components. Or to use the majority's phrase, no "history shows that th[is] specific practice is permitted." And so, contra the majority, Greece's prayers cannot simply ride on the constitutional coattails of the legislative tradition *Marsh* described. The Board's practice must, in its own particulars, meet constitutional requirements.

And the guideposts for addressing that inquiry include the principles of religious neutrality I discussed earlier. The government (whether federal, state, or local) may not favor, or align itself with, any particular creed. And that is nowhere more true than when officials and citizens come face to face in their shared institutions of governance. In performing civic functions and seeking civic benefits, each person of this nation must experience a government that belongs to one and all, irrespective of belief. And for its part, each government must ensure that its participatory processes will not classify those citizens by faith, or make relevant their religious differences.

\*\*\* None of this means that Greece's town hall must be religion- or prayer-free. "[W]e are a religious people," *Marsh* observed [quoting] and prayer draws some

warrant from tradition in a town hall, as well as in Congress or a state legislature. What the circumstances here demand is the recognition that we are a pluralistic people too. When citizens of all faiths come to speak to each other and their elected representatives in a legislative session, the government must take especial care to ensure that the prayers they hear will seek to include, rather than serve to divide. No more is required--but that much is crucial--to treat every citizen, of whatever religion, as an equal participant in her government.

\*\*\* But Greece could not do what it did: infuse a participatory government body with one (and only one) faith, so that month in and month out, the citizens appearing before it become partly defined by their creed--as those who share, and those who do not, the community's majority religious belief. In this country, when citizens go before the government, they go not as Christians or Muslims or Jews (or what have you), but just as Americans (or here, as Grecians). That is what it means to be an equal citizen, irrespective of religion. And that is what the Town of Greece precluded by so identifying itself with a single faith.

### III

How, then, does the majority go so far astray, allowing the Town of Greece to turn its assemblies for citizens into a forum for Christian prayer? The answer does not lie in first principles: I have no doubt that every member of this Court believes as firmly as I that our institutions of government belong equally to all, regardless of faith. Rather, the error reflects two kinds of blindness. First, the majority misapprehends the facts of this case, as distinct from those characterizing traditional legislative prayer. And second, the majority misjudges the essential meaning of the religious worship in Greece's town hall, along with its capacity to exclude and divide. \*\*\*

### IV

In 1790, George Washington traveled to Newport, Rhode Island, a longtime bastion of religious liberty and the home of the first community of American Jews. Among the citizens he met there was Moses Seixas, one of that congregation's lay officials. The ensuing exchange between the two conveys, as well as anything I know, the promise this country makes to members of every religion.

Seixas wrote first, welcoming Washington to Newport. He spoke of "a deep sense of gratitude" for the new American Government--"a Government, which to bigotry gives no sanction, to persecution no assistance--but generously affording to All liberty of conscience, and immunities of Citizenship: deeming every one, of whatever Nation, tongue, or language, equal parts of the great governmental Machine." The first phrase there is the more poetic: a government that to "bigotry gives no sanction, to persecution no assistance." But the second is actually the more startling and transformative: a government that, beyond not aiding persecution, grants "immunities of citizenship" to the Christian and the Jew alike, and makes them "equal parts" of the whole country.

Washington responded the very next day. Like any successful politician, he appreciated a great line when he saw one--and knew to borrow it too. And so he repeated, word for word, Seixas's phrase about neither sanctioning bigotry nor assisting persecution. But he no less embraced the point Seixas had made about equality of citizenship. "It is now no more," Washington said, "that

toleration is spoken of, as if it was by the indulgence of one class of people" to another, lesser one. For "[a]ll possess alike . . . immunities of citizenship." That is America's promise in the First Amendment: full and equal membership in the polity for members of every religious group, assuming only that they, like anyone "who live[s] under [the Government's] protection[,] should demean themselves as good citizens."

For me, that remarkable guarantee means at least this much: When the citizens of this country approach their government, they do so only as Americans, not as members of one faith or another. And that means that even in a partly legislative body, they should not confront government-sponsored worship that divides them along religious lines. I believe, for all the reasons I have given, that the Town of Greece betrayed that promise. I therefore respectfully dissent from the Court's decision.

## Notes

1. The Second Circuit had held that the prayer practices of Town of Greece violated the Establishment Clause, reasoning that one invocation to Athena out of 130 is simply not sufficient to meet the requirement of non-endorsement given that two-thirds of the prayers contained references to "Jesus Christ," "Jesus," "Your Son," or the "Holy Spirit." The Brief for the United States (and thus the Obama Administration) supported the Town of Greece, arguing that the courts should not consider the content of the prayers:

Under the principles announced in *Marsh*, which relied heavily on the history of legislative prayer in this country, a prayer practice that is not problematic in the ways identified in *Marsh* (as petitioner's practice concededly is not) does not amount to an unconstitutional establishment of religion merely because most prayer-givers are Christian and many or most of their prayers contain sectarian references. The unbroken history of the offering of prayer in Congress, for example, has included a large majority of Christian prayer-givers and a substantial number of prayers with identifiably sectarian references. Neither federal courts nor legislative bodies are well suited to police the content of such prayers, and this Court has consistently disapproved of government interference in dictating the substance of prayers.

Do you think the same view would prevail if the prayers were not Judeo-Christian?

2. What about prayers in court? Consider this:

It was in 1982 that Bates was indicted in Bay County, Florida, for the first-degree murder, kidnapping, sexual battery, and armed robbery of Janet Renee White. Before the beginning of jury selection for the 1983 trial, the judge asked those present in the courtroom, including the members of the jury venire, to stand while Reverend N.B. Langford of the First Baptist Church opened the proceedings with a prayer. Reverend Langford then gave the following invocation:

May we pray together. Father, this is a beautiful day that you've given to each of us, and we thank you for the privilege that's ours to enjoy all the

bounties that you've given to each of us. Lord, we pray for the seriousness of the situation with which we're confronted, and we ask for your wisdom and your guidance, Father, upon all who are involved, we pray for the Judge as he presides for your special wisdom and for your guidance to do upon his life. Thank you, Father, that we live in a country that has freedom for all, and we ask now for your leadership and your blessings upon the judicial system, for in Christ's name I pray, Amen.

Bates' court-appointed counsel, Theodore Bowers, did not object to the prayer and the court proceeded with jury selection. The next day the prosecution called its first witness, the victim's husband. He testified, among other things, that he had last seen his wife at the First Baptist Church as her coffin was being closed during her funeral service. Bowers did not object to that testimony.

Bates was convicted and sentenced to death. In a habeas petition, he argued ineffective assistance by his attorney for not objecting to the prayer and the subsequent testimony. What result? See *Bates v. Sec'y, Florida Dep't of Corr.*, 768 F.3d 1278 (11th Cir. 2014).

## II. Displays of Religious Symbols

### *Allegheny County v. Greater Pittsburgh ACLU*

492 U.S. 573 (1989)

BLACKMUN, J., ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED THE OPINION OF THE COURT WITH RESPECT TO PARTS III-A, IV, AND V, IN WHICH BRENNAN, MARSHALL, STEVENS, AND O'CONNOR, JJ., JOINED, AN OPINION WITH RESPECT TO PARTS I AND II, IN WHICH STEVENS AND O'CONNOR, JJ., JOINED, AN OPINION WITH RESPECT TO PART III-B, IN WHICH STEVENS, J., JOINED, AN OPINION WITH RESPECT TO PART VII, IN WHICH O'CONNOR, J., JOINED, AND AN OPINION WITH RESPECT TO PART VI. O'CONNOR, J., FILED AN OPINION CONCURRING IN PART AND CONCURRING IN THE JUDGMENT, IN PART II OF WHICH BRENNAN AND STEVENS, JJ., JOINED. BRENNAN, J., FILED AN OPINION CONCURRING IN PART AND DISSENTING IN PART, IN WHICH MARSHALL AND STEVENS, JJ., JOINED. STEVENS, J., FILED AN OPINION CONCURRING IN PART AND DISSENTING IN PART, IN WHICH BRENNAN AND MARSHALL, JJ., JOINED. KENNEDY, J., FILED AN OPINION CONCURRING IN THE JUDGMENT IN PART AND DISSENTING IN PART, IN WHICH REHNQUIST, C. J., AND WHITE AND SCALIA, JJ., JOINED.

JUSTICE BLACKMUN ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED THE OPINION OF THE COURT WITH RESPECT TO PARTS III-A, IV, AND V, AN OPINION WITH RESPECT TO PARTS I AND II, IN WHICH JUSTICE STEVENS AND JUSTICE O'CONNOR JOIN, AN OPINION WITH RESPECT TO PART III-B, IN WHICH JUSTICE STEVENS JOINS, AN OPINION WITH RESPECT TO PART VII, IN WHICH JUSTICE O'CONNOR JOINS, AND AN OPINION WITH RESPECT TO PART VI.

This litigation concerns the constitutionality of two recurring holiday displays located on public property in downtown Pittsburgh. The first is a crèche placed on the Grand Staircase of the Allegheny County Courthouse. The second is a Chanukah menorah placed just outside the City-County Building, next to a Christmas tree and a sign saluting liberty. The Court of Appeals for the Third

Circuit ruled that each display violates the Establishment Clause of the First Amendment because each has the impermissible effect of endorsing religion. We agree that the crèche display has that unconstitutional effect but reverse the Court of Appeals' judgment regarding the menorah display.

I

A

The county courthouse is owned by Allegheny County and is its seat of government. It houses the offices of the county commissioners, controller, treasurer, sheriff, and clerk of court. Civil and criminal trials are held there. The "main," "most beautiful," and "most public" part of the courthouse is its Grand Staircase, set into one arch and surrounded by others, with arched windows serving as a backdrop.

Since 1981, the county has permitted the Holy Name Society, a Roman Catholic group, to display a crèche in the county courthouse during the Christmas holiday season. Christmas, we note perhaps needlessly, is the holiday when Christians celebrate the birth of Jesus of Nazareth, whom they believe to be the Messiah. Western churches have celebrated Christmas Day on December 25 since the fourth century. As observed in this Nation, Christmas has a secular, as well as a religious, dimension.

The crèche in the county courthouse, like other crèches, is a visual representation of the scene in the manger in Bethlehem shortly after the birth of Jesus, as described in the Gospels of Luke and Matthew. The crèche includes figures of the infant Jesus, Mary, Joseph, farm animals, shepherds, and wise men, all placed in or before a wooden representation of a manger, which has at its crest an angel bearing a banner that proclaims "Gloria in Excelsis Deo!"

During the 1986-1987 holiday season, the crèche was on display on the Grand Staircase from November 26 to January 9. It had a wooden fence on three sides and bore a plaque stating: "This Display Donated by the Holy Name Society." Sometime during the week of December 2, the county placed red and white poinsettia plants around the fence. The county also placed a small evergreen tree, decorated with a red bow, behind each of the two end-posts of the fence. These trees stood alongside the manger backdrop and were slightly shorter than it was. The angel thus was at the apex of the crèche display. Altogether, the crèche, the fence, the poinsettias, and the trees occupied a substantial amount of space on the Grand Staircase. No figures of Santa Claus or other decorations appeared on the Grand Staircase. Cf. *Lynch v. Donnelly* (1984).

The county uses the crèche as the setting for its annual Christmas-carol program. During the 1986 season, the county invited high school choirs and other musical groups to perform during weekday lunch hours from December 3 through December 23. The county dedicated this program to world peace and to the families of prisoners-of-war and of persons missing in action in Southeast Asia.

Near the Grand Staircase is an area of the county courthouse known as the "gallery forum" used for art and other cultural exhibits. The crèche, with its fence-and-floral frame, however, was distinct and not connected with any exhibit in the gallery forum. In addition, various departments and offices within

the county courthouse had their own Christmas decorations, but these also are not visible from the Grand Staircase.

## B

The City-County Building is separate and a block removed from the county courthouse and, as the name implies, is jointly owned by the city of Pittsburgh and Allegheny County. The city's portion of the building houses the city's principal offices, including the mayor's. The city is responsible for the building's Grant Street entrance which has three rounded arches supported by columns.

For a number of years, the city has had a large Christmas tree under the middle arch outside the Grant Street entrance. Following this practice, city employees on November 17, 1986, erected a 45-foot tree under the middle arch and decorated it with lights and ornaments. A few days later, the city placed at the foot of the tree a sign bearing the mayor's name and entitled "Salute to Liberty." Beneath the title, the sign stated:

"During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom."

At least since 1982, the city has expanded its Grant Street holiday display to include a symbolic representation of Chanukah, an 8-day Jewish holiday that begins on the 25th day of the Jewish lunar month of Kislev. The 25th of Kislev usually occurs in December, 9 and thus Chanukah is the annual Jewish holiday that falls closest to Christmas Day each year. In 1986, Chanukah began at sundown on December 26.

According to Jewish tradition, on the 25th of Kislev in 164 B.C.E. (before the common era (165 B.C.)), the Maccabees rededicated the Temple of Jerusalem after recapturing it from the Greeks, or, more accurately, from the Greek-influenced Seleucid Empire, in the course of a political rebellion. Chanukah is the holiday which celebrates that event. The early history of the celebration of Chanukah is unclear; it appears that the holiday's central ritual - the lighting of lamps - was well established long before a single explanation of that ritual took hold.

The Talmud explains the lamplighting ritual as a commemoration of an event that occurred during the rededication of the Temple. The Temple housed a seven-branch menorah, which was to be kept burning continuously. When the Maccabees rededicated the Temple, they had only enough oil to last for one day. But, according to the Talmud, the oil miraculously lasted for eight days (the length of time it took to obtain additional oil). To celebrate and publicly proclaim this miracle, the Talmud prescribes that it is a mitzvah (i. e., a religious deed or commandment), for Jews to place a lamp with eight lights just outside the entrance to their homes or in a front window during the eight days of Chanukah. Where practicality or safety from persecution so requires, the lamp may be placed in a window or inside the home. The Talmud also ordains certain blessings to be recited each night of Chanukah before lighting the lamp. One such benediction has been translated into English as "We are blessing God who has sanctified us and commanded us with mitzvot and has told us to light the candles of Hanukkah."

Although Jewish law does not contain any rule regarding the shape or substance of a Chanukah lamp (or "hanukkiyyah"), it became customary to evoke the memory of the Temple menorah. The Temple menorah was of a tree-and-branch design; it had a central candlestick with six branches. In contrast, a Chanukah menorah of tree-and-branch design has eight branches - one for each day of the holiday - plus a ninth to hold the shamash (an extra candle used to light the other eight). Also in contrast to the Temple menorah, the Chanukah menorah is not a sanctified object; it need not be treated with special care.

Lighting the menorah is the primary tradition associated with Chanukah, but the holiday is marked by other traditions as well. One custom among some Jews is to give children Chanukah gelt, or money. Another is for the children to gamble their gelt using a dreidel, a top with four sides. Each of the four sides contains a Hebrew letter; together the four letters abbreviate a phrase that refers to the Chanukah miracle.

Chanukah, like Christmas, is a cultural event as well as a religious holiday. Indeed, the Chanukah story always has had a political or national, as well as a religious, dimension: it tells of national heroism in addition to divine intervention. Also, Chanukah, like Christmas, is a winter holiday; according to some historians, it was associated in ancient times with the winter solstice. Just as some Americans celebrate Christmas without regard to its religious significance, some nonreligious American Jews celebrate Chanukah as an expression of ethnic identity, and "as a cultural or national event, rather than as a specifically religious event."

The cultural significance of Chanukah varies with the setting in which the holiday is celebrated. In contemporary Israel, the nationalist and military aspects of the Chanukah story receive special emphasis. In this country, the tradition of giving Chanukah gelt has taken on greater importance because of the temporal proximity of Chanukah to Christmas. Indeed, some have suggested that the proximity of Christmas accounts for the social prominence of Chanukah in this country. Whatever the reason, Chanukah is observed by American Jews to an extent greater than its religious importance would indicate: in the hierarchy of Jewish holidays, Chanukah ranks fairly low in religious significance. This socially heightened status of Chanukah reflects its cultural or secular dimension.

On December 22 of the 1986 holiday season, the city placed at the Grant Street entrance to the City-County Building an 18-foot Chanukah menorah of an abstract tree-and-branch design. The menorah was placed next to the city's 45-foot Christmas tree, against one of the columns that supports the arch into which the tree was set. The menorah is owned by Chabad, a Jewish group, but is stored, erected, and removed each year by the city. The tree, the sign, and the menorah were all removed on January 13. Appendix B, is a photograph of the tree, the sign, and the menorah.

## II

This litigation began on December 10, 1986, when respondents, the Greater Pittsburgh Chapter of the American Civil Liberties Union and seven local

residents, filed suit against the county and the city, seeking permanently to enjoin the county from displaying the crèche in the county courthouse and the city from displaying the menorah in front of the City-County Building. Respondents claim that the displays of the crèche and the menorah each violate the Establishment Clause of the First Amendment, made applicable to state governments by the Fourteenth Amendment. Chabad was permitted to intervene to defend the display of its menorah.

On May 8, 1987, the District Court denied respondents' request for a permanent injunction. Relying on *Lynch v. Donnelly* (1984), the court stated that "the crèche was but part of the holiday decoration of the stairwell and a foreground for the high school choirs which entertained each day at noon." Regarding the menorah, the court concluded that "it was but an insignificant part of another holiday display." The court also found that "the displays had a secular purpose" and "did not create an excessive entanglement of government with religion."

Respondents appealed, and a divided panel of the Court of Appeals reversed. Distinguishing *Lynch v. Donnelly*, the panel majority determined that the crèche and the menorah must be understood as endorsing Christianity and Judaism. \*\*\* The dissenting judge stated that the crèche, "accompanied by poinsettia plants and evergreens, does not violate the Establishment Clause simply because plastic Santa Clauses or reindeer are absent." As to the menorah, he asserted: "Including a reference to Chanukah did no more than broaden the commemoration of the holiday season and stress the notion of sharing its joy."

Rehearing en banc was denied by a 6-to-5 vote. The county, the city, and Chabad each filed a petition for certiorari. We granted all three petitions.

### III

#### A

This Nation is heir to a history and tradition of religious diversity that dates from the settlement of the North American Continent. Sectarian differences among various Christian denominations were central to the origins of our Republic. Since then, adherents of religions too numerous to name have made the United States their home, as have those whose beliefs expressly exclude religion.

Precisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights, the very first words of which declare: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." It is settled law that no government official in this Nation may violate these fundamental constitutional rights regarding matters of conscience.

In the course of adjudicating specific cases, this Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a

governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs. \*\*\*

In *Lemon v. Kurtzman*, the Court sought to refine these principles by focusing on three "tests" for determining whether a government practice violates the Establishment Clause. Under the *Lemon* analysis, a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion. This trilogy of tests has been applied regularly in the Court's later Establishment Clause cases.

Our subsequent decisions further have refined the definition of governmental action that unconstitutionally advances religion. In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of "endorsing" religion, a concern that has long had a place in our Establishment Clause jurisprudence. \*\*\*

Of course, the word "endorsement" is not self-defining. Rather, it derives its meaning from other words that this Court has found useful over the years in interpreting the Establishment Clause. \*\*\* Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly* (O'Connor, J., concurring).

## B

We have had occasion in the past to apply Establishment Clause principles to the government's display of objects with religious significance. In *Stone v. Graham* (1980), we held that the display of a copy of the Ten Commandments on the walls of public classrooms violates the Establishment Clause. Closer to the facts of this litigation is *Lynch v. Donnelly* in which we considered whether the city of Pawtucket, R. I., had violated the Establishment Clause by including a crèche in its annual Christmas display, located in a private park within the downtown shopping district. By a 5-to-4 decision in that difficult case, the Court upheld inclusion of the crèche in the Pawtucket display, holding, *inter alia*, that the inclusion of the crèche did not have the impermissible effect of advancing or promoting religion.

The rationale of the majority opinion in *Lynch* is none too clear: the opinion contains two strands, neither of which provides guidance for decision in subsequent cases. First, the opinion states that the inclusion of the crèche in the display was "no more an advancement or endorsement of religion" than other "endorsements" this Court has approved in the past, - but the opinion offers no discernible measure for distinguishing between permissible and impermissible endorsements. Second, the opinion observes that any benefit the government's display of the crèche gave to religion was no more than "indirect, remote, and incidental," - without saying how or why.

Although Justice O'Connor joined the majority opinion in *Lynch*, she wrote a concurrence that differs in significant respects from the majority opinion. The

main difference is that the concurrence provides a sound analytical framework for evaluating governmental use of religious symbols.

First and foremost, the concurrence squarely rejects any notion that this Court will tolerate some government endorsement of religion. Rather, the concurrence recognizes any endorsement of religion as "invalid," because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

Second, the concurrence articulates a method for determining whether the government's use of an object with religious meaning has the effect of endorsing religion. The effect of the display depends upon the message that the government's practice communicates: the question is "what viewers may fairly understand to be the purpose of the display." \*\*\*

The concurrence applied this mode of analysis to the Pawtucket crèche, seen in the context of that city's holiday celebration as a whole. In addition to the crèche, the city's display contained: a Santa Claus house with a live Santa distributing candy; reindeer pulling Santa's sleigh; a live 40-foot Christmas tree strung with lights; statutes of carolers in old-fashioned dress; candy-striped poles; a "talking" wishing well; a large banner proclaiming "SEASONS GREETINGS"; a miniature "village" with several houses and a church; and various "cut-out" figures, including those of a clown, a dancing elephant, a robot, and a teddy bear. The concurrence concluded that both because the crèche is "a traditional symbol" of Christmas, a holiday with strong secular elements, and because the crèche was "displayed along with purely secular symbols," the crèche's setting "changes what viewers may fairly understand to be the purpose of the display" and "negates any message of endorsement" of "the Christian beliefs represented by the crèche."

\*\*\* Accordingly, our present task is to determine whether the display of the crèche and the menorah, in their respective "particular physical settings," has the effect of endorsing or disapproving religious beliefs.

#### IV

We turn first to the county's crèche display. There is no doubt, of course, that the crèche itself is capable of communicating a religious message. Indeed, the crèche in this lawsuit uses words, as well as the picture of the Nativity scene, to make its religious meaning unmistakably clear. "Glory to God in the Highest!" says the angel in the crèche - Glory to God because of the birth of Jesus. This praise to God in Christian terms is indisputably religious - indeed sectarian - just as it is when said in the Gospel or in a church service.

Under the Court's holding in *Lynch*, the effect of a crèche display turns on its setting. Here, unlike in *Lynch*, nothing in the context of the display detracts from the crèche's religious message. The *Lynch* display comprised a series of figures and objects, each group of which had its own focal point. Santa's house and his reindeer were objects of attention separate from the crèche, and had their specific visual story to tell. Similarly, whatever a "talking" wishing well may be, it obviously was a center of attention separate from the crèche. Here, in contrast, the crèche stands alone: it is the single element of the display on the Grand Staircase.

The floral decoration surrounding the crèche cannot be viewed as somehow equivalent to the secular symbols in the overall *Lynch* display. The floral frame, like all good frames, serves only to draw one's attention to the message inside the frame. The floral decoration surrounding the crèche contributes to, rather than detracts from, the endorsement of religion conveyed by the crèche. It is as if the county had allowed the Holy Name Society to display a cross on the Grand Staircase at Easter, and the county had surrounded the cross with Easter lilies. The county could not say that surrounding the cross with traditional flowers of the season would negate the endorsement of Christianity conveyed by the cross on the Grand Staircase. Its contention that the traditional Christmas greens negate the endorsement effect of the crèche fares no better.

Nor does the fact that the crèche was the setting for the county's annual Christmas-carol program diminish its religious meaning. \*\*\*

Furthermore, the crèche sits on the Grand Staircase, the "main" and "most beautiful part" of the building that is the seat of county government. \*\*\*

The fact that the crèche bears a sign disclosing its ownership by a Roman Catholic organization does not alter this conclusion. On the contrary, the sign simply demonstrates that the government is endorsing the religious message of that organization, rather than communicating a message of its own. \*\*\* Indeed, the very concept of "endorsement" conveys the sense of promoting someone else's message. Thus, by prohibiting government endorsement of religion, the Establishment Clause prohibits precisely what occurred here: the government's lending its support to the communication of a religious organization's religious message.

Finally, the county argues that it is sufficient to validate the display of the crèche on the Grand Staircase that the display celebrates Christmas, and Christmas is a national holiday. This argument obviously proves too much. It would allow the celebration of the Eucharist inside a courthouse on Christmas Eve. \*\*\*

In sum, *Lynch* teaches that government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine. Here, Allegheny County has transgressed this line. It has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ. Under *Lynch*, and the rest of our cases, nothing more is required to demonstrate a violation of the Establishment Clause. The display of the crèche in this context, therefore, must be permanently enjoined.

## V

Justice Kennedy and the three Justices who join him would find the display of the crèche consistent with the Establishment Clause. He argues that this conclusion necessarily follows from the Court's decision in *Marsh v. Chambers* (1983), which sustained the constitutionality of legislative prayer. He also asserts that the crèche, even in this setting, poses "no realistic risk" of "represent[ing] an effort to proselytize," having repudiated the Court's endorsement inquiry in favor of a "proselytization" approach. The Court's

analysis of the crèche, he contends, "reflects an unjustified hostility toward religion."

Justice Kennedy's reasons for permitting the crèche on the Grand Staircase and his condemnation of the Court's reasons for deciding otherwise are so far reaching in their implications that they require a response in some depth. \*\*\*

A

[omitted]

B

[omitted]

C

Although Justice Kennedy repeatedly accuses the Court of harboring a "latent hostility" or "callous indifference" toward religion, nothing could be further from the truth, and the accusations could be said to be as offensive as they are absurd. Justice Kennedy apparently has misperceived a respect for religious pluralism, a respect commanded by the Constitution, as hostility or indifference to religion. No misperception could be more antithetical to the values embodied in the Establishment Clause. \*\*\*

VI

The display of the Chanukah menorah in front of the City-County Building may well present a closer constitutional question. The menorah, one must recognize, is a religious symbol: it serves to commemorate the miracle of the oil as described in the Talmud. But the menorah's message is not exclusively religious. The menorah is the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions.

Moreover, the menorah here stands next to a Christmas tree and a sign saluting liberty. While no challenge has been made here to the display of the tree and the sign, their presence is obviously relevant in determining the effect of the menorah's display. The necessary result of placing a menorah next to a Christmas tree is to create an "overall holiday setting" that represents both Christmas and Chanukah - two holidays, not one.

The mere fact that Pittsburgh displays symbols of both Christmas and Chanukah does not end the constitutional inquiry. If the city celebrates both Christmas and Chanukah as religious holidays, then it violates the Establishment Clause. The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone.

Conversely, if the city celebrates both Christmas and Chanukah as secular holidays, then its conduct is beyond the reach of the Establishment Clause. Because government may celebrate Christmas as a secular holiday, it follows that government may also acknowledge Chanukah as a secular holiday. Simply put, it would be a form of discrimination against Jews to allow Pittsburgh to celebrate Christmas as a cultural tradition while simultaneously disallowing the city's acknowledgment of Chanukah as a contemporaneous cultural tradition.

Accordingly, the relevant question for Establishment Clause purposes is whether the combined display of the tree, the sign, and the menorah has the effect of endorsing both Christian and Jewish faiths, or rather simply recognizes

that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society. Of the two interpretations of this particular display, the latter seems far more plausible and is also in line with *Lynch*.

The Christmas tree, unlike the menorah, is not itself a religious symbol. Although Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas. Numerous Americans place Christmas trees in their homes without subscribing to Christian religious beliefs, and when the city's tree stands alone in front of the City-County Building, it is not considered an endorsement of Christian faith. Indeed, a 40-foot Christmas tree was one of the objects that validated the crèche in *Lynch*. The widely accepted view of the Christmas tree as the preeminent secular symbol of the Christmas holiday season serves to emphasize the secular component of the message communicated by other elements of an accompanying holiday display, including the Chanukah menorah.

The tree, moreover, is clearly the predominant element in the city's display. The 45-foot tree occupies the central position beneath the middle archway in front of the Grant Street entrance to the City-County Building; the 18-foot menorah is positioned to one side. Given this configuration, it is much more sensible to interpret the meaning of the menorah in light of the tree, rather than vice versa. In the shadow of the tree, the menorah is readily understood as simply a recognition that Christmas is not the only traditional way of observing the winter-holiday season. In these circumstances, then, the combination of the tree and the menorah communicates, not a simultaneous endorsement of both the Christian and Jewish faiths, but instead, a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition.

Although the city has used a symbol with religious meaning as its representation of Chanukah, this is not a case in which the city has reasonable alternatives that are less religious in nature. It is difficult to imagine a predominantly secular symbol of Chanukah that the city could place next to its Christmas tree. An 18-foot dreidel would look out of place and might be interpreted by some as mocking the celebration of Chanukah. The absence of a more secular alternative symbol is itself part of the context in which the city's actions must be judged in determining the likely effect of its use of the menorah. Where the government's secular message can be conveyed by two symbols, only one of which carries religious meaning, an observer reasonably might infer from the fact that the government has chosen to use the religious symbol that the government means to promote religious faith. But where, as here, no such choice has been made, this inference of endorsement is not present.

The mayor's sign further diminishes the possibility that the tree and the menorah will be interpreted as a dual endorsement of Christianity and Judaism. The sign states that during the holiday season the city salutes liberty. Moreover, the sign draws upon the theme of light, common to both Chanukah and Christmas as winter festivals, and links that theme with this Nation's legacy of freedom, which allows an American to celebrate the holiday season in whatever way he wishes, religiously or otherwise. \*\*\*

Given all these considerations, it is not "sufficiently likely" that residents of Pittsburgh will perceive the combined display of the tree, the sign, and the menorah as an "endorsement" or "disapproval . . . of their individual religious choices." While an adjudication of the display's effect must take into account the perspective of one who is neither Christian nor Jewish, as well as of those who adhere to either of these religions, the constitutionality of its effect must also be judged according to the standard of a "reasonable observer." \*\*\*

The conclusion here that, in this particular context, the menorah's display does not have an effect of endorsing religious faith does not foreclose the possibility that the display of the menorah might violate either the "purpose" or "entanglement" prong of the *Lemon* analysis. These issues were not addressed by the Court of Appeals and may be considered by that court on remand.

## VII

*Lynch v. Donnelly* confirms, and in no way repudiates, the longstanding constitutional principle that government may not engage in a practice that has the effect of promoting or endorsing religious beliefs. The display of the crèche in the county courthouse has this unconstitutional effect. The display of the menorah in front of the City-County Building, however, does not have this effect, given its "particular physical setting."

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded for further proceedings.

*It is so ordered.*

JUSTICE O'CONNOR, WITH WHOM JUSTICE BRENNAN AND JUSTICE STEVENS JOIN AS TO PART II, CONCURRING IN PART AND CONCURRING IN THE JUDGMENT.

## I

Judicial review of government action under the Establishment Clause is a delicate task. The Court has avoided drawing lines which entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion. Instead the courts have made case-specific examinations of the challenged government action and have attempted to do so with the aid of the standards described by Justice Blackmun in Part III-A of the Court's opinion. Unfortunately, even the development of articulable standards and guidelines has not always resulted in agreement among the Members of this Court on the results in individual cases. And so it is again today. \*\*\*

JUSTICE STEVENS, WITH WHOM JUSTICE BRENNAN AND JUSTICE MARSHALL JOIN, CONCURRING IN PART AND DISSENTING IN PART. [OMITTED]

JUSTICE KENNEDY, WITH WHOM THE CHIEF JUSTICE, JUSTICE WHITE, AND JUSTICE SCALIA JOIN, CONCURRING IN THE JUDGMENT IN PART AND DISSENTING IN PART.

The majority holds that the County of Allegheny violated the Establishment Clause by displaying a crèche in the county courthouse, because the "principal

or primary effect" of the display is to advance religion within the meaning of *Lemon v. Kurtzman* (1971). This view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents, and I dissent from this holding. The crèche display is constitutional, and, for the same reasons, the display of a menorah by the city of Pittsburgh is permissible as well. On this latter point, I concur in the result, but not the reasoning, of Part VI of Justice Blackmun's opinion.

## I

In keeping with the usual fashion of recent years, the majority applies the *Lemon* test to judge the constitutionality of the holiday displays here in question. I am content for present purposes to remain within the *Lemon* framework, but do not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area. Persuasive criticism of *Lemon* has emerged. Our cases often question its utility in providing concrete answers to Establishment Clause questions, calling it but a "helpful signpost" or "guidelin[e]" to assist our deliberations rather than a comprehensive test. Substantial revision of our Establishment Clause doctrine may be in order; but it is unnecessary to undertake that task today, for even the *Lemon* test, when applied with proper sensitivity to our traditions and our case law, supports the conclusion that both the crèche and the menorah are permissible displays in the context of the holiday season.

The only *Lemon* factor implicated in these cases directs us to inquire whether the "principal or primary effect" of the challenged government practice is "one that neither advances nor inhibits religion." \*\*\*

\*\*\* Noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage.

## II

\*\*\* If government is to participate in its citizens' celebration of a holiday that contains both a secular and a religious component, enforced recognition of only the secular aspect would signify the callous indifference toward religious faith that our cases and traditions do not require; for by commemorating the holiday only as it is celebrated by nonadherents, the government would be refusing to acknowledge the plain fact, and the historical reality, that many of its citizens celebrate its religious aspects as well. Judicial invalidation of government's attempts to recognize the religious underpinnings of the holiday would signal not neutrality but a pervasive intent to insulate government from all things religious. The Religion Clauses do not require government to acknowledge these holidays or their religious component; but our strong tradition of government accommodation and acknowledgment permits government to do so.

There is no suggestion here that the government's power to coerce has been used to further the interests of Christianity or Judaism in any way. No one was compelled to observe or participate in any religious ceremony or activity. Neither the city nor the county contributed significant amounts of tax money to serve the cause of one religious faith. The crèche and the menorah are purely passive symbols of religious holidays. Passersby who disagree with the message

conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.

There is no realistic risk that the crèche and the menorah represent an effort to proselytize or are otherwise the first step down the road to an establishment of religion. \*\*\*

### III

\*\*\* The United States Code itself contains religious references that would be suspect under the endorsement test. Congress has directed the President to "set aside and proclaim a suitable day each year . . . as a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." This statute does not require anyone to pray, of course, but it is a straightforward endorsement of the concept of "turn[ing] to God in prayer." Also by statute, the Pledge of Allegiance to the Flag describes the United States as "one Nation under God." To be sure, no one is obligated to recite this phrase, see *West Virginia State Board of Education v. Barnette* (1943), but it borders on sophistry to suggest that the "reasonable" atheist would not feel less than a "full membe[r] of the political community" every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false. Likewise, our national motto, "In God we trust," which is prominently engraved in the wall above the Speaker's dias in the Chamber of the House of Representatives and is reproduced on every coin minted and every dollar printed by the Federal Government, must have the same effect. \*\*\*

### B

In addition to disregarding precedent and historical fact, the majority's approach to government use of religious symbolism threatens to trivialize constitutional adjudication. By mischaracterizing the Court's opinion in *Lynch* as an endorsement-in-context test, Justice Blackmun embraces a jurisprudence of minutiae. A reviewing court must consider whether the city has included Santas, talking wishing wells, reindeer, or other secular symbols as "a center of attention separate from the crèche." After determining whether these centers of attention are sufficiently "separate" that each "had their specific visual story to tell," the court must then measure their proximity to the crèche. A community that wishes to construct a constitutional display must also take care to avoid floral frames or other devices that might insulate the crèche from the sanitizing effect of the secular portions of the display. The majority also notes the presence of evergreens near the crèche that are identical to two small evergreens placed near official county signs. After today's decision, municipal greenery must be used with care.

\*\*\* My description of the majority's test, though perhaps uncharitable, is intended to illustrate the inevitable difficulties with its application.

#### IV

The approach adopted by the majority contradicts important values embodied in the Clause. Obsessive, implacable resistance to all but the most carefully scripted and secularized forms of accommodation requires this Court to act as a censor, issuing national decrees as to what is orthodox and what is not. What is orthodox, in this context, means what is secular; the only Christmas the State can acknowledge is one in which references to religion have been held to a minimum. The Court thus lends its assistance to an Orwellian rewriting of history as many understand it. I can conceive of no judicial function more antithetical to the First Amendment.

A further contradiction arises from the majority's approach, for the Court also assumes the difficult and inappropriate task of saying what every religious symbol means. Before studying these cases, I had not known the full history of the menorah, and I suspect the same was true of my colleagues. More important, this history was, and is, likely unknown to the vast majority of people of all faiths who saw the symbol displayed in Pittsburgh. Even if the majority is quite right about the history of the menorah, it hardly follows that this same history informed the observers' view of the symbol and the reason for its presence. This Court is ill equipped to sit as a national theology board, and I question both the wisdom and the constitutionality of its doing so. Indeed, were I required to choose between the approach taken by the majority and a strict separationist view, I would have to respect the consistency of the latter.

The suit before us is admittedly a troubling one. It must be conceded that, however neutral the purpose of the city and county, the eager proselytizer may seek to use these symbols for his own ends. The urge to use them to teach or to taunt is always present. It is also true that some devout adherents of Judaism or Christianity may be as offended by the holiday display as are nonbelievers, if not more so. To place these religious symbols in a common hallway or sidewalk, where they may be ignored or even insulted, must be distasteful to many who cherish their meaning.

For these reasons, I might have voted against installation of these particular displays were I a local legislative official. But we have no jurisdiction over matters of taste within the realm of constitutionally permissible discretion. Our role is enforcement of a written Constitution. In my view, the principles of the Establishment Clause and our Nation's historic traditions of diversity and pluralism allow communities to make reasonable judgments respecting the accommodation or acknowledgment of holidays with both cultural and religious aspects. No constitutional violation occurs when they do so by displaying a symbol of the holiday's religious origins.

## Note

In this fragmented decision, the conclusions of the individual Justices are varied, and while Justice Blackmun delivers the Judgment of the Court, his view - - - that the crèche is unconstitutional and the menorah constitutional - - - is actually a minority view:

Justice	Crèche	Menorah
Blackmun	Unconstitutional	Constitutional
O'Connor	Unconstitutional	Constitutional
Brennan	Unconstitutional	Unconstitutional
Stevens	Unconstitutional	Unconstitutional
Marshall	Unconstitutional	Unconstitutional
Kennedy	Constitutional	Constitutional
White	Constitutional	Constitutional
Scalia	Constitutional	Constitutional
Rehnquist	Constitutional	Constitutional

What is the explanation for the difference between the crèche and the menorah? Is it convincing?

# *McCreary County, Kentucky v. ACLU of Kentucky*

545 U.S. 844 (2005)

SOUTER, J., DELIVERED THE OPINION OF THE COURT, IN WHICH STEVENS, O'CONNOR, GINSBURG, AND BREYER, JJ., JOINED. O'CONNOR, J., FILED A CONCURRING OPINION. SCALIA, J., FILED A DISSENTING OPINION, IN WHICH REHNQUIST, C. J., AND THOMAS, J., JOINED, AND IN WHICH KENNEDY, J., JOINED AS TO PARTS II AND III.

JUSTICE SOUTER DELIVERED THE OPINION OF THE COURT.

Executives of two counties posted a version of the Ten Commandments on the walls of their courthouses. After suits were filed charging violations of the Establishment Clause, the legislative body of each county adopted a resolution calling for a more extensive exhibit meant to show that the Commandments are Kentucky's "precedent legal code." The result in each instance was a modified display of the Commandments surrounded by texts containing religious references as their sole common element. After changing counsel, the counties revised the exhibits again by eliminating some documents, expanding the text set out in another, and adding some new ones.

The issues are whether a determination of the counties' purpose is a sound basis for ruling on the Establishment Clause complaints, and whether evaluation of the counties' claim of secular purpose for the ultimate displays may take their evolution into account. We hold that the counties' manifest objective may be dispositive of the constitutional enquiry, and that the development of the presentation should be considered when determining its purpose.

## I

In the summer of 1999, petitioners McCreary County and Pulaski County, Kentucky (hereinafter Counties), put up in their respective courthouses large, gold-framed copies of an abridged text of the King James version of the Ten Commandments, including a citation to the Book of Exodus. In McCreary County, the placement of the Commandments responded to an order of the county legislative body requiring "the display [to] be posted in 'a very high traffic area' of the courthouse." In Pulaski County, amidst reported controversy over the propriety of the display, the Commandments were hung in a ceremony presided over by the county Judge-Executive, who called them "good rules to live by" and who recounted the story of an astronaut who became convinced "there must be a divine God" after viewing the Earth from the moon. The Judge-Executive was accompanied by the pastor of his church, who called the Commandments "a creed of ethics" and told the press after the ceremony that displaying the Commandments was "one of the greatest things the judge could have done to close out the millennium." In both counties, this was the version of the Commandments posted:

- "Thou shalt have no other gods before me.
- "Thou shalt not make unto thee any graven images.
- "Thou shalt not take the name of the Lord thy God in vain.
- "Remember the sabbath day, to keep it holy.
- "Honor thy father and thy mother.
- "Thou shalt not kill.

"Thou shalt not commit adultery.  
"Thou shalt not steal.  
"Thou shalt not bear false witness.  
"Thou shalt not covet.  
"Exodus 20:3-17."

In each county, the hallway display was "readily visible to ... county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote."

In November 1999, respondents American Civil Liberties Union of Kentucky et. al. sued the Counties in Federal District Court under Rev. Stat. §1979, 42 U.S.C. §1983, and sought a preliminary injunction against maintaining the displays, which the ACLU charged were violations of the prohibition of religious establishment included in the First Amendment of the Constitution. Within a month, and before the District Court had responded to the request for injunction, the legislative body of each County authorized a second, expanded display, by nearly identical resolutions reciting that the Ten Commandments are "the precedent legal code upon which the civil and criminal codes of ... Kentucky are founded," and stating several grounds for taking that position: that "the Ten Commandments are codified in Kentucky's civil and criminal laws"; that the Kentucky House of Representatives had in 1993 "voted unanimously ... to adjourn ... 'in remembrance and honor of Jesus Christ, the Prince of Ethics"; that the "County Judge and ... magistrates agree with the arguments set out by Judge [Roy] Moore" in defense of his "display [of] the Ten Commandments in his courtroom"; and that the "Founding Father[s] [had an] explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America's strength and direction."

As directed by the resolutions, the Counties expanded the displays of the Ten Commandments in their locations, presumably along with copies of the resolution, which instructed that it, too, be posted. In addition to the first display's large framed copy of the edited King James version of the Commandments, the second included eight other documents in smaller frames, each either having a religious theme or excerpted to highlight a religious element. The documents were the "endowed by their Creator" passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, "In God We Trust"; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible," reading that "[t]he Bible is the best gift God has ever given to man"; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower Compact.

After argument, the District Court entered a preliminary injunction on May 5, 2000, ordering that the "display ... be removed from [each] County Courthouse IMMEDIATELY" and that no county official "erect or cause to be erected similar displays." The court's analysis of the situation followed the three-part formulation first stated in *Lemon v. Kurtzman* (1971). As to governmental

purpose, it concluded that the original display "lack[ed] any secular purpose" because the Commandments "are a distinctly religious document, believed by many Christians and Jews to be the direct and revealed word of God." Although the Counties had maintained that the original display was meant to be educational, "[t]he narrow scope of the display--a single religious text unaccompanied by any interpretation explaining its role as a foundational document--can hardly be said to present meaningfully the story of this country's religious traditions." The court found that the second version also "clearly lack[ed] a secular purpose" because the "Count[ies] narrowly tailored [their] selection of foundational documents to incorporate only those with specific references to Christianity."

The Counties filed a notice of appeal from the preliminary injunction but voluntarily dismissed it after hiring new lawyers. They then installed another display in each courthouse, the third within a year. No new resolution authorized this one, nor did the Counties repeal the resolutions that preceded the second. The posting consists of nine framed documents of equal size, one of them setting out the Ten Commandments explicitly identified as the "King James Version" at Exodus 20:3-17 and quoted at greater length than before:

"Thou shalt have no other gods before me.

"Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water underneath the earth: Thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me.

"Thou shalt not take the name of the LORD thy God in vain: for the LORD will not hold him guiltless that taketh his name in vain.

"Remember the sabbath day, to keep it holy.

"Honour thy father and thy mother: that thy days may be long upon the land which the LORD thy God giveth thee.

"Thou shalt not kill.

"Thou shalt not commit adultery.

"Thou shalt not steal.

"Thou shalt not bear false witness against thy neighbour.

"Thou shalt not covet thy neighbour's house, thou shalt not covet th[y] neighbor's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor anything that is th[y] neighbour's."

Assembled with the Commandments are framed copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice. The collection is entitled "The Foundations of American Law and Government Display" and each document comes with a statement about its historical and legal significance. The comment on the Ten Commandments reads:

"The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.' The Ten Commandments provide the moral

background of the Declaration of Independence and the foundation of our legal tradition."

The ACLU moved to supplement the preliminary injunction to enjoin the Counties' third display, and the Counties responded with several explanations for the new version, including desires "to demonstrate that the Ten Commandments were part of the foundation of American Law and Government" and "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government." The court, however, took the objective of proclaiming the Commandments' foundational value as "a religious, rather than secular, purpose" \*\*\* and found that the assertion that the Counties' broader educational goals are secular "crumble[s] ... upon an examination of the history of this litigation." \*\*\*

As requested, the trial court supplemented the injunction, and a divided panel of the Court of Appeals for the Sixth Circuit affirmed. \*\*\*

We granted certiorari and now affirm.

## II

Twenty-five years ago in a case prompted by posting the Ten Commandments in Kentucky's public schools, this Court recognized that the Commandments "are undeniably a sacred text in the Jewish and Christian faiths" and held that their display in public classrooms violated the First Amendment's bar against establishment of religion. *Stone v. Graham* (1980). Stone found a predominantly religious purpose in the government's posting of the Commandments, given their prominence as "an instrument of religion." The Counties ask for a different approach here by arguing that official purpose is unknowable and the search for it inherently vain. In the alternative, the Counties would avoid the District Court's conclusion by having us limit the scope of the purpose enquiry so severely that any trivial rationalization would suffice, under a standard oblivious to the history of religious government action like the progression of exhibits in this case.

## A

Ever since *Lemon v. Kurtzman* summarized the three familiar considerations for evaluating Establishment Clause claims, looking to whether government action has "a secular legislative purpose" has been a common, albeit seldom dispositive, element of our cases. Though we have found government action motivated by an illegitimate purpose only four times since *Lemon*, and "the secular purpose requirement alone may rarely be determinative..., it nevertheless serves an important function."

The touchstone for our analysis is the principle that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides. Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the "understanding, reached ... after decades of religious war, that liberty and social stability demand a religious tolerance that respects the

religious views of all citizens ...." By showing a purpose to favor religion, the government "sends the ... message to ... nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members...."

Indeed, the purpose apparent from government action can have an impact more significant than the result expressly decreed: when the government maintains Sunday closing laws, it advances religion only minimally because many working people would take the day as one of rest regardless, but if the government justified its decision with a stated desire for all Americans to honor Christ, the divisive thrust of the official action would be inescapable. This is the teaching of *McGowan v. Maryland* (1961), which upheld Sunday closing statutes on practical, secular grounds after finding that the government had forsaken the religious purposes behind centuries-old predecessor laws.

## B

Despite the intuitive importance of official purpose to the realization of Establishment Clause values, the Counties ask us to abandon *Lemon's* purpose test, or at least to truncate any enquiry into purpose here. Their first argument is that the very consideration of purpose is deceptive: according to them, true "purpose" is unknowable, and its search merely an excuse for courts to act selectively and unpredictably in picking out evidence of subjective intent. The assertions are as seismic as they are unconvincing.

Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country, and governmental purpose is a key element of a good deal of constitutional doctrine, e.g., *Washington v. Davis* (1976) (discriminatory purpose required for Equal Protection violation); *Hunt v. Washington State Apple Advertising Comm'n* (1977) (discriminatory purpose relevant to dormant Commerce Clause claim); *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993) (discriminatory purpose raises level of scrutiny required by free exercise claim). With enquiries into purpose this common, if they were nothing but hunts for mares' nests deflecting attention from bare judicial will, the whole notion of purpose in law would have dropped into disrepute long ago.

But scrutinizing purpose does make practical sense, as in Establishment Clause analysis, where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts. The eyes that look to purpose belong to an "objective observer," one who takes account of the traditional external signs that show up in the "text, legislative history, and implementation of the statute," or comparable official act. *Santa Fe Independent School Dist. v. Doe*. There is, then, nothing hinting at an unpredictable or disingenuous exercise when a court enquires into purpose after a claim is raised under the Establishment Clause.

The cases with findings of a predominantly religious purpose point to the straightforward nature of the test. \*\*\*

## C

After declining the invitation to abandon concern with purpose wholesale, we also have to avoid the Counties' alternative tack of trivializing the enquiry into it. The Counties would read the cases as if the purpose enquiry were so naive that

any transparent claim to secularity would satisfy it, and they would cut context out of the enquiry, to the point of ignoring history, no matter what bearing it actually had on the significance of current circumstances. There is no precedent for the Counties' arguments, or reason supporting them.

1

*Lemon* said that government action must have "a secular ... purpose," and after a host of cases it is fair to add that although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective. \*\*\*

2

The Counties' second proffered limitation can be dispatched quickly. They argue that purpose in a case like this one should be inferred, if at all, only from the latest news about the last in a series of governmental actions, however close they may all be in time and subject. But the world is not made brand new every morning, and the Counties are simply asking us to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show. The Counties' position just bucks common sense: reasonable observers have reasonable memories, and our precedents sensibly forbid an observer "to turn a blind eye to the context in which [the] policy arose."

III

This case comes to us on appeal from a preliminary injunction. We accordingly review the District Court's legal rulings de novo, and its ultimate conclusion for abuse of discretion.

We take *Stone* as the initial legal benchmark, our only case dealing with the constitutionality of displaying the Commandments. *Stone* recognized that the Commandments are an "instrument of religion" and that, at least on the facts before it, the display of their text could presumptively be understood as meant to advance religion: although state law specifically required their posting in public school classrooms, their isolated exhibition did not leave room even for an argument that secular education explained their being there.

But *Stone* did not purport to decide the constitutionality of every possible way the Commandments might be set out by the government, and under the Establishment Clause detail is key. Hence, we look to the record of evidence showing the progression leading up to the third display of the Commandments.

A

The display rejected in *Stone* had two obvious similarities to the first one in the sequence here: both set out a text of the Commandments as distinct from any traditionally symbolic representation, and each stood alone, not part of an arguably secular display. *Stone* stressed the significance of integrating the Commandments into a secular scheme to forestall the broadcast of an otherwise clearly religious message, and for good reason, the Commandments being a central point of reference in the religious and moral history of Jews and Christians. They proclaim the existence of a monotheistic god (no other gods). They regulate details of religious obligation (no graven images, no sabbath breaking, no vain oath swearing). And they unmistakably rest even the universally accepted prohibitions (as against murder, theft, and the like) on the

sanction of the divinity proclaimed at the beginning of the text. Displaying that text is thus different from a symbolic depiction, like tablets with 10 roman numerals, which could be seen as alluding to a general notion of law, not a sectarian conception of faith. Where the text is set out, the insistence of the religious message is hard to avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote the religious point of view.

\*\*\*What is more, at the ceremony for posting the framed Commandments in Pulaski County, the county executive was accompanied by his pastor, who testified to the certainty of the existence of God. The reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments' religious message.

This is not to deny that the Commandments have had influence on civil or secular law; a major text of a majority religion is bound to be felt. The point is simply that the original text viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction. When the government initiates an effort to place this statement alone in public view, a religious object is unmistakable.

#### B

Once the Counties were sued, they modified the exhibits and invited additional insight into their purpose in a display that hung for about six months. \*\*\*

Today, the Counties make no attempt to defend their undeniable objective, but instead hopefully describe version two as "dead and buried." Their refusal to defend the second display is understandable, but the reasonable observer could not forget it.

#### C

1

After the Counties changed lawyers, they mounted a third display, without a new resolution or repeal of the old one.

\*\*\* Nor did the selection of posted material suggest a clear theme that might prevail over evidence of the continuing religious object. In a collection of documents said to be "foundational" to American government, it is at least odd to include a patriotic anthem, but to omit the Fourteenth Amendment, the most significant structural provision adopted since the original Framing. And it is no less baffling to leave out the original Constitution of 1787 while quoting the 1215 Magna Carta even to the point of its declaration that "fish-weirs shall be removed from the Thames." If an observer found these choices and omissions perplexing in isolation, he would be puzzled for a different reason when he read the Declaration of Independence seeking confirmation for the Counties' posted explanation that the "Ten Commandments' ... influence is clearly seen in the Declaration;" in fact the observer would find that the Commandments are sanctioned as divine imperatives, while the Declaration of Independence holds that the authority of government to enforce the law derives "from the consent of the governed." If the observer had not thrown up his hands, he would probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality.

In holding the preliminary injunction adequately supported by evidence that the Counties' purpose had not changed at the third stage, we do not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter. We hold only that purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense. \*\*\*

Nor do we have occasion here to hold that a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history. We do not forget, and in this litigation have frequently been reminded, that our own courtroom frieze was deliberately designed in the exercise of governmental authority so as to include the figure of Moses holding tablets exhibiting a portion of the Hebrew text of the later, secularly phrased Commandments; in the company of 17 other lawgivers, most of them secular figures, there is no risk that Moses would strike an observer as evidence that the National Government was violating neutrality in religion.

#### IV

The importance of neutrality as an interpretive guide is no less true now than it was when the Court broached the principle in *Everson v. Board of Ed. of Ewing* (1947), and a word needs to be said about the different view taken in today's dissent.

\*\*\* But the dissent's argument for the original understanding is flawed from the outset by its failure to consider the full range of evidence showing what the Framers believed. \*\*\*

[T]here is also evidence supporting the proposition that the Framers intended the Establishment Clause to require governmental neutrality in matters of religion, including neutrality in statements acknowledging religion. The very language of the Establishment Clause represented a significant departure from early drafts that merely prohibited a single national religion, and, the final language instead "extended [the] prohibition to state support for 'religion' in general."

The historical record, moreover, is complicated beyond the dissent's account by the writings and practices of figures no less influential than Thomas Jefferson and James Madison. Jefferson, for example, refused to issue Thanksgiving Proclamations because he believed that they violated the Constitution. And Madison, whom the dissent claims as supporting its thesis, criticized Virginia's general assessment tax not just because it required people to donate "three pence" to religion, but because "it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority."

The fair inference is that there was no common understanding about the limits of the establishment prohibition, and the dissent's conclusion that its narrower view was the original understanding, stretches the evidence beyond tensile capacity. What the evidence does show is a group of statesmen, like others before and after them, who proposed a guarantee with contours not wholly worked out, leaving the Establishment Clause with edges still to be determined.

And none the worse for that. Indeterminate edges are the kind to have in a constitution meant to endure, and to meet "exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur." *McCulloch v. Maryland* (1819).

While the dissent fails to show a consistent original understanding from which to argue that the neutrality principle should be rejected, it does manage to deliver a surprise. As mentioned, the dissent says that the deity the Framers had in mind was the God of monotheism, with the consequence that government may espouse a tenet of traditional monotheism. This is truly a remarkable view. \*\*\* Today's dissent, however, apparently means that government should be free to approve the core beliefs of a favored religion over the tenets of others, a view that should trouble anyone who prizes religious liberty. Certainly history cannot justify it; on the contrary, history shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular, a fact that no member of this Court takes as a premise for construing the Religion Clauses. \*\*\*

Historical evidence thus supports no solid argument for changing course (whatever force the argument might have when directed at the existing precedent), whereas public discourse at the present time certainly raises no doubt about the value of the interpretative approach invoked for 60 years now. We are centuries away from the St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is inescapable. This is no time to deny the prudence of understanding the Establishment Clause to require the Government to stay neutral on religious belief, which is reserved for the conscience of the individual.

## V

Given the ample support for the District Court's finding of a predominantly religious purpose behind the Counties' third display, we affirm the Sixth Circuit in upholding the preliminary injunction.

*It is so ordered.*

JUSTICE O'CONNOR, CONCURRING [OMITTED].

JUSTICE SCALIA, WITH WHOM THE CHIEF JUSTICE AND JUSTICE THOMAS JOIN, AND WITH WHOM JUSTICE KENNEDY JOINS AS TO PARTS II AND III, DISSENTING.

I would uphold McCreary County and Pulaski County, Kentucky's (hereinafter Counties) displays of the Ten Commandments. I shall discuss first, why the Court's oft repeated assertion that the government cannot favor religious practice is false; second, why today's opinion extends the scope of that falsehood even beyond prior cases; and third, why even on the basis of the Court's false assumptions the judgment here is wrong.

## I

[omitted]

## II

As bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve. Today's opinion is no different. In two respects it modifies *Lemon* to ratchet up the Court's hostility to religion. First, the Court justifies inquiry into legislative purpose, not as an end itself, but as a means to ascertain the appearance of the government action to an "objective observer." Because in the Court's view the true danger to be guarded against is that the objective observer would feel like an "outside[r]" or "not [a] full membe[r] of the political community," its inquiry focuses not on the actual purpose of government action, but the "purpose apparent from government action." Under this approach, even if a government could show that its actual purpose was not to advance religion, it would presumably violate the Constitution as long as the Court's objective observer would think otherwise.

I have remarked before that it is an odd jurisprudence that bases the unconstitutionality of a government practice that does not actually advance religion on the hopes of the government that it would do so. But that oddity pales in comparison to the one invited by today's analysis: the legitimacy of a government action with a wholly secular effect would turn on the misperception of an imaginary observer that the government officials behind the action had the intent to advance religion.

Second, the Court replaces *Lemon's* requirement that the government have "a secular . . . purpose," with the heightened requirement that the secular purpose "predominate" over any purpose to advance religion. The Court treats this extension as a natural outgrowth of the longstanding requirement that the government's secular purpose not be a sham, but simple logic shows the two to be unrelated. If the government's proffered secular purpose is not genuine, then the government has no secular purpose at all. The new demand that secular purpose predominate contradicts *Lemon's* more limited requirement, and finds no support in our cases. \*\*\*

I have urged that *Lemon's* purpose prong be abandoned, because (as I have discussed in Part I) even an exclusive purpose to foster or assist religious practice is not necessarily invalidating. But today's extension makes things even worse. By shifting the focus of *Lemon's* purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose, the Court converts what has in the past been a fairly limited inquiry into a rigorous review of the full record. Those responsible for the adoption of the Religion Clauses would surely regard it as a bitter irony that the religious values they designed those Clauses to protect have now become so distasteful to this Court that if they constitute anything more than a subordinate motive for government action they will invalidate it.

### III

Even accepting the Court's *Lemon*-based premises, the displays at issue here were constitutional. \*\*\*

In sum: The first displays did not necessarily evidence an intent to further religious practice; nor did the second displays, or the resolutions authorizing them; and there is in any event no basis for attributing whatever intent motivated the first and second displays to the third. Given the presumption of

regularity that always accompanies our review of official action, the Court has identified no evidence of a purpose to advance religion in a way that is inconsistent with our cases. The Court may well be correct in identifying the third displays as the fruit of a desire to display the Ten Commandments, but neither our cases nor our history support its assertion that such a desire renders the fruit poisonous.

For the foregoing reasons, I would reverse the judgment of the Court of Appeals.

## *Van Orden v. Perry*

545 U.S. 677 (2005)

REHNQUIST, C. J., ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED AN OPINION, IN WHICH SCALIA, KENNEDY, AND THOMAS, JJ., JOINED. SCALIA, J., AND THOMAS, J., FILED CONCURRING OPINIONS. BREYER, J., FILED AN OPINION CONCURRING IN THE JUDGMENT. STEVENS, J., FILED A DISSENTING OPINION, IN WHICH GINSBURG, J., JOINED. O'CONNOR, J., FILED A DISSENTING OPINION. SOUTER, J., FILED A DISSENTING OPINION, IN WHICH STEVENS AND GINSBURG, JJ., JOINED.

CHIEF JUSTICE REHNQUIST ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED AN OPINION, IN WHICH JUSTICE SCALIA, JUSTICE KENNEDY, AND JUSTICE THOMAS JOIN.

The question here is whether the Establishment Clause of the First Amendment allows the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds. We hold that it does.

The 22 acres surrounding the Texas State Capitol contain 17 monuments and 21 historical markers commemorating the "people, ideals, and events that compose Texan identity." The monolith challenged here stands 6-feet high and 3-feet wide. It is located to the north of the Capitol building, between the Capitol and the Supreme Court building. Its primary content is the text of the Ten Commandments. An eagle grasping the American flag, an eye inside of a pyramid, and two small tablets with what appears to be an ancient script are carved above the text of the Ten Commandments. Below the text are two Stars of David and the superimposed Greek letters Chi and Rho, which represent Christ. The bottom of the monument bears the inscription "PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961."

The legislative record surrounding the State's acceptance of the monument from the Eagles--a national social, civic, and patriotic organization--is limited to legislative journal entries. After the monument was accepted, the State selected a site for the monument based on the recommendation of the state organization responsible for maintaining the Capitol grounds. The Eagles paid the cost of erecting the monument, the dedication of which was presided over by two state legislators.

Petitioner Thomas Van Orden is a native Texan and a resident of Austin. At one time he was a licensed lawyer, having graduated from Southern Methodist Law School. Van Orden testified that, since 1995, he has encountered the Ten

Commandments monument during his frequent visits to the Capitol grounds. His visits are typically for the purpose of using the law library in the Supreme Court building, which is located just northwest of the Capitol building.

Forty years after the monument's erection and six years after Van Orden began to encounter the monument frequently, he sued numerous state officials in their official capacities under Rev. Stat. §1979, 42 U.S.C. §1983, seeking both a declaration that the monument's placement violates the Establishment Clause and an injunction requiring its removal. After a bench trial, the District Court held that the monument did not contravene the Establishment Clause. It found that the State had a valid secular purpose in recognizing and commending the Eagles for their efforts to reduce juvenile delinquency. The District Court also determined that a reasonable observer, mindful of the history, purpose, and context, would not conclude that this passive monument conveyed the message that the State was seeking to endorse religion. The Court of Appeals affirmed the District Court's holdings with respect to the monument's purpose and effect. We granted certiorari and now affirm.

Our cases, Januslike, point in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation's history. \*\*\*

The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom.

This case, like all Establishment Clause challenges, presents us with the difficulty of respecting both faces. Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens. One face looks to the past in acknowledgment of our Nation's heritage, while the other looks to the present in demanding a separation between church and state. Reconciling these two faces requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage.\*\*\*

These two faces are evident in representative cases both upholding and invalidating laws under the Establishment Clause. Over the last 25 years, we have sometimes pointed to *Lemon v. Kurtzman* (1971), as providing the governing test in Establishment Clause challenges. Compare *Wallace v. Jaffree*, (1985) (applying *Lemon*), with *Marsh v. Chambers* (1983) (not applying *Lemon*). Yet, just two years after *Lemon* was decided, we noted that the factors identified in *Lemon* serve as "no more than helpful signposts." *Hunt v. McNair* (1973). Many of our recent cases simply have not applied the *Lemon* test. See, e.g., *Zelman v. Simmons-Harris* (2002); *Good News Club v. Milford Central School* (2001). Others have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test.

Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history.

As we explained in *Lynch v. Donnelly* (1984): "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." \*\*\*

Recognition of the role of God in our Nation's heritage has also been reflected in our decisions. We have acknowledged, for example, that "religion has been closely identified with our history and government," *School Dist. of Abington Township v. Schempp*, and that "[t]he history of man is inseparable from the history of religion," *Engel v. Vitale* (1962). This recognition has led us to hold that the Establishment Clause permits a state legislature to open its daily sessions with a prayer by a chaplain paid by the State. *Marsh v. Chambers*. \*\*\* With similar reasoning, we have upheld laws, which originated from one of the Ten Commandments, that prohibited the sale of merchandise on Sunday. *McGowan v. Maryland* (1961).

In this case we are faced with a display of the Ten Commandments on government property outside the Texas State Capitol. Such acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America. We need only look within our own Courtroom. Since 1935, Moses has stood, holding two tablets that reveal portions of the Ten Commandments written in Hebrew, among other lawgivers in the south frieze. Representations of the Ten Commandments adorn the metal gates lining the north and south sides of the Courtroom as well as the doors leading into the Courtroom. Moses also sits on the exterior east facade of the building holding the Ten Commandments tablets.

Similar acknowledgments can be seen throughout a visitor's tour of our Nation's Capital. For example, a large statue of Moses holding the Ten Commandments, alongside a statue of the Apostle Paul, has overlooked the rotunda of the Library of Congress' Jefferson Building since 1897. And the Jefferson Building's Great Reading Room contains a sculpture of a woman beside the Ten Commandments with a quote above her from the Old Testament (Micah 6:8). A medallion with two tablets depicting the Ten Commandments decorates the floor of the National Archives. Inside the Department of Justice, a statue entitled "The Spirit of Law" has two tablets representing the Ten Commandments lying at its feet. In front of the Ronald Reagan Building is another sculpture that includes a depiction of the Ten Commandments. So too a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross, stands outside the federal courthouse that houses both the Court of Appeals and the District Court for the District of Columbia. Moses is also prominently featured in the Chamber of the United States House of Representatives.

Our opinions, like our building, have recognized the role the Decalogue plays in America's heritage. See, e.g., *McGowan v. Maryland* (separate opinion of Frankfurter, J.). The Executive and Legislative Branches have also acknowledged the historical role of the Ten Commandments. See, e.g., Public Papers of the Presidents, Harry S. Truman, 1950, p. 157 (1965); S. Con. Res. 13, 105th Cong., 1st Sess. (1997); H. Con. Res. 31, 105th Cong., 1st Sess. (1997). These displays and recognitions of the Ten Commandments bespeak the rich American tradition of religious acknowledgments.

Of course, the Ten Commandments are religious--they were so viewed at their inception and so remain. The monument, therefore, has religious significance. According to Judeo-Christian belief, the Ten Commandments were given to Moses by God on Mt. Sinai. But Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning, as the foregoing examples demonstrate. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause. See *Lynch v. Donnelly*; *Marsh v. Chambers*; *McGowan v. Maryland*; *Walz v. Tax Comm'n of City of New York* (1970).

There are, of course, limits to the display of religious messages or symbols. For example, we held unconstitutional a Kentucky statute requiring the posting of the Ten Commandments in every public schoolroom. *Stone v. Graham* (1980) (*per curiam*). In the classroom context, we found that the Kentucky statute had an improper and plainly religious purpose. As evidenced by *Stone's* almost exclusive reliance upon two of our school prayer cases, *School Dist. of Abington Township v. Schempp* (1963), and *Engel v. Vitale* (1962), it stands as an example of the fact that we have "been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," *Edwards v. Aguillard* (1987). Compare *Lee v. Weisman* (1992) (holding unconstitutional a prayer at a secondary school graduation), with *Marsh v. Chambers* (upholding a prayer in the state legislature). Indeed, *Edwards v. Aguillard* recognized that *Stone*--along with *Schempp* and *Engel*--was a consequence of the "particular concerns that arise in the context of public elementary and secondary schools." Neither *Stone* itself nor subsequent opinions have indicated that *Stone's* holding would extend to a legislative chamber, see *Marsh v. Chambers, supra*, or to capitol grounds.

The placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in *Stone*, where the text confronted elementary school students every day. Indeed, Van Orden, the petitioner here, apparently walked by the monument for a number of years before bringing this lawsuit. The monument is therefore also quite different from the prayers involved in *Schempp* and *Lee v. Weisman*. Texas has treated her Capitol grounds monuments as representing the several strands in the State's political and legal history. The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government. We cannot say that Texas' display of this monument violates the Establishment Clause of the First Amendment.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, CONCURRING.

I join the opinion of *The Chief Justice* because I think it accurately reflects our current Establishment Clause jurisprudence--or at least the Establishment Clause jurisprudence we currently apply some of the time. I would prefer to reach the same result by adopting an Establishment Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be

consistently applied--the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.

JUSTICE THOMAS, CONCURRING.

\*\*\* This case would be easy if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges,\* and return to the original meaning of the Clause. I have previously suggested that the Clause's text and history "resist incorporation" against the States. If the Establishment Clause does not restrain the States, then it has no application here, where only state action is at issue. \*\*\*

JUSTICE BREYER, CONCURRING IN THE JUDGMENT.

\*\*\* The case before us is a borderline case. It concerns a large granite monument bearing the text of the Ten Commandments located on the grounds of the Texas State Capitol. On the one hand, the Commandments' text undeniably has a religious message, invoking, indeed emphasizing, the Deity. On the other hand, focusing on the text of the Commandments alone cannot conclusively resolve this case. Rather, to determine the message that the text here conveys, we must examine how the text is used. And that inquiry requires us to consider the context of the display.

In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law)--a fact that helps to explain the display of those tablets in dozens of courthouses throughout the Nation, including the Supreme Court of the United States.

Here the tablets have been used as part of a display that communicates not simply a religious message, but a secular message as well. The circumstances surrounding the display's placement on the capitol grounds and its physical setting suggest that the State itself intended the latter, nonreligious aspects of the tablets' message to predominate. And the monument's 40-year history on the Texas state grounds indicates that that has been its effect.

The group that donated the monument, the Fraternal Order of Eagles, a private civic (and primarily secular) organization, while interested in the religious aspect of the Ten Commandments, sought to highlight the Commandments' role in shaping civic morality as part of that organization's efforts to combat juvenile delinquency. See 1961 Tex. Gen. Laws 1995. The Eagles' consultation with a committee composed of members of several faiths in order to find a nonsectarian text underscores the group's ethics-based motives. The tablets, as displayed on the monument, prominently acknowledge that the Eagles donated the display, a factor which, though not sufficient, thereby further distances the State itself from the religious aspect of the Commandments' message.

The physical setting of the monument, moreover, suggests little or nothing of the sacred. The monument sits in a large park containing 17 monuments and 21 historical markers, all designed to illustrate the "ideals" of those who settled in Texas and of those who have lived there since that time. The setting does not readily lend itself to meditation or any other religious activity. But it does provide a context of history and moral ideals. It (together with the display's inscription about its origin) communicates to visitors that the State sought to reflect moral principles, illustrating a relation between ethics and law that the State's citizens, historically speaking, have endorsed. That is to say, the context suggests that the State intended the display's moral message--an illustrative message reflecting the historical "ideals" of Texans--to predominate.

If these factors provide a strong, but not conclusive, indication that the Commandments' text on this monument conveys a predominantly secular message, a further factor is determinative here. As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner). And I am not aware of any evidence suggesting that this was due to a climate of intimidation. Hence, those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to "engage in" any "religious practic[e]," to "compel" any "religious practic[e]," or to "work deterrence" of any "religious belief." *Schempp* (Goldberg, J., concurring). Those 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage.

This case, moreover, is distinguishable from instances where the Court has found Ten Commandments displays impermissible. The display is not on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state. See, e.g., *Weisman*; *Stone v. Graham*. This case also differs from *McCreary County*, where the short (and stormy) history of the courthouse Commandments' displays demonstrates the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them. That history there indicates a governmental effort substantially to promote religion, not simply an effort primarily to reflect, historically, the secular impact of a religiously inspired document. And, in today's world, in a Nation of so many different religious and comparable nonreligious fundamental beliefs, a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that this longstanding, pre-existing monument has not.

\*\*\* But, as I have said, in reaching the conclusion that the Texas display falls on the permissible side of the constitutional line, I rely less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves. This display has stood apparently uncontested for nearly two generations. That experience helps us understand that as a practical matter of *degree* this display is unlikely to prove

divisive. And this matter of degree is, I believe, critical in a borderline case such as this one.

At the same time, to reach a contrary conclusion here, based primarily upon on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid. \*\*\*

JUSTICE STEVENS, WITH WHOM JUSTICE GINSBURG JOINS, DISSENTING.

The sole function of the monument on the grounds of Texas' State Capitol is to display the full text of one version of the Ten Commandments. The monument is not a work of art and does not refer to any event in the history of the State. It is significant because, and only because, it communicates the following message:

“I AM the LORD thy God”

\*\*\* [text of 10 Commandments omitted].

Viewed on its face, Texas' display has no purported connection to God's role in the formation of Texas or the founding of our Nation; nor does it provide the reasonable observer with any basis to guess that it was erected to honor any individual or organization. The message transmitted by Texas' chosen display is quite plain: This State endorses the divine code of the "Judeo-Christian" God.

For those of us who learned to recite the King James version of the text long before we understood the meaning of some of its words, God's Commandments may seem like wise counsel. The question before this Court, however, is whether it is counsel that the State of Texas may proclaim without violating the Establishment Clause of the Constitution. If any fragment of Jefferson's metaphorical "wall of separation between church and State" is to be preserved--if there remains any meaning to the "wholesome 'neutrality' of which this Court's [Establishment Clause] cases speak," --a negative answer to that question is mandatory.

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JUSTICE O'CONNOR, DISSENTING.

For essentially the reasons given by *Justice Souter* (dissenting opinion), as well as the reasons given in my concurrence in *McCreary County v. American Civil Liberties Union of Ky.*, I respectfully dissent.

JUSTICE SOUTER, WITH WHOM JUSTICE STEVENS AND JUSTICE GINSBURG JOIN, DISSENTING.

Although the First Amendment's Religion Clauses have not been read to mandate absolute governmental neutrality toward religion, the Establishment Clause requires neutrality as a general rule, *e.g.*, *Everson v. Board of Ed. of Ewing* (1947), and thus expresses Madison's condemnation of "employ[ing] Religion as an engine of Civil policy," Memorial and Remonstrance Against Religious Assessments. A governmental display of an obviously religious text cannot be squared with neutrality, except in a setting that plausibly indicates that the statement is not placed in view with a predominant purpose on the part of government either to adopt the religious message or to urge its acceptance by others.

\*\*\* Texas seeks to take advantage of the recognition that visual symbol and written text can manifest a secular purpose in secular company, when it argues that its monument (like Moses in the frieze) is not alone and ought to be viewed as only 1 among 17 placed on the 22 acres surrounding the state capitol. Texas, indeed, says that the Capitol grounds are like a museum for a collection of exhibits, the kind of setting that several Members of the Court have said can render the exhibition of religious artifacts permissible, even though in other circumstances their display would be seen as meant to convey a religious message forbidden to the State. So, for example, the Government of the United States does not violate the Establishment Clause by hanging Giotto's Madonna on the wall of the National Gallery.

But 17 monuments with no common appearance, history, or esthetic role scattered over 22 acres is not a museum, and anyone strolling around the lawn would surely take each memorial on its own terms without any dawning sense that some purpose held the miscellany together more coherently than fortuity and the edge of the grass. One monument expresses admiration for pioneer women. One pays respect to the fighters of World War II. And one quotes the God of Abraham whose command is the sanction for moral law. The themes are individual grit, patriotic courage, and God as the source of Jewish and Christian morality; there is no common denominator. In like circumstances, we rejected an argument similar to the State's, noting in *County of Allegheny* that "[t]he presence of Santas or other Christmas decorations elsewhere in the . . . [c]ourthouse, and of the nearby gallery forum, fail to negate the [crèche's] endorsement effect. . . . The record demonstrates . . . that the crèche, with its floral frame, was its own display distinct from any other decorations or exhibitions in the building."

If the State's museum argument does nothing to blunt the religious message and manifestly religious purpose behind it, neither does the plurality's reliance on generalities culled from cases factually different from this one. In fact, it is not until the end of its opinion that the plurality turns to the relevant precedent of *Stone*, a case actually dealing with a display of the Decalogue.

When the plurality finally does confront *Stone*, it tries to avoid the case's obvious applicability by limiting its holding to the classroom setting. The plurality claims to find authority for limiting *Stone*'s reach this way in the opinion's citations of two school-prayer cases, *School Dist. of Abington Township*

v. *Schempp* (1963), and *Engel v. Vitale* (1962). But *Stone* relied on those cases for widely applicable notions, not for any concept specific to schools. The opinion quoted *Schempp's* statements that "it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment;" and that "the place of the Bible as an instrument of religion cannot be gainsaid." And *Engel* was cited to support the proposition that the State was responsible for displaying the Commandments, even though their framed, printed texts were bought with private subscriptions. Thus, the schoolroom was beside the point of the citations, and that is presumably why the *Stone* Court failed to discuss the educational setting, as other opinions had done when school was significant. *Stone* did not, for example, speak of children's impressionability or their captivity as an audience in a school class. In fact, *Stone's* reasoning reached the classroom only in noting the lack of support for the claim that the State had brought the Commandments into schools in order to "integrat[e] [them] into the school curriculum." Accordingly, our numerous prior discussions of *Stone* have never treated its holding as restricted to the classroom.

Nor can the plurality deflect *Stone* by calling the Texas monument "a far more passive use of [the Decalogue] than was the case in *Stone*, where the text confronted elementary school students every day." Placing a monument on the ground is not more "passive" than hanging a sheet of paper on a wall when both contain the same text to be read by anyone who looks at it. The problem in *Stone* was simply that the State was putting the Commandments there to be seen, just as the monument's inscription is there for those who walk by it.

To be sure, Kentucky's compulsory-education law meant that the schoolchildren were forced to see the display every day, whereas many see the monument by choice, and those who customarily walk the Capitol grounds can presumably avoid it if they choose. But in my judgment (and under our often inexact Establishment Clause jurisprudence, such matters often boil down to judgment [as Breyer, J., concurring states], this distinction should make no difference. The monument in this case sits on the grounds of the Texas State Capitol. There is something significant in the common term "statehouse" to refer to a state capitol building: it is the civic home of every one of the State's citizens. If neutrality in religion means something, any citizen should be able to visit that civic home without having to confront religious expressions clearly meant to convey an official religious position that may be at odds with his own religion, or with rejection of religion. See *County of Allegheny (O'Connor, J., concurring in part and concurring in judgment)* ("I agree that the crèche displayed on the Grand Staircase of the Allegheny County Courthouse, the seat of county government, conveys a message to nonadherents of Christianity that they are not full members of the political community .... The display of religious symbols in public areas of core government buildings runs a special risk of making religion relevant, in reality or public perception, to status in the political community" (alteration and internal quotation marks omitted)).

Finally, though this too is a point on which judgment will vary, I do not see a persuasive argument for constitutionality in the plurality's observation that Van Orden's lawsuit comes "[f]orty years after the monument's erection . . . ," an observation that echoes the State's contention that one fact cutting in its favor

is that "the monument stood ... in Austin . . . for some forty years without generating any controversy or litigation." It is not that I think the passage of time is necessarily irrelevant in Establishment Clause analysis. We have approved framing-era practices because they must originally have been understood as constitutionally permissible, *e.g.*, *Marsh v. Chambers* (1983) (legislative prayer), and we have recognized that Sunday laws have grown recognizably secular over time, *McGowan v. Maryland* (1961). There is also an analogous argument, not yet evaluated, that ritualistic religious expression can become so numbing over time that its initial Establishment Clause violation becomes at some point too diminished for notice. But I do not understand any of these to be the State's argument, which rather seems to be that 40 years without a challenge shows that as a factual matter the religious expression is too tepid to provoke a serious reaction and constitute a violation. Perhaps, but the writer of Exodus chapter 20 was not lukewarm, and other explanations may do better in accounting for the late resort to the courts. Suing a State over religion puts nothing in a plaintiff's pocket and can take a great deal out, and even with volunteer litigators to supply time and energy, the risk of social ostracism can be powerfully deterrent. I doubt that a slow walk to the courthouse, even one that took 40 years, is much evidentiary help in applying the Establishment Clause.

I would reverse the judgment of the Court of Appeals.

## Notes

1. The "Ten Commandments Cases" of *McCreary County* and *Van Orden* were decided the same day, at the end of the 2004-2005 Term. The cases reached opposite conclusions: in *McCreary* the Ten Commandments display violated the Establishment Clause and in *Van Orden* the Ten Commandments display did not violate the Establishment Clause. Both cases were closely divided, 5-4, with a Justice who is not usually considered to be a "centrist" or "swing vote" responsible for the difference. Be prepared to discuss the reasoning of this Justice and whether you agree.
2. The Court describes Thomas Van Orden as a native Texan and resident of Austin, who one time was a licensed lawyer, having graduated from Southern Methodist Law School, and who was encountering the Ten Commandments monument during his frequent visits to the Capitol grounds to visit the law library. What do you think motivated Van Orden to bring the challenge?

### **Note: *Salazar v. Buono***

The Court's fragmented and complicated decision in *Salazar v. Buono*, 559 U.S. 700 (2010), considers the long-running and controversial Mojave Desert Cross. In 1934, members of the Veterans of Foreign Wars (VFW) placed a Latin cross on federal land in the Mojave National Preserve to honor American soldiers who died in World War I. Frank Buono, a retired Park Service employee and regular visitor to the Preserve "claimed to be offended" by a religious symbol's presence on federal land. He brought a suit alleging a violation of the First Amendment's Establishment Clause and seeking an injunction requiring the Government to remove the cross. During some of the litigation, the eight foot high cross was "boarded over."

In the litigation's first stage (*Buono I*), the District Court found that Buono had standing to sue and, concluding that the presence of the cross on federal land conveyed an impression of governmental endorsement of religion applying *Lemon v. Kurtzman*, it granted Buono's requested injunctive relief. The District Court did not consider whether the Government's actions regarding the cross had a secular purpose or caused entanglement with religion.

While the Government's appeal was pending, Congress passed the Department of Defense Appropriations Act, 2004, §8121(a) of which directed the Secretary of the Interior to transfer the cross and the land on which it stands to the VFW in exchange for privately owned land elsewhere in the Preserve. Affirming the District Court's judgment both as to standing and on the merits, the Ninth Circuit declined to address the statute's effect on Buono's suit or the statute's constitutionality (*Buono II*). Because the Government did not seek review by this Court, the Court of Appeals' judgment became final. Buono then returned to the District Court seeking injunctive relief against the land transfer, either through enforcement or modification of the 2002 injunction. In 2005, that court rejected the Government's claim that the transfer was a bona fide attempt to comply with the injunction, concluding, instead, that it was actually an invalid attempt to keep the cross on display. The court granted Buono's motion to enforce the 2002 injunction; denied as moot his motion to amend it; and permanently enjoined the Government from implementing the land-transfer statute (*Buono III*). The Ninth Circuit again affirmed, largely following the District Court's reasoning.

The Court's judgment reversed and remanded the case.

The plurality opinion, authored by Justice Kennedy was joined in full only by Chief Justice Roberts, and only in part by Justice Alito. Kennedy concluded that Buono has standing to maintain this action. Whatever

the validity of the Government's argument that Buono's asserted injury—offense at a religious symbol's presence on federal land—is not personal to him and so does not confer Article III standing, that argument is not available at this stage of the litigation. Buono's entitlement to an injunction having been established in Buono I and II, he sought in Buono III to prevent the Government from frustrating or evading that injunction. His interests in doing so were sufficiently personal and concrete to support his standing, given the rights he obtained under the earlier decree against the same party as to the same cross and the same land. The Government's contention that Buono sought to extend, rather than to enforce, the 2002 injunction is not an argument about standing, but about the merits of the District Court's order.

Justice Kennedy's opinion also concluded that the District Court erred in enjoining the Government from implementing the land-transfer statute on the premise that the relief was necessary to protect Buono's rights under the 2002 injunction. Kennedy reasoned that a court may order an injunction only after taking into account all the circumstances bearing on the need for prospective relief. Here, the District Court did not engage in the appropriate inquiry. The land-transfer statute was a substantial change in circumstances bearing on the propriety of the requested relief. By dismissing as illicit the motives of Congress in passing it, the District Court took insufficient account of the context in which the statute was enacted and the reasons for its passage. Placement of the cross on federal land by private persons was not an attempt to set the state's imprimatur on a particular creed. Rather, the intent was simply to honor fallen soldiers. Moreover, the cross stood for nearly seven decades before the statute was enacted, by which time the cross and the cause it commemorated had become entwined in the public consciousness. The 2002 injunction thus presented the Government with a dilemma. It could not maintain the cross without violating the injunction, but it could not remove the cross without conveying disrespect for those the cross was seen as honoring. Deeming neither alternative satisfactory, Congress enacted the land-transfer statute. The statute embodied a legislative judgment that this dispute is best resolved through a framework and policy of accommodation. The statute should not have been dismissed as an evasion, for it brought about a change of law and a congressional statement of policy applicable to the case.

Thus, because legislative action undermined the basis for previous relief, the relevant question was whether an ongoing exercise of the court's equitable authority is supported by the prior showing of illegality, judged against the claim that changed circumstances render prospective relief inappropriate. The District Court granted the 2002 injunction based solely on its conclusion that the presence of the cross on federal land conveyed an impression of governmental endorsement of religion, and the Ninth Circuit affirmed on the same grounds. Neither court considered

whether the Government had acted based on an improper purpose. Given this sole reliance on perception, any further relief grounded on the injunction should have rested on the same basis. But the District Court used an injunction granted for one reason (perceived governmental endorsement) as the basis for enjoining conduct that was alleged to be objectionable for a different reason (an illicit governmental purpose). Ordering relief under such circumstances was improper. The court failed to consider whether the change in law and circumstances effected by the land-transfer statute had rendered the “reasonable observer” standard inappropriate to resolve the dispute. Nor did the court attempt to reassess *Buono I*’s findings in light of the accommodation policy embraced by Congress. Rather, it concentrated solely on the religious aspects of the cross, divorced from its background and context. The same respect for a coordinate branch of Government that forbids striking down an Act of Congress except upon a clear showing of unconstitutionality, requires that a congressional command be given effect unless no legal alternative exists. Even if, contrary to the congressional judgment, the land transfer were thought an insufficient accommodation in light of the earlier endorsement finding, it was incumbent upon the District Court to consider less drastic relief than complete invalidation of the statute. On remand, that court should conduct a proper inquiry into the continued necessity for injunctive relief in light of the statute.

Concurring, Justice Alito concluded that this case should not be remanded for the lower courts to decide whether implementation of the land-transfer statute would violate the District Court’s injunction or the Establishment Clause. Rather, because the factual record has been sufficiently developed to permit resolution of these questions, he would decide them and hold that the statute may be implemented. The case’s singular circumstances presented Congress with a delicate problem. Its solution was an approach designed to eliminate any perception of religious sponsorship stemming from the location of the cross on federally owned land, while avoiding the disturbing symbolism that some would associate with the destruction of this historic monument. The mechanism Congress selected is quite common in the West, a “land exchange,” whereby ownership of the land on which the cross is located would be transferred to the VFW in exchange for another nearby parcel of equal value. The land transfer would not violate the District Court injunction, the obvious meaning of which was simply that the Government could not allow the cross to remain on federal land. Nor would the statute’s implementation constitute an endorsement of religion in violation of the Establishment Clause. The so-called “endorsement test” views a challenged religious display through the eyes of a hypothetical reasonable observer aware of the history and all other pertinent facts relating to the display. Here, therefore, this observer would be familiar

with the monument's origin and history and thereby appreciate that the transfer represents an effort by Congress to address a unique situation and to find a solution that best accommodates conflicting concerns. Finally, the statute was not enacted for the illicit purpose of embracing the monument's religious message but to commemorate the Nation's war dead and to avoid the disturbing symbolism that would have been created by the monument's destruction.

Justice Scalia, joined by Justice Thomas, concluded that this Court need not—indeed, cannot—decide this case's merits because Buono lacks Article III standing to pursue the relief he seeks, which is not enforcement of the original injunction but expansion of it. By enjoining the Government from implementing the statute at issue, the District Court's 2005 order went well beyond the original injunction's proscription of the cross's display on public property. Because Buono seeks new relief, he must show that he has standing to pursue that relief by demonstrating that blocking the land transfer will “redress or prevent an actual or imminently threatened injury to [him] caused by private or official violation of law.” He has failed, however, to allege any such injury. Even assuming that being offended by a religious display constitutes a cognizable injury, it is merely speculative whether the cross will remain in place, and in any event Buono has made clear, by admitting he has no objection to Christian symbols on private property, that he will not be offended. Neither district courts' discretion to expand injunctions they have issued nor this District Court's characterization of its 2005 order as merely enforcing the existing injunction makes any difference. If in fact a court awards new relief, it must have Article III jurisdiction to do so.

Justice Stevens, dissenting, joined by Sotomayor and Ginsberg, concluded that the District Court was right to enforce its prior judgment by enjoining Congress' proposed remedy—a remedy that was engineered to leave the cross intact and that did not alter its basic meaning. While “the Nation should memorialize the service of those who fought and died in World War I,” it “cannot lawfully do so by continued endorsement of a starkly sectarian message” : “A Latin cross necessarily symbolizes one of the most important tenets upon which believers in a benevolent Creator, as well as nonbelievers, are known to differ.”

Justice Breyer, dissenting, concluded that the Establishment Clause question was not properly before the Court. He stated that the only question was whether the law permits the District Court to hold that the land transfer (presumably along with the subsequent public display of the cross) falls within the scope of its original injunctive order, an order that says the Government must not “permi[t] the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve.” For Breyer, the District Court was correct, based “not in the Constitution but in cases that concern the law of injunctions.”

Soon after the Court's decision, the cross was "stolen."

### III. The Problem of Establishment Clause Standing

As *Salazar v. Buono* illustrates, the problem of "standing" can be a challenging one in Establishment Clause cases. Where is the "injury"? Is it simply because one is a taxpayer and one's money has been used to support religion? In *Flast v. Cohen*, 392 U.S. 83 (1968), the Court developed a test that liberalized - - - or seemed to liberalize - - - taxpayer standing in Establishment Clause challenges. The Court's closely divided and most recent decision on Establishment Clause standing, regarding a tax subsidy to religious schools, seriously undermines *Flast v. Cohen*.

#### *Arizona Christian School Tuition Organization v. Winn*

563 U.S. \_\_\_ (2011)

KENNEDY, J., DELIVERED THE OPINION OF THE COURT, IN WHICH ROBERTS, C. J., AND SCALIA, THOMAS, AND ALITO, JJ., JOINED. SCALIA, J., FILED A CONCURRING OPINION, IN WHICH THOMAS, J., JOINED. KAGAN, J., FILED A DISSENTING OPINION, IN WHICH GINSBURG, BREYER, AND SOTOMAYOR, JJ., JOINED.

JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

Arizona provides tax credits for contributions to school tuition organizations, or STOs. STOs use these contributions to provide scholarships to students attending private schools, many of which are religious. Respondents are a group of Arizona taxpayers who challenge the STO tax credit as a violation of Establishment Clause principles under the First and Fourteenth Amendments. After the Arizona Supreme Court rejected a similar Establishment Clause claim on the merits, respondents sought intervention from the Federal Judiciary.

To obtain a determination on the merits in federal court, parties seeking relief must show that they have standing under Article III of the Constitution. Standing in Establishment Clause cases may be shown in various ways. Some plaintiffs may demonstrate standing based on the direct harm of what is claimed to be an establishment of religion, such as a mandatory prayer in a public school classroom. Other plaintiffs may demonstrate standing on the ground that they have incurred a cost or been denied a benefit on account of their religion. Those costs and benefits can result from alleged discrimination in the tax code, such as when the availability of a tax exemption is conditioned on religious affiliation.

For their part, respondents contend that they have standing to challenge Arizona's STO tax credit for one and only one reason: because they are Arizona taxpayers. But the mere fact that a plaintiff is a taxpayer is not generally deemed sufficient to establish standing in federal court. To overcome that rule, respondents must rely on an exception created in *Flast v. Cohen* (1968). For the

reasons discussed below, respondents cannot take advantage of *Flast's* narrow exception to the general rule against taxpayer standing. As a consequence, respondents lacked standing to commence this action, and their suit must be dismissed for want of jurisdiction.

## I

Respondents challenged §43-1089, a provision of the Arizona Tax Code. Section 43-1089 allows Arizona taxpayers to obtain dollar-for-dollar tax credits of up to \$500 per person and \$1,000 per married couple for contributions to STOs. If the credit exceeds an individual's tax liability, the credit's unused portion can be carried forward up to five years. Under a version of §43-1089 in effect during the pendency of this lawsuit, a charitable organization could be deemed an STO only upon certain conditions. The organization was required to be exempt from federal taxation under §501(c)(3) of the Internal Revenue Code of 1986. It could not limit its scholarships to students attending only one school. And it had to allocate "at least ninety per cent of its annual revenue for educational scholarships or tuition grants" to children attending qualified schools. A "qualified school," in turn, was defined in part as a private school in Arizona that did not discriminate on the basis of race, color, handicap, familial status, or national origin.

In an earlier lawsuit filed in state court, Arizona taxpayers challenged §43-1089, invoking both the United States Constitution and the Arizona Constitution. The Arizona Supreme Court rejected the taxpayers' claims on the merits. This Court denied certiorari.

The present action was filed in the United States District Court for the District of Arizona. It named the Director of the Arizona Department of Revenue as defendant. The Arizona taxpayers who brought the suit claimed that §43-1089 violates the Establishment Clause of the First Amendment, as incorporated against the States by the Fourteenth Amendment. Respondents alleged that §43-1089 allows STOs "to use State income-tax revenues to pay tuition for students at religious schools," some of which "discriminate on the basis of religion in selecting students." Respondents requested, among other forms of relief, an injunction against the issuance of §43-1089 tax credits for contributions to religious STOs. The District Court dismissed respondents' suit as jurisdictionally barred by the Tax Injunction Act, 28 U.S.C. §1341. The Court of Appeals reversed. This Court agreed with the Court of Appeals and affirmed. *Hibbs v. Winn* (2004).

On remand, the Arizona Christian School Tuition Organization and other interested parties intervened. The District Court once more dismissed respondents' suit, this time for failure to state a claim. Once again, the Court of Appeals reversed. It held that respondents had standing under *Flast v. Cohen*. Reaching the merits, the Court of Appeals ruled that respondents had stated a claim that §43-1089 violated the Establishment Clause of the First Amendment. The full Court of Appeals denied en banc review, with eight judges dissenting. This Court granted certiorari.

## II

The concept and operation of the separation of powers in our National Government have their principal foundation in the first three Articles of the

Constitution. Under Article III, the Federal Judiciary is vested with the "Power" to resolve not questions and issues but "Cases" or "Controversies." \*\*\*

### III

To state a case or controversy under Article III, a plaintiff must establish standing. *Allen v. Wright* (1984). The minimum constitutional requirements for standing were explained in *Lujan v. Defenders of Wildlife* (1992).

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

In requiring a particular injury, the Court meant "that the injury must affect the plaintiff in a personal and individual way." The question now before the Court is whether respondents, the plaintiffs in the trial court, satisfy the requisite elements of standing.

### A

Respondents suggest that their status as Arizona taxpayers provides them with standing to challenge the STO tax credit. Absent special circumstances, however, standing cannot be based on a plaintiff's mere status as a taxpayer. This Court has rejected the general proposition that an individual who has paid taxes has a "continuing, legally cognizable interest in ensuring that those funds are not *used* by the Government in a way that violates the Constitution." *Hein v. Freedom From Religion Foundation, Inc.* (2007) (plurality opinion). This precept has been referred to as the rule against taxpayer standing.

The doctrinal basis for the rule was discussed in *Frothingham v. Mellon* (1923) (decided with *Massachusetts v. Mellon*). There, a taxpayer-plaintiff had alleged that certain federal expenditures were in excess of congressional authority under the Constitution. The plaintiff argued that she had standing to raise her claim because she had an interest in the Government Treasury and because the allegedly unconstitutional expenditure of Government funds would affect her personal tax liability. The Court rejected those arguments. The "effect upon future taxation, of any payment out of funds," was too "remote, fluctuating and uncertain" to give rise to a case or controversy. And the taxpayer-plaintiff's "interest in the moneys of the Treasury," the Court recognized, was necessarily "shared with millions of others." As a consequence, *Frothingham* held that the taxpayer-plaintiff had not presented a "judicial controversy" appropriate for resolution in federal court but rather a "matter of public ... concern" that could be pursued only through the political process.

In a second pertinent case, *Doremus v. Board of Ed. of Hawthorne* (1952), the Court considered *Frothingham's* prohibition on taxpayer standing in connection with an alleged Establishment Clause violation. A New Jersey statute had provided that public school teachers would read Bible verses to their students at the start of each schoolday. A plaintiff sought to have the law enjoined,

asserting standing based on her status as a taxpayer. Writing for the Court, Justice Jackson reiterated the foundational role that Article III standing plays in our separation of powers. \*\*\*

It followed that the plaintiff's allegations did not give rise to a case or controversy subject to judicial resolution under Article III. \*\*\*

Difficulties persist even if one assumes that an expenditure or tax benefit depletes the government's coffers. \*\*\*

These well-established principles apply to the present cases. Respondents may be right that Arizona's STO tax credits have an estimated annual value of over \$50 million. The education of its young people is, of course, one of the State's principal missions and responsibilities; and the consequent costs will make up a significant portion of the state budget. That, however, is just the beginning of the analysis.

By helping students obtain scholarships to private schools, both religious and secular, the STO program might relieve the burden placed on Arizona's public schools. The result could be an immediate and permanent cost savings for the State. Underscoring the potential financial benefits of the STO program, the average value of an STO scholarship may be far less than the average cost of educating an Arizona public school student. Because it encourages scholarships for attendance at private schools, the STO tax credit may not cause the State to incur any financial loss.

Even assuming the STO tax credit has an adverse effect on Arizona's annual budget, problems would remain. \*\*\*

Each of the inferential steps to show causation and redressability depends on premises as to which there remains considerable doubt. The taxpayers have not shown that any interest they have in protecting the State Treasury would be advanced. Even were they to show some closer link, that interest is still of a general character, not particular to certain persons. Nor have the taxpayers shown that higher taxes will result from the tuition credit scheme. The rule against taxpayer standing, a rule designed both to avoid speculation and to insist on particular injury, applies to respondents' lawsuit. The taxpayers, then, must rely on an exception to the rule, an exception next to be considered.

## B

The primary contention of respondents, of course, is that, despite the general rule that taxpayers lack standing to object to expenditures alleged to be unconstitutional, their suit falls within the exception established by *Flast v. Cohen*. It must be noted at the outset that, as this Court has explained, *Flast's* holding provides a "narrow exception" to "the general rule against taxpayer standing." *Bowen v. Kendrick* (1988).

At issue in *Flast* was the standing of federal taxpayers to object, on First Amendment grounds, to a congressional statute that allowed expenditures of federal funds from the General Treasury to support, among other programs, "instruction in reading, arithmetic, and other subjects in religious schools, and to purchase textbooks and other instructional materials for use in such schools." *Flast* held that taxpayers have standing when two conditions are met.

The first condition is that there must be a "logical link" between the plaintiff's taxpayer status "and the type of legislative enactment attacked." This condition was not satisfied in *Doremus* because the statute challenged in that case--providing for the recitation of Bible passages in public schools--involved at most an "incidental expenditure of tax funds." In *Flast*, by contrast, the allegation was that the Federal Government violated the Establishment Clause in the exercise of its legislative authority both to collect and spend tax dollars. In the decades since *Flast*, the Court has been careful to enforce this requirement. See *Hein*, 551 U.S. 587 (no standing under *Flast* to challenge federal executive actions funded by general appropriations); *Valley Forge*, 454 U.S. 464 (no standing under *Flast* to challenge an agency's decision to transfer a parcel of federal property pursuant to the Property Clause).

The second condition for standing under *Flast* is that there must be "a nexus" between the plaintiff's taxpayer status and "the precise nature of the constitutional infringement alleged." This condition was deemed satisfied in *Flast* based on the allegation that Government funds had been spent on an outlay for religion in contravention of the Establishment Clause. In *Frothingham*, by contrast, the claim was that Congress had exceeded its constitutional authority without regard to any specific prohibition. Confirming that *Flast* turned on the unique features of Establishment Clause violations, this Court has "declined to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause." *Hein* (plurality opinion).

After stating the two conditions for taxpayer standing, *Flast* considered them together, explaining that individuals suffer a particular injury for standing purposes when, in violation of the Establishment Clause and by means of "the taxing and spending power," their property is transferred through the Government's Treasury to a sectarian entity. As *Flast* put it: "The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power." *Flast* thus "understood the 'injury' alleged in Establishment Clause challenges to federal spending to be the very 'extract[ion] and spen[din]g' of 'tax money' in aid of religion alleged by a plaintiff." "Such an injury," *Flast* continued, is unlike "generalized grievances about the conduct of government" and so is "appropriate for judicial redress."

*Flast* found support for its finding of personal injury in "the history of the Establishment Clause," particularly James Madison's Memorial and Remonstrance Against Religious Assessments. In 1785, the General Assembly of the Commonwealth of Virginia considered a "tax levy to support teachers of the Christian religion." Under the proposed assessment bill, taxpayers would direct their payments to Christian societies of their choosing. If a taxpayer made no such choice, the General Assembly was to divert his funds to "seminaries of learning," at least some of which "undoubtedly would have been religious in character." *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) (Souter, J., dissenting). However the "seminaries" provision might have functioned in practice, critics took the position that the proposed bill threatened compulsory religious contributions.

In the Memorial and Remonstrance, Madison objected to the proposed assessment on the ground that it would coerce a form of religious devotion in violation of conscience. In Madison's view, government should not "force a citizen to contribute three pence only of his property for the support of any one establishment." *Flast* (quoting 2 Writings of James Madison). This Madisonian prohibition does not depend on the amount of property conscripted for sectarian ends. Any such taking, even one amounting to "three pence only," violates conscience. The proposed bill ultimately died in committee; and the General Assembly instead enacted legislation forbidding "compelled" support of religion. See A Bill for Establishing Religious Freedom, reprinted in 2 PAPERS OF THOMAS JEFFERSON; see also *Flast*. Madison himself went on to become, as *Flast* put it, "the leading architect of the religion clauses of the First Amendment." *Flast* was thus informed by "the specific evils" identified in the public arguments of "those who drafted the Establishment Clause and fought for its adoption."

Respondents contend that these principles demonstrate their standing to challenge the STO tax credit. In their view the tax credit is, for *Flast* purposes, best understood as a governmental expenditure. That is incorrect.

It is easy to see that tax credits and governmental expenditures can have similar economic consequences, at least for beneficiaries whose tax liability is sufficiently large to take full advantage of the credit. Yet tax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities. A dissenter whose tax dollars are "extracted and spent" knows that he has in some small measure been made to contribute to an establishment in violation of conscience. In that instance the taxpayer's direct and particular connection with the establishment does not depend on economic speculation or political conjecture. The connection would exist even if the conscientious dissenter's tax liability were unaffected or reduced. When the government declines to impose a tax, by contrast, there is no such connection between dissenting taxpayer and alleged establishment. Any financial injury remains speculative. And awarding some citizens a tax credit allows other citizens to retain control over their own funds in accordance with their own consciences.

The distinction between governmental expenditures and tax credits refutes respondents' assertion of standing. When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers. Arizona's §43-1089 does not "extrac[t] and spen[d]" a conscientious dissenter's funds in service of an establishment, or "'force a citizen to contribute three pence only of his property'" to a sectarian organization. On the contrary, respondents and other Arizona taxpayers remain free to pay their own tax bills, without contributing to an STO. Respondents are likewise able to contribute to an STO of their choice, either religious or secular. And respondents also have the option of contributing to other charitable organizations, in which case respondents may become eligible for a tax deduction or a different tax credit. The STO tax credit is not tantamount to a religious tax or to a tithe and does not visit the injury identified in *Flast*. It follows that respondents have neither alleged an injury for standing purposes under general rules nor met the *Flast* exception. Finding standing under these circumstances would be more than the extension of *Flast*

"to the limits of its logic." *Hein* (plurality opinion). It would be a departure from *Flast's* stated rationale.

Furthermore, respondents cannot satisfy the requirements of causation and redressability. When the government collects and spends taxpayer money, governmental choices are responsible for the transfer of wealth. In that case a resulting subsidy of religious activity is, for purposes of *Flast*, traceable to the government's expenditures. And an injunction against those expenditures would address the objections of conscience raised by taxpayer-plaintiffs. Here, by contrast, contributions result from the decisions of private taxpayers regarding their own funds. Private citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute to STOs. While the State, at the outset, affords the opportunity to create and contribute to an STO, the tax credit system is implemented by private action and with no state intervention. Objecting taxpayers know that their fellow citizens, not the State, decide to contribute and in fact make the contribution. These considerations prevent any injury the objectors may suffer from being fairly traceable to the government. And while an injunction against application of the tax credit most likely would reduce contributions to STOs, that remedy would not affect noncontributing taxpayers or their tax payments. As a result, any injury suffered by respondents would not be remedied by an injunction limiting the tax credit's operation.

Resisting this conclusion, respondents suggest that Arizonans who benefit from §43-1089 tax credits in effect are paying their state income tax to STOs. In respondents' view, tax credits give rise to standing even if tax deductions do not, since only the former yield a dollar-for-dollar reduction in final tax liability. But what matters under *Flast* is whether sectarian STOs receive government funds drawn from general tax revenues, so that moneys have been extracted from a citizen and handed to a religious institution in violation of the citizen's conscience. Under that inquiry, respondents' argument fails. Like contributions that lead to charitable tax deductions, contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations. Respondents' contrary position assumes that income should be treated as if it were government property even if it has not come into the tax collector's hands. That premise finds no basis in standing jurisprudence. Private bank accounts cannot be equated with the Arizona State Treasury.

The conclusion that the *Flast* exception is inapplicable at first may seem in tension with several earlier cases, all addressing Establishment Clause issues and all decided after *Flast*. See *Mueller*; *Nyquist v. Mauclet*, (1977); *Hunt v. McNair* (1973); *Walz v. Tax Comm'n of City of New York* (1970). But those cases do not mention standing and so are not contrary to the conclusion reached here. When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed. The Court would risk error if it relied on assumptions that have gone unstated and unexamined.

Furthermore, if a law or practice, including a tax credit, disadvantages a particular religious group or a particular nonreligious group, the disadvantaged party would not have to rely on *Flast* to obtain redress for a resulting injury. Because standing in Establishment Clause cases can be shown in various ways, it is far from clear that any nonbinding *sub silentio* holdings in the cases

respondents cite would have depended on *Flast*. See, e.g., *Walz* (explaining that the plaintiff was an "owner of real estate" in New York City who objected to the city's issuance of "property tax exemptions to religious organizations"). That the plaintiffs in those cases could have advanced arguments for jurisdiction independent of *Flast* makes it particularly inappropriate to determine whether or why standing should have been found where the issue was left unexplored.

If an establishment of religion is alleged to cause real injury to particular individuals, the federal courts may adjudicate the matter. Like other constitutional provisions, the Establishment Clause acquires substance and meaning when explained, elaborated, and enforced in the context of actual disputes. That reality underlies the case-or-controversy requirement, a requirement that has not been satisfied here.

Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them. In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so. Making the Article III standing inquiry all the more necessary are the significant implications of constitutional litigation, which can result in rules of wide applicability that are beyond Congress' power to change.

The present suit serves as an illustration of these principles. The fact that respondents are state taxpayers does not give them standing to challenge the subsidies that §43-1089 allegedly provides to religious STOs. To alter the rules of standing or weaken their requisite elements would be inconsistent with the case-or-controversy limitation on federal jurisdiction imposed by Article III.

The judgment of the Court of Appeals is reversed.

*It is so ordered.*

JUSTICE SCALIA, WITH WHOM JUSTICE THOMAS JOINS, CONCURRING.

Taxpayers ordinarily do not have standing to challenge federal or state expenditures that allegedly violate the Constitution. In *Flast v. Cohen* (1968), we created a narrow exception for taxpayers raising Establishment Clause challenges to government expenditures. Today's majority and dissent struggle with whether respondents' challenge to the Arizona tuition tax credit falls within that narrow exception. Under a principled reading of Article III, their struggles are unnecessary. *Flast* is an anomaly in our jurisprudence, irreconcilable with the Article III restrictions on federal judicial power that our opinions have established. I would repudiate that misguided decision and enforce the Constitution. See *Hein v. Freedom From Religion Foundation, Inc.*, (2007) (*Scalia, J.*, concurring in judgment).

I nevertheless join the Court's opinion because it finds respondents lack standing by applying *Flast* rather than distinguishing it away on unprincipled grounds.

JUSTICE KAGAN, WITH WHOM JUSTICE GINSBURG, JUSTICE BREYER, AND JUSTICE SOTOMAYOR JOIN, DISSENTING.

Since its inception, the Arizona private-school-tuition tax credit has cost the State, by its own estimate, nearly \$350 million in diverted tax revenue. The Arizona taxpayers who instituted this suit (collectively, Plaintiffs) allege that the use of these funds to subsidize school tuition organizations (STOs) breaches the Establishment Clause's promise of religious neutrality. Many of these STOs, the Plaintiffs claim, discriminate on the basis of a child's religion when awarding scholarships.

For almost half a century, litigants like the Plaintiffs have obtained judicial review of claims that the government has used its taxing and spending power in violation of the Establishment Clause. Beginning in *Flast v. Cohen* (1968), and continuing in case after case for over four decades, this Court and others have exercised jurisdiction to decide taxpayer-initiated challenges not materially different from this one. Not every suit has succeeded on the merits, or should have. But every taxpayer-plaintiff has had her day in court to contest the government's financing of religious activity.

Today, the Court breaks from this precedent by refusing to hear taxpayers' claims that the government has unconstitutionally subsidized religion through its tax system. These litigants lack standing, the majority holds, because the funding of religion they challenge comes from a tax credit, rather than an appropriation. A tax credit, the Court asserts, does not injure objecting taxpayers, because it "does not extract and spend [their] funds in service of an establishment."

This novel distinction in standing law between appropriations and tax expenditures has as little basis in principle as it has in our precedent. Cash grants and targeted tax breaks are means of accomplishing the same government objective--to provide financial support to select individuals or organizations. Taxpayers who oppose state aid of religion have equal reason to protest whether that aid flows from the one form of subsidy or the other. Either way, the government has financed the religious activity. And so either way, taxpayers should be able to challenge the subsidy.

Still worse, the Court's arbitrary distinction threatens to eliminate *all* occasions for a taxpayer to contest the government's monetary support of religion. Precisely because appropriations and tax breaks can achieve identical objectives, the government can easily substitute one for the other. Today's opinion thus enables the government to end-run *Flast's* guarantee of access to the Judiciary. From now on, the government need follow just one simple rule--subsidize through the tax system--to preclude taxpayer challenges to state funding of religion.

And that result--the effective demise of taxpayer standing--will diminish the Establishment Clause's force and meaning. Sometimes, no one other than taxpayers has suffered the injury necessary to challenge government sponsorship of religion. Today's holding therefore will prevent federal courts from determining whether some subsidies to sectarian organizations comport

with our Constitution's guarantee of religious neutrality. Because I believe these challenges warrant consideration on the merits, I respectfully dissent from the Court's decision.

## I

As the majority recounts, this Court has held that paying taxes usually does not give an individual Article III standing to challenge government action. Taxpayers cannot demonstrate the requisite injury because each person's "interest in the moneys of the Treasury ... is comparatively minute and indeterminable." *Frothingham v. Mellon* (1923). Given the size and complexity of government budgets, it is a "fiction" to contend that an unlawful expenditure causes an individual "any measurable economic harm." *Hein v. Freedom From Religion Foundation, Inc.* (2007) (plurality opinion). Nor can taxpayers in the ordinary case establish causation (*i.e.*, that the disputed government measure affects their tax burden) or redressability (*i.e.*, that a judicial remedy would result in tax reductions). On these points, all agree.

The disagreement concerns their relevance here. This case is not about the general prohibition on taxpayer standing, and cannot be resolved on that basis. This case is instead about the exception to the rule--the principle established decades ago in *Flast* that taxpayers *may* challenge certain government actions alleged to violate the Establishment Clause. The Plaintiffs have standing if their suit meets *Flast's* requirements--and it does so under any fair reading of that decision.

Taxpayers have standing, *Flast* held, when they allege that a statute enacted pursuant to the legislature's taxing and spending power violates the Establishment Clause. In this situation, the Court explained, a plaintiff can establish a two-part nexus "between the [taxpayer] status asserted and the claim sought to be adjudicated." First, by challenging legislative action taken under the taxing and spending clause, the taxpayer shows "a logical link between [her] status and the type of ... enactment attacked." Second, by invoking the Establishment Clause--a specific limitation on the legislature's taxing and spending power--the taxpayer demonstrates "a nexus between [her] status and the precise nature of the constitutional infringement alleged." Because of these connections, *Flast* held, taxpayers alleging that the government is using tax proceeds to aid religion have "the necessary stake ... in the outcome of the litigation to satisfy Article III." They are "proper and appropriate part[ies]"--indeed, often the only possible parties--to seek judicial enforcement of the Constitution's guarantee of religious neutrality.

That simple restatement of the *Flast* standard should be enough to establish that the Plaintiffs have standing. They attack a provision of the Arizona tax code that the legislature enacted pursuant to the State Constitution's taxing and spending clause (*Flast* nexus, part 1). And they allege that this provision violates the Establishment Clause (*Flast* nexus, part 2). By satisfying both of *Flast's* conditions, the Plaintiffs have demonstrated their "stake as taxpayers" in enforcing constitutional restraints on the provision of aid to STOs. Indeed, the connection in this case between "the [taxpayer] status asserted and the claim sought to be adjudicated," could not be any tighter: As noted when this Court previously addressed a different issue in this lawsuit, the Plaintiffs invoke the Establishment Clause to challenge "an integral part of the State's tax statute"

that "is reflected on state *tax forms*" and that "is part of the calculus necessary to determine *tax liability*." *Hibbs v. Winn* (2004) (*Winn I*) (Kennedy, J., dissenting) (emphasis added). Finding standing here is merely a matter of applying *Flast*. I would therefore affirm the Court of Appeals' determination (not questioned even by the eight judges who called for rehearing en banc on the merits) that the Plaintiffs can pursue their claim in federal court.

## II

The majority reaches a contrary decision by distinguishing between two methods of financing religion: A taxpayer has standing to challenge state subsidies to religion, the Court announces, when the mechanism used is an appropriation, but not when the mechanism is a targeted tax break, otherwise called a "tax expenditure."<sup>1</sup> In the former case, but not in the latter, the Court declares, the taxpayer suffers cognizable injury.

But this distinction finds no support in case law, and just as little in reason. In the decades since *Flast*, no court--not one--has differentiated between appropriations and tax expenditures in deciding whether litigants have standing. Over and over again, courts (including this one) have faced Establishment Clause challenges to tax credits, deductions, and exemptions; over and over again, these courts have reached the merits of these claims. And that is for a simple reason: Taxpayers experience the same injury for standing purposes whether government subsidization of religion takes the form of a cash grant or a tax measure. The only rationale the majority offers for its newfound distinction--that grants, but not tax expenditures, somehow come from a complaining taxpayer's own wallet--cannot bear the weight the Court places on it. If *Flast* is still good law--and the majority today says nothing to the contrary--then the Plaintiffs should be able to pursue their claim on the merits.

## A

Until today, this Court has never so much as hinted that litigants in the same shoes as the Plaintiffs lack standing under *Flast*. To the contrary: We have faced the identical situation five times--including in a prior incarnation of this very case!--and we have five times resolved the suit without questioning the plaintiffs' standing. Lower federal courts have followed our example and handled the matter in the same way. I count 14 separate cases (involving 20 appellate and district courts) that adjudicated taxpayer challenges to tax expenditures alleged to violate the Establishment Clause. I suspect I have missed a few. I have not found any instance of a court dismissing such a claim for lack of standing.

Consider the five cases in which this Court entertained suits filed by taxpayers alleging that tax expenditures unlawfully subsidized religion. We first took up such a challenge in *Walz v. Tax Comm'n of City of New York* (1970), where we upheld the constitutionality of a property tax exemption for religious organizations. Next, in *Hunt v. McNair* (1973), we decided that the Establishment Clause permitted a state agency to issue tax-exempt bonds to sectarian institutions. The same day, in *Committee for Public Ed. & Religious Liberty v. Nyquist* (1973), we struck down a state tax deduction for parents who paid tuition at religious and other private schools. A decade later, in *Mueller v. Allen* (1983), we considered, but this time rejected, a similar Establishment Clause challenge to a state tax deduction for expenses incurred in attending

such schools. And most recently, we decided a preliminary issue *in this very case*, ruling that the Tax Injunction Act, 28 U.S.C. §1341, posed no barrier to the Plaintiffs' litigation of their Establishment Clause claim. See *Winn I*. The Court in all five of these cases divided sharply on the merits of the disputes. But in one respect, the Justices were unanimous: Not a single one thought to question the litigants' standing.

The Solicitor General, participating here as *amicus curiae*, conceded at oral argument that under the Federal Government's--and now the Court's--view of taxpayer standing, each of these five cases should have been dismissed for lack of jurisdiction.

[The Court:] So if you are right, ... the Court was without authority to decide *Walz, Nyquist, Hunt, Mueller*, [and] *Hibbs* [v. *Winn*,] this very case, just a few years ago?....

[Solicitor General:] Right.... [M]y answer to you is yes.

[The Court:] I just want to make sure I heard your answer to the--you said the answer is yes. In other words, you agree ... those cases were wrongly decided.... [Y]ou would have said there would have been no standing in those cases.

[Solicitor General:] No taxpayer standing."

Nor could the Solicitor General have answered differently. Each of these suits, as described above, alleged that a state tax expenditure violated the Establishment Clause. And each relied *only* on taxpayer standing as the basis for federal-court review. The Court today speculates that "the plaintiffs in those cases could have advanced arguments for jurisdiction independent of *Flast*." But whatever could have been, in fact not one of them did so.

And the Court itself understood the basis of standing in these five cases. This and every federal court has an independent obligation to consider standing, even when the parties do not call it into question. To do anything else would risk an unlawful exercise of judicial authority. And in these cases the Court had an additional prompt: In several of them, *amici*, including the United States, contested--or at least raised as a question--the plaintiffs' standing as taxpayers to pursue their claims. The Court, moreover, was well aware at the time of the issues presented by taxpayer standing. We decided three of the cases within a year of elaborating the general bar on taxpayer suits, and the fourth just after we held that bar applicable to a different kind of Establishment Clause claim, see *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.* (1982). Indeed, the decisions on their face reflect the Court's recognition of what gave the plaintiffs standing; in each, we specifically described the plaintiffs as taxpayers who challenged the use of the tax system to fund religious activities. In short, we considered and decided all these cases because we thought taxpayer standing existed.

The majority shrugs off these decisions because they did not discuss what was taken as obvious. But we have previously stressed that the Court should not "disregard the implications of an exercise of judicial authority assumed to be proper for over 40 years." *Brown Shoe Co. v. United States* (1962); see *Bowen v. Kendrick* (1988) (finding standing partly because the Court, in deciding similar

cases, had "not questioned the standing of taxpayer plaintiffs to raise Establishment Clause challenges"); *Bank of United States v. Deveaux* (1809) (Marshall, C.J.) (prior decisions exercising but not discussing jurisdiction "have much weight, as they show that [a jurisdictional flaw] neither occurred to the bar or the bench"). And that principle has extra force here, because we have relied on some of these decisions to support the Court's jurisdiction in other cases. Pause on that for a moment: The very decisions the majority today so easily dismisses are featured in our prior cases as exemplars of jurisdiction. \*\*\* We called those cases "adjudications of great moment discerning no [jurisdictional] barrier" and warned that they could not "be written off as reflecting nothing more than unexamined custom or unthinking habit." Until today, that is--when the majority does write off these adjudications and reaches a result against all precedent.

## B

Our taxpayer standing cases have declined to distinguish between appropriations and tax expenditures for a simple reason: Here, as in many contexts, the distinction is one in search of a difference. To begin to see why, consider an example far afield from *Flast* and, indeed, from religion. Imagine that the Federal Government decides it should pay hundreds of billions of dollars to insolvent banks in the midst of a financial crisis. Suppose, too, that many millions of taxpayers oppose this bailout on the ground (whether right or wrong is immaterial) that it uses their hard-earned money to reward irresponsible business behavior. In the face of this hostility, some Members of Congress make the following proposal: Rather than give the money to banks via appropriations, the Government will allow banks to subtract the exact same amount from the tax bill they would otherwise have to pay to the U.S. Treasury. Would this proposal calm the furor? Or would most taxpayers respond by saying that a subsidy is a subsidy (or a bailout is a bailout), whether accomplished by the one means or by the other? Surely the latter; indeed, we would think the less of our countrymen if they failed to see through this cynical proposal.

And what ordinary people would appreciate, this Court's case law also recognizes--that targeted tax breaks are often "economically and functionally indistinguishable from a direct monetary subsidy." *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) (Thomas, J., concurring). Tax credits, deductions, and exemptions provided to an individual or organization have "much the same effect as a cash grant to the [recipient] of the amount of tax it would have to pay" absent the tax break. \*\*\*

For just this reason, government budgeting rules routinely insist on calculation of tax subsidies, in addition to appropriations. The President must provide information on the estimated cost of tax expenditures in the budget he submits to Congress each year. Similarly, congressional budget committees must report to all Members on the level of tax expenditures in the federal budget. Many States--including Arizona--likewise compute the impact of targeted tax breaks on the public treasury, in recognition that these measures are just spending under a different name. The Arizona Department of Revenue must issue an annual report "detailing the approximate costs in lost revenue for all state tax expenditures." The most recent report notes the significance of this accounting

in the budget process. It explains that "the fiscal impact of implementing" targeted tax breaks, including the STO credit challenged here, is "similar to a direct expenditure of state funds." ("A dollar is a dollar--both for the person who receives it and the government that pays it, whether the dollar comes with a tax credit label or a direct expenditure label").

And because these financing mechanisms result in the same bottom line, taxpayers challenging them can allege the same harm. Our prior cases have often recognized the cost that targeted tax breaks impose on taxpayers generally. "When the Government grants exemptions or allows deductions" to some, we have observed, "all taxpayers are affected; the very fact of the exemption or deduction ... means that other taxpayers can be said to be indirect and vicarious 'donors.'" *Bob Jones Univ. v. United States* (1983). \*\*\* [T]he key is this: Whenever taxpayers have standing under *Flast* to challenge an appropriation, they should also have standing to contest a tax expenditure. Their access to the federal courts should not depend on which type of financial subsidy the State has offered.

Consider some further examples of the point, but this time concerning state funding of religion. Suppose a State desires to reward Jews--by, say, \$500 per year--for their religious devotion. Should the nature of taxpayers' concern vary if the State allows Jews to claim the aid on their tax returns, in lieu of receiving an annual stipend? Or assume a State wishes to subsidize the ownership of crucifixes. It could purchase the religious symbols in bulk and distribute them to all takers. Or it could mail a reimbursement check to any individual who buys her own and submits a receipt for the purchase. Or it could authorize that person to claim a tax credit equal to the price she paid. Now, really--do taxpayers have less reason to complain if the State selects the last of these three options? The Court today says they do, but that is wrong. The effect of each form of subsidy is the same, on the public fisc and on those who contribute to it. Regardless of which mechanism the State uses, taxpayers have an identical stake in ensuring that the State's exercise of its taxing and spending power complies with the Constitution.

Here, the mechanism Arizona has selected is a dollar-for-dollar tax credit to aid school tuition organizations. Each year come April 15, the State tells Arizonans: Either pay the full amount of your tax liability to the State, or subtract up to \$500 from your tax bill by contributing that sum to an STO. To claim the credit, an individual makes a notation on her tax return and splits her tax payment into two checks, one made out to the State and the other to the STO. As this Court recognized in *Winn I*, the STO payment is therefore "costless" to the individual; it comes out of what she otherwise would be legally obligated to pay the State--hence, out of public resources. And STOs capitalize on this aspect of the tax credit for all it is worth--which is quite a lot. To drum up support, STOs highlight that "donations" are made not with an individual's own, but with other people's--*i.e.*, taxpayers'--money. One STO advertises that "[w]ith Arizona's scholarship tax credit, you can send children to our community's [religious] day schools and it won't cost you a dime!" Another urges potential donors to "imagine giving [to charity] with someone else's money.... Stop Imagining, thanks to Arizona tax laws you can!" And so Arizonans do just that: It is, after all, good fun to spend other people's money. By the State's reckoning, from

1998 to 2008 the credit cost Arizona almost \$350 million in redirected tax revenue.

The Plaintiffs contend that this expenditure violates the Establishment Clause. If the legislature had appropriated these monies for STOs, the Plaintiffs would have standing, beyond any dispute, to argue the merits of their claim in federal court. But the Plaintiffs have no such recourse, the Court today holds, because Arizona funds STOs through a tax credit rather than a cash grant. No less than in the hypothetical examples offered above, here too form prevails over substance, and differences that make no difference determine access to the Judiciary. And the casualty is a historic and vital method of enforcing the Constitution's guarantee of religious neutrality.

### C

The majority offers just one reason to distinguish appropriations and tax expenditures: A taxpayer experiences injury, the Court asserts, only when the government "extracts and spends" her very own tax dollars to aid religion. In other words, a taxpayer suffers legally cognizable harm if but only if her particular tax dollars wind up in a religious organization's coffers. See also Tr. of Oral Arg. 4 (Solicitor General proposing that the "key point" was: "If you placed an electronic tag to track and monitor each cent that the [Plaintiffs] pay in tax," none goes to religious STOs). And no taxpayer can make this showing, the Court concludes, if the government subsidizes religion through tax credits, deductions, or exemptions (rather than through appropriations).

The majority purports to rely on *Flast* to support this new "extraction" requirement. It plucks the three words "extrac[t] and spen[d]" from the midst of the *Flast* opinion, and suggests that they severely constrict the decision's scope. And it notes that *Flast* partly relied on James Madison's famed argument in the Memorial and Remonstrance Against Religious Assessments: "[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." And that is all the majority can come up with.

But as indicated earlier, everything of import in *Flast* cuts against the majority's position. Here is how *Flast* stated its holding: "[W]e hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of" the Establishment Clause. Nothing in that straightforward sentence supports the idea that a taxpayer can challenge only legislative action that disburses his particular contribution to the state treasury. And here is how *Flast* primarily justified its holding: "[O]ne of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." That evil arises even if the specific dollars that the government uses do not come from citizens who object to the preference. Likewise, the two-part nexus test, which is the heart of *Flast*'s doctrinal analysis, contains no hint of an extraction requirement. And finally, James Madison provides no comfort to today's majority. He referred to "three pence" exactly because it was, even in 1785, a meaningless sum of money; then, as today, the core injury of a religious establishment had naught to do with any

given individual's out-of-pocket loss. So the majority is left with nothing, save for three words *Flast* used to describe the particular facts in that case: In not a single non-trivial respect could the *Flast* Court recognize its handiwork in the majority's depiction.

The injury to taxpayers that *Flast* perceived arose whenever the legislature used its taxing-and-spending power to channel tax dollars to religious activities. In that and subsequent cases (including the five in this Court involving tax expenditures), a taxpayer pleaded the requisite harm by stating that public resources were funding religion; the tracing of particular dollars (whether by the Solicitor General's "electronic tag" or other means) did not enter into the question. And for all the reasons already given, that standard is met regardless whether the funding is provided via cash grant or tax expenditure. Taxpayers pick up the cost of the subsidy in either form. So taxpayers have an interest in preventing the use of either mechanism to infringe religious neutrality.

Indeed, the majority's new conception of injury is at odds not merely with *Flast*, but also (if ironically) with our cases precluding taxpayer standing generally. Today's majority insists that legislation challenged under the Establishment Clause must "extrac[t] and spen[d] a conscientious dissenter's funds." But we have rejected taxpayer standing in other contexts because each taxpayer's share of treasury funds is "minute and indeterminable." *Frothingham*. No taxpayer can point to an expenditure (by cash grant or otherwise) and say that her own tax dollars are in the mix; in fact, they almost surely are not. "[I]t is," as we have noted, "a complete fiction to argue that an unconstitutional ... expenditure causes an individual ... taxpayer any measurable economic harm." *Hein* (plurality opinion). That is as true in Establishment Clause cases as in any others. Taxpayers have standing in these cases *despite* their foreseeable failure to show that the alleged constitutional violation involves their own tax dollars, not *because* the State has used their particular funds.

And something still deeper is wrong with the majority's "extract and spend" requirement: It does not measure what matters under the Establishment Clause. Let us indulge the Court's fiction that a taxpayer's ".000000000001 penny" is somehow involved in an ordinary appropriation of public funds for religious activity (thus supposedly distinguishing it from a tax expenditure). Still, consider the following example: Imagine the Internal Revenue Service places a checkbox on tax returns asking filers if they object to the government using their taxes to aid religion. If the government keeps "yes" money separate from "no" money and subsidizes religious activities only from the nonobjectors' account, the majority's analysis suggests that no taxpayer would have standing to allege a violation of the Establishment Clause. The funds used, after all, would not have been "extracted from a citizen and handed to a religious institution in violation of the citizen's conscience." But this Court has never indicated that States may insulate subsidies to religious organizations from legal challenge by eliciting the consent of some taxpayers. And the Court has of course been right not to take this approach. Taxpayers incur the same harm, and should have the same ability to bring suit, whether the government stores tax funds in one bank account or two. None of the principles underlying the Establishment Clause suggests otherwise.

James Madison, whom the Court again rightly labels "the leading architect of the religion clauses," (quoting *Flast*), had something important to say about the matter of "extraction." As the majority notes, Madison's Memorial and Remonstrance criticized a tax levy proposed in Virginia to aid teachers of the Christian religion. But Madison's passionate opposition to that proposal informs this case in a manner different than the majority suggests. The Virginia tax in fact would not have extracted any monies (not even "three pence") from unwilling citizens, as the Court now requires. The plan allowed conscientious objectors to opt out of subsidizing religion by contributing their assessment to an alternative fund for the construction and maintenance of county schools. See A Bill Establishing A Provision for Teachers of the Christian Religion, reprinted in *Everson v. Board of Ed. of Ewing* (1947) (supplemental appendix to dissent of Rutledge, J.); Letter from James Madison to Thomas Jefferson (Jan. 9, 1785), reprinted in 2 Writings of James Madison, at 102, 113. Indeed, the Virginia Assessment was specifically "designed to avoid any charges of coercion of dissenters to pay taxes to support religious teachings with which they disagreed."

In this respect, the Virginia Assessment is just like the Arizona tax credit. Although both funnel tax funds to religious organizations (and so saddle *all* taxpayers with the cost), neither forces any given taxpayer to pay for the subsidy out of her pocket. Madison thought that feature of the Assessment insufficient to save it. By relying on the selfsame aspect of the Arizona scheme to deny the Plaintiffs' claim of injury, the majority betrays Madison's vision.

### III

Today's decision devastates taxpayer standing in Establishment Clause cases. The government, after all, often uses tax expenditures to subsidize favored persons and activities. Still more, the government almost *always* has this option. Appropriations and tax subsidies are readily interchangeable; what is a cash grant today can be a tax break tomorrow. The Court's opinion thus offers a roadmap--more truly, just a one-step instruction--to any government that wishes to insulate its financing of religious activity from legal challenge. Structure the funding as a tax expenditure, and *Flast* will not stand in the way. No taxpayer will have standing to object. However blatantly the government may violate the Establishment Clause, taxpayers cannot gain access to the federal courts.

And by ravaging *Flast* in this way, today's decision damages one of this Nation's defining constitutional commitments. "Congress shall make no law respecting an establishment of religion"--ten simple words that have stood for over 200 years as a foundation stone of American religious liberty. Ten words that this Court has long understood, as James Madison did, to limit (though by no means eliminate) the government's power to finance religious activity. The Court's ruling today will not shield all state subsidies for religion from review; as the Court notes, some persons alleging Establishment Clause violations have suffered individualized injuries, and therefore have standing, independent of their taxpayer status. But *Flast* arose because "the taxing and spending power [may] be used to favor one religion over another or to support religion in general," without causing particularized harm to discrete persons. It arose because state sponsorship of religion sometimes harms individuals only (but

this "only" is no small matter) in their capacity as contributing members of our national community. In those cases, the *Flast* Court thought, our Constitution's guarantee of religious neutrality still should be enforced.

Because that judgment was right then, and remains right today, I respectfully dissent.

## Notes

1. In *Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007), a closely divided Court considered whether there was Article III standing to challenge President George W. Bush's executive orders creating a White House Office of Faith-Based and Community Initiatives and similar "offices" in other executive agencies. The plurality distinguished *Flast v. Cohen* because it involved a Congressional act, while the Faith-Based and Community Initiatives were the result of executive action.
2. Together with *Zelman v. Simmons-Harris* (2002) in the previous chapter, does *Winn* mean the end of Establishment Clause challenges to public (taxpayer) support for religious schools?

# Chapter Fourteen: FREEDOM OF RELIGIOUS EXERCISE

This Chapter considers freedom of religion in the First Amendment and in statutory contexts.

## Chapter Outline

### I. Belief v. Practice

*Reynolds v. United States*

Note: The Polygamy Voting Cases

Notes

Note: Fraud or Heresy?

### II. The Problem of Neutral Rules of General Applicability and Religious Exercise

*Sherbert v. Verner*

*Lyng v. Northwest Indian Cemetery Protective Association*

*Employment Division, Department of Human Resources of Oregon v. Smith*

### III. Legislating Free Exercise

#### A. RFRA

Text of Religious Freedom Restoration Act (RFRA)

Note: The Constitutionality of RFRA

*Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*

*Burwell v. Hobby Lobby Stores, Inc.*

#### B. RLUIPA

Text of RLUIPA

Note: The Relevance of RLUIPA for RFRA

Note: Prison Litigation Under RLUIPA

### IV. Targeting Religion and Ministerial Employees

*Church of the Lukumi Babalu Aye v. City of Hialeah*

*Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment*

*Opportunity Commission*

Notes

## I. Belief v. Practice

### *Reynolds v. United States*

98 U.S. 145 (1879)

MR. CHIEF JUSTICE WAITE DELIVERED THE OPINION OF THE COURT.

[ERROR to the Supreme Court of the Territory of Utah.

This is an indictment found in the District Court for the third judicial district of the Territory of Utah, charging George Reynolds with bigamy, in violation of sect. 5352 of the Revised Statutes, which, omitting its exceptions, is as follows:--

'Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than \$500, and by imprisonment for a term of not more than five years.']

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5. As to the defence of religious belief or duty.

On the trial, the plaintiff in error, the accused, proved that at the time of his alleged second marriage he was, and for many years before had been, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, and a believer in its doctrines; that it was an accepted doctrine of that church 'that it was the duty of male members of said church, circumstances permitting, to practise polygamy ; . . . that this duty was enjoined by different books which the members of said church believed to be of divine origin, and among others the Holy Bible, and also that the members of the church believed that the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of said church; that the failing or refusing to practise polygamy by such male members of said church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come.' He also proved 'that he had received permission from the recognized authorities in said church to enter into polygamous marriage; . . . that Daniel H. Wells, one having authority in said church to perform the marriage ceremony, married the said defendant on or about the time the crime is alleged to have been committed, to some woman by the name of Schofield, and that such marriage ceremony was performed under and pursuant to the doctrines of said church.'

Upon this proof he asked the court to instruct the jury that if they found from the evidence that he 'was married as charged-if he was married-in pursuance of and in conformity with what he believed at the time to be a religious duty, that the verdict must be 'not guilty.'" This request was refused, and the court did charge 'that there must have been a criminal intent, but that if the defendant, under the influence of a religious belief that it was right,-under an inspiration, if you please, that it was right,-deliberately married a second time, having a first wife living, the want of consciousness of evil intent-the want of understanding

on his part that he was committing a crime-did not excuse him; but the law inexorably in such case implies the criminal intent.'

Upon this charge and refusal to charge the question is raised, whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.

Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.

The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.

Before the adoption of the Constitution, attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia. In 1784, the House of Delegates of that State having under consideration 'a bill establishing provision for teachers of the Christian religion,' postponed it until the next session, and directed that the bill should be published and distributed, and that the people be requested 'to signify their opinion respecting the adoption of such a bill at the next session of assembly.'

This brought out a determined opposition. Amongst others, Mr. Madison prepared a 'Memorial and Remonstrance,' which was widely circulated and signed, and in which he demonstrated 'that religion, or the duty we owe the Creator,' was not within the cognizance of civil government. At the next session the proposed bill was not only defeated, but another, 'for establishing religious freedom,' drafted by Mr. Jefferson, was passed. In the preamble of this act religious freedom is defined; and after a recital 'that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty,' it is declared 'that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.' In these two sentences is found the true distinction between what properly belongs to the church and what to the State.

In a little more than a year after the passage of this statute the convention met which prepared the Constitution of the United States.' Of this convention Mr. Jefferson was not a member, he being then absent as minister to France. As soon as he saw the draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion, but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations. Five of the States, while adopting the Constitution, proposed amendments. Three-New Hampshire, New York, and Virginia-included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon. Accordingly, at the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association, took occasion to say: 'Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,-I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.' Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void (2 Kent, Com. 79), and from the earliest history of England polygamy has been treated as an offence against society. After the establishment of the ecclesiastical courts, and until the time of James I., it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage, just as they were for testamentary causes and the settlement of the estates of deceased persons.

By the statute of 1 James I. (c. 11), the offence, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted, generally with some modifications, in all the colonies. In connection with the case we are now considering, it is a significant fact that

on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that 'all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience,' the legislature of that State substantially enacted the statute of James I., death penalty included, because, as recited in the preamble, 'it hath been doubted whether bigamy or polygamy be punishable by the laws of this Commonwealth.' 12 Hening's Stat. 691. From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. Chancellor Kent observes that this remark is equally striking and profound. 2 Kent, Com. 81, note (e). An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To

permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. Here the accused knew he had been once married, and that his first wife was living. He also knew that his second marriage was forbidden by law. When, therefore, he married the second time, he is presumed to have intended to break the law. And the breaking of the law is the crime. Every act necessary to constitute the crime was knowingly done, and the crime was therefore knowingly committed. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law. The only defence of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion: it was still belief, and belief only.

In *Regina v. Wagstaff* (10 Cox Crim. Cases, 531), the parents of a sick child, who omitted to call in medical attendance because of their religious belief that what they did for its cure would be effective, were held not to be guilty of manslaughter, while it was said the contrary would have been the result if the child had actually been starved to death by the parents, under the notion that it was their religious duty to abstain from giving it food. But when the offence consists of a positive act which is knowingly done, it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made. No case, we believe, can be found that has gone so far.

6. As to that part of the charge which directed the attention of the jury to the consequences of polygamy.

The passage complained of is as follows: 'I think it not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion. As this contest goes on, they multiply, and there are pure-minded women and there are innocent children,-innocent in a sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory of Utah, just so do these victims multiply and spread themselves over the land.'

While every appeal by the court to the passions or the prejudices of a jury should be promptly rebuked, and while it is the imperative duty of a reviewing court to take care that wrong is not done in this way, we see no just cause for complaint in this case. Congress, in 1862, saw fit to make bigamy a crime in the Territories. This was done because of the evil consequences that were supposed to flow from plural marriages. All the court did was to call the attention of the jury to the peculiar character of the crime for which the accused was on trial, and to remind them of the duty they had to perform. There was no appeal to the passions, no instigation of prejudice. Upon the showing made by the accused himself, he was guilty of a violation of the law under which he had been indicted: and the effort of the court seems to have

been not to withdraw the minds of the jury from the issue to be tried, but to bring them to it; not to make them partial, but to keep them impartial.

Upon a careful consideration of the whole case, we are satisfied that no error was committed by the court below.

*Judgment affirmed.*

MR. JUSTICE FIELD, CONCURRING [OMITTED]

### ***Note: The Polygamy Voting Cases***

In *Murphy v. Ramsey*, 114 U.S. 15 (1885), the Court, in an opinion by Justice Matthews, unanimously upheld a conviction barring voting for polygamists under a 1882 Congressional statute that provided:

That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such territory or other place, or be eligible for election or appointment to or to be entitled to hold any office or place of public trust, honor, or emolument, in, under, or for any such territory or place, or under the United States.

The Court stated that

Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment.' It is assumed by counsel of the petitioner that, because no mode of worship can be established, or religious tenets enforced, in this country, therefore any form of worship may be followed, and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practicing them. But nothing is further from the truth. While legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as 'religion.'

Relying on *Murphy v. Ramsey* and *Reynolds v. United States* shortly thereafter, the United States Supreme Court upheld a prohibition of

voting by believers in polygamy in *Davis v. Beason*, 133 U.S. 333 (1890). Davis involved a requirement in the territory of Idaho that required persons wishing vote take the following oath:

“I do swear (or affirm) that I am a male citizen of the United States, of the age of twenty-one years, (or will be on the 6th day of November, 1888;) that I have (or will have) actually resided in this territory four months, and in this county for thirty days, next preceding the day of the next ensuing election; that I have never been convicted of treason, felony, or bribery; that I am not registered or entitled to vote at any other place in this territory; and I do further swear that I am not a bigamist or polygamist; that I am not a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other person, to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy, polygamy, or plural or celestial marriage as a doctrinal rite of such organization; that I do not and will not, publicly or privately, or in any manner whatever, teach, advise, counsel, or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty or otherwise; that I do regard the constitution of the United States, and the laws thereof, and the laws of this territory, as interpreted by the courts, as the supreme laws of the land, the teachings of any order, organization, or association to the contrary notwithstanding, so help me God.”

Samuel Davis, and others, were prosecuted under the statute because “in truth, each of the defendants was a member of an order, organization, and association, namely, the Church of Jesus Christ of Latter-Day Saints, commonly known as the ‘Mormon Church,’ which they knew taught, advised, counseled, and encouraged its members and devotees to commit the crimes of bigamy and polygamy as duties arising and resulting from membership in said order, organization, and association, and which order, organization, and association, as they all knew, practiced bigamy and polygamy, and plural and celestial marriage as doctrinal rites of said organization; and that, in pursuance of said conspiracy, the said defendants went before the registrars of different precincts of the county, (which are designated,) and took and had administered to them respectively the oath aforesaid.”

Writing for a unanimous Court in Justice Field reasoned:

Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and to debase man. Few crimes are more pernicious to the best interests of society, and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise, and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal, and proper subjects of punishment, as aiding and abetting crime are in all other cases. The term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often

confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter. The first amendment to the constitution, in declaring that congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. The oppressive measures adopted, and the cruelties and punishments inflicted, by the governments of Europe for many ages, to compel parties to conform, in their religious beliefs and modes of worship, to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons, and enforce an outward conformity to a prescribed standard, led to the adoption of the amendment in question. It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes, as prompted by the passions of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that, as religious beliefs, their supporters could be protected in their exercise by the constitution of the United States. Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.

The remainder of the opinion discussed the power of the Territory of Idaho to pass the criminal statute in question given that there was a federal statute.

The note in *Davis v. Beason* discusses New York's early "free exercise" clause:

The constitutions of several states, in providing for religious freedom, have declared expressly that such freedom shall not be construed to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the state. Thus, the constitution of New York of 1777 provided as follows: 'The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this state, to all mankind: provided, that the liberty of conscience hereby granted shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.' Article 38. The same declaration is repeated in the constitution of 1821, (article 7, § 3,) and in that of 1846, (article 1, § 3,) except that for the words 'hereby granted,' the words 'hereby secured' are substituted. The constitutions of California, Colorado, Connecticut, Florida, Georgia, Illinois, Maryland, Minnesota, Mississippi, Missouri, Nevada, and South Carolina contain a similar declaration.

## Notes

1. What is the belief/practice dichotomy? Is it consistent with the language of the First Amendment's "Free Exercise" Clause? Is it consistent with the Court's decision in *Davis v. Beason*?

2. The Court has disavowed some aspects of *Davis v. Beason* in *Romer v. Evans*, 517 U.S. 620 (1996), finding Colorado's Amendment 2 violated the Equal Protection Clause. Justice Kennedy's opinion for the Court stated:

*Davis v. Beason* (1890), not cited by the parties but relied upon by the [Justice Scalia's] dissent, is not evidence that Amendment 2 is within our constitutional tradition, and any reliance upon it as authority for sustaining the amendment is misplaced. In *Davis*, the Court approved an Idaho territorial statute denying Mormons, polygamists, and advocates of polygamy the right to vote and to hold office because, as the Court construed the statute, it "simply excludes from the privilege of voting, or of holding any office of honor, trust or profit, those who have been convicted of certain offences, and those who advocate a practical resistance to the laws of the Territory and justify and approve the commission of crimes forbidden by it." To the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law. *Brandenburg v. Ohio* (1969) (*per curiam*). To the extent it held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome. *Dunn v. Blumstein* (1972). To the extent *Davis* held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable. See *Richardson v. Ramirez* (1974).

3. Consider these two passages from *Reynolds*:

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.

[P]olygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.

What is the Court implying?

### **Note: Fraud or Heresy?**

In *United States v. Ballard*, 322 U.S. 78 (1944), the Court considered convictions for a scheme to defraud by organizing and promoting the "I Am" movement through the use of the mails. The "I am" movement's tenets included the person of Guy W. Ballard, alias St. Germain, Jesus, George Washington, and Godfre Ray King, as well as Edna W. Ballard and Donald Ballard who had, by reason of super-natural attainments, the power to heal persons of ailments and diseases and to make well persons afflicted with any diseases, injuries, or ailments. The judge instructed the jury:

The issue is: Did these defendants honestly and in good faith believe those things? If they did, they should be acquitted. I cannot make it any clearer than that.

If these defendants did not believe those things, they did not believe that Jesus came down and dictated, or that Saint Germain came down and dictated, did not believe the things that they wrote, the things that they preached, but used the mail for the purpose of getting money, the jury should find them guilty. Therefore, gentlemen, religion cannot come into this case.

On appeal by the defendants, the Ninth Circuit reversed, holding that it was error to withhold the question of veracity of the beliefs from the jury. The Court, in an opinion by Justice Douglas, reversed the Ninth Circuit, stating

we do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury. Whatever this particular indictment might require, the First Amendment precludes such a course, as the United States seems to concede. "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson v. Jones* (1872). The First Amendment has a dual aspect. It not only "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship" but also "safeguards the free exercise of the chosen form of religion." *Cantwell v. Connecticut* (1940). "Thus the Amendment embraces two concepts, — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." Freedom of thought, which

includes freedom of religious belief, is basic in a society of free men. *Board of Education v. Barnette* (1943). It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.

There were two persuasive dissents reaching opposite conclusions from each other.

Chief Justice Stone, joined by Justices Roberts and Frankfurter, would have reinstated the guilty verdicts, rather than remand, and reasoned that

I am not prepared to say that the constitutional guaranty of freedom of religion affords immunity from criminal prosecution for the fraudulent procurement of money by false statements as to one's religious experiences, more than it renders polygamy or libel immune from criminal prosecution. I cannot say that freedom of thought and worship includes freedom to procure money by making knowingly false statements about one's religious experiences.

Justice Jackson, dissenting, found a guilty verdict "difficult to reconcile this conclusion with our traditional religious freedoms."

In the first place, as a matter of either practice or philosophy I do not see how we can separate an issue as to what is believed from considerations

as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen. How can the Government prove these persons knew something to be false which it cannot prove to be false? If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer.

In the second place, any inquiry into intellectual honesty in religion raises profound psychological problems. William James, who wrote on these matters as a scientist, reminds us that it is not theology and ceremonies which keep religion going. Its vitality is in the religious experiences of many people. "If you ask what these experiences are, they are conversations with the unseen, voices and visions, responses to prayer, changes of heart, deliverances from fear, inflowings of help, assurances of support, whenever certain persons set their own internal attitude in certain appropriate ways." If religious liberty includes, as it must, the right to communicate such experiences to others, it seems to me an impossible task for juries to separate fancied ones from real ones, dreams from happenings, and hallucinations from true clairvoyance. Such experiences, like some tones and colors, have existence for one, but none at all for another. They cannot be verified to the minds of those whose field of consciousness does not include religious insight. When one comes to trial which turns on any aspect of religious belief or representation, unbelievers among his judges are likely not to understand and are almost certain not to believe him.

## II. The Problem of Neutral Rules of General Applicability and Religious Exercise

### *Sherbert v. Verner*

374 U.S. 398 (1963)

BRENNAN, J., DELIVERED THE OPINION OF THE COURT IN WHICH WARREN, C.J., AND BLACK, CLARK, AND GOLDBERG, JJ, JOINED. DOUGLAS, J., FILED A CONCURRING OPINION. STEWART, J., FILED A CONCURRING OPINION. HARLAN, J., FILED A DISSENTING OPINION IN WHICH WHITE, J., JOINED.

JUSTICE BRENNAN DELIVERED THE OPINION OF THE COURT.

Appellant, a member of the Seventh-day Adventist Church, was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith. When she was unable to obtain other employment because from conscientious scruples she would not take Saturday work, she filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act. That law provides that, to be

eligible for benefits, a claimant must be "able to work and . . . available for work"; and, further, that a claimant is ineligible for benefits "[i]f. . . he has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer . . . ." The appellee Employment Security Commission, in administrative proceedings under the statute, found that appellant's restriction upon her availability for Saturday work brought her within the provision disqualifying for benefits insured workers who fail, without good cause, to accept "suitable work when offered. . . by the employment office or the employer . . . ." The Commission's finding was sustained by the Court of Common Pleas for Spartanburg County. That court's judgment was in turn affirmed by the South Carolina Supreme Court, which rejected appellant's contention that, as applied to her, the disqualifying provisions of the South Carolina statute abridged her right to the free exercise of her religion secured under the Free Exercise Clause of the First Amendment through the Fourteenth Amendment. The State Supreme Court held specifically that appellant's ineligibility infringed no constitutional liberties because such a construction of the statute "places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience." We noted probable jurisdiction of appellant's appeal. We reverse the judgment of the South Carolina Supreme Court and remand for further proceedings not inconsistent with this opinion.

#### I.

The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such, *Cantwell v. Connecticut* Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins*, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island* nor employ the taxing power to inhibit the dissemination of particular religious views, *Murdock v. Pennsylvania*. On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for "even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions." *Braunfeld v. Brown*. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order. See, e. g., *Reynolds v. United States*; *Jacobson v. Massachusetts*; *Prince v. Massachusetts*; *Cleveland v. United States*.

Plainly enough, appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . ."

#### II.

We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does. In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect." Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right" but merely a "privilege." It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.<sup>\*\*\*</sup> Likewise, to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.

Significantly South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we here hold infringes the Sabbatarian's religious liberty. When in times of "national emergency" the textile plants are authorized by the State Commissioner of Labor to operate on Sunday, "no employee shall be required to work on Sunday . . . who is conscientiously opposed to Sunday work; and if any employee should refuse to work on Sunday on account of conscientious . . . objections he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner." S. C. Code, § 64-4. No question of the disqualification of a Sunday worshipper for benefits is likely to arise, since we cannot suppose that an employer will discharge him in violation of this statute. The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina's general statutory scheme necessarily effects.

### III.

We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." No such abuse or danger has been advanced in the present case. The appellees suggest no more than a possibility that the filing of fraudulent claims by

unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work. But that possibility is not apposite here because no such objection appears to have been made before the South Carolina Supreme Court, and we are unwilling to assess the importance of an asserted state interest without the views of the state court. Nor, if the contention had been made below, would the record appear to sustain it; there is no proof whatever to warrant such fears of malingering or deceit as those which the respondents now advance. Even if consideration of such evidence is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs, *United States v. Ballard*—a question as to which we intimate no view since it is not before us—it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties. For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.

In these respects, then, the state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the less direct burden upon religious practices in *Braunfeld v. Brown*. The Court recognized that the Sunday closing law which that decision sustained undoubtedly served "to make the practice of [the Orthodox Jewish merchants] . . . religious beliefs more expensive." But the statute was nevertheless saved by a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers. That secular objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. Requiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable. In the present case no such justifications underlie the determination of the state court that appellant's religion makes her ineligible to receive benefits.

#### IV.

In holding as we do, plainly we are not fostering the "establishment" of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall. Nor does the recognition of the appellant's right to unemployment benefits under the state statute serve to abridge any other person's religious liberties. Nor do we, by our decision today, declare the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment. This is not a case in which an employee's religious convictions serve to make him a nonproductive member of society. Finally, nothing we say today constrains the States to adopt any particular form or scheme of unemployment compensation. Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions

respecting the day of rest. This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Everson v. Board of Education* (1947).

In view of the result we have reached under the First and Fourteenth Amendments' guarantee of free exercise of religion, we have no occasion to consider appellant's claim that the denial of benefits also deprived her of the equal protection of the laws in violation of the Fourteenth Amendment.

The judgment of the South Carolina Supreme Court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

JUSTICE DOUGLAS, CONCURRING.

\*\*\* The result turns not on the degree of injury, which may indeed be nonexistent by ordinary standards. The harm is the interference with the individual's scruples or conscience —an important area of privacy which the First Amendment fences off from government. The interference here is as plain as it is in Soviet Russia, where a churchgoer is given a second-class citizenship, resulting in harm though perhaps not in measurable damages.

This case is resolvable not in terms of what an individual can demand of government, but solely in terms of what government may not do to an individual in violation of his religious scruples. The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.

Those considerations, however, are not relevant here. If appellant is otherwise qualified for unemployment benefits, payments will be made to her not as a Seventh-day Adventist, but as an unemployed worker. Conceivably these payments will indirectly benefit her church, but no more so than does the salary of any public employee. Thus, this case does not involve the problems of direct or indirect state assistance to a religious organization —matters relevant to the Establishment Clause, not in issue here.

JUSTICE STEWART, CONCURRING IN THE RESULT.

Although fully agreeing with the result which the Court reaches in this case, I cannot join the Court's opinion. This case presents a double-barreled dilemma, which in all candor I think the Court's opinion has not succeeded in papering over. The dilemma ought to be resolved.

I.

\*\*\* Because the appellant refuses to accept available jobs which would require her to work on Saturdays, South Carolina has declined to pay unemployment compensation benefits to her. Her refusal to work on Saturdays is based on the tenets of her religious faith. The Court says that South Carolina cannot under these circumstances declare her to be not "available for work" within the meaning of its statute because to do so would violate her constitutional right to the free exercise of her religion.

Yet what this Court has said about the Establishment Clause must inevitably lead to a diametrically opposite result. If the appellant's refusal to work on Saturdays were based on indolence, or on a compulsive desire to watch the Saturday television programs, no one would say that South Carolina could not hold that she was not "available for work" within the meaning of its statute. That being so, the Establishment Clause as construed by this Court not only *permits* but affirmatively *requires* South Carolina equally to deny the appellant's claim for unemployment compensation when her refusal to work on Saturdays is based upon her religious creed. For, as said in *Everson v. Board of Education*, the Establishment Clause bespeaks "a government . . . stripped of all power . . . to support, or otherwise to assist any or all religions . . . ," and no State "can pass laws which aid one religion . . . ." In Mr. Justice Rutledge's words, \*\*\* the Establishment Clause forbids "every form of public aid or support for religion." In the words of the Court in *Engel v. Vitale*, the Establishment Clause forbids the "financial support of government" to be "placed behind a particular religious belief."

To require South Carolina to so administer its laws as to pay public money to the appellant under the circumstances of this case is thus clearly to require the State to violate the Establishment Clause as construed by this Court. This poses no problem for me, because I think the Court's mechanistic concept of the Establishment Clause is historically unsound and constitutionally wrong. I think the process of constitutional decision in the area of the relationships between government and religion demands considerably more than the invocation of broad brushed rhetoric of the kind I have quoted. And I think that the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief. In short, I think our Constitution commands the positive protection by government of religious freedom—not only for a minority, however small—not only for the majority, however large—but for each of us.

South Carolina would deny unemployment benefits to a mother unavailable for work on Saturdays because she was unable to get a babysitter. Thus, we do not have before us a situation where a State provides unemployment compensation generally, and singles out for disqualification only those persons who are unavailable for work on religious grounds. This is not, in short, a scheme which operates so as to discriminate against religion as such. But the Court nevertheless holds that the State must prefer a religious over a secular ground for being unavailable for work—that state financial support of the appellant's religion is constitutionally required to carry out "the governmental obligation of neutrality in the face of religious differences. . . ."

Yet in cases decided under the Establishment Clause the Court has decreed otherwise. \*\*\*

JUSTICE HARLAN, WHOM JUSTICE WHITE JOINS, DISSENTING.

Today's decision is disturbing both in its rejection of existing precedent and in its implications for the future. The significance of the decision can best be understood after an examination of the state law applied in this case.

South Carolina's Unemployment Compensation Law was enacted in 1936 in response to the grave social and economic problems that arose during the depression of that period. \*\*\*

In the present case all that the state court has done is to apply these accepted principles. Since virtually all of the mills in the Spartanburg area were operating on a six-day week, the appellant was "unavailable for work," and thus ineligible for benefits, when personal considerations prevented her from accepting employment on a fulltime basis in the industry and locality in which she had worked. The fact that these personal considerations sprang from her religious convictions was wholly without relevance to the state court's application of the law. Thus in no proper sense can it be said that the State discriminated against the appellant on the basis of her religious beliefs or that she was denied benefits *because* she was a Seventh-day Adventist. She was denied benefits just as any other claimant would be denied benefits who was not "available for work" for personal reasons.

With this background, this Court's decision comes into clearer focus. What the Court is holding is that if the State chooses to condition unemployment compensation on the applicant's availability for work, it is constitutionally compelled to *carve out an exception*—and to provide benefits—for those whose unavailability is due to their religious convictions. \*\*\*

[T]he implications of the present decision are far more troublesome than its apparently narrow dimensions would indicate at first glance. The meaning of today's holding, as already noted, is that the State must furnish unemployment benefits to one who is unavailable for work if the unavailability stems from the exercise of religious convictions. The State, in other words, must *single out* for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior (in this case, inability to work on Saturdays) is not religiously motivated.

\*\*\* I cannot subscribe to the conclusion that the State is constitutionally *compelled* to carve out an exception to its general rule of eligibility in the present case. Those situations in which the Constitution may require special treatment on account of religion are, in my view, few and far between, and this view is amply supported by the course of constitutional litigation in this area. See, *e. g.*, *Braunfeld v. Brown*; *Cleveland v. United States*; *Prince v. Massachusetts*; *Jacobson v. Massachusetts*; *Reynolds v. United States*. Such compulsion in the present case is particularly inappropriate in light of the indirect, remote, and insubstantial effect of the decision below on the exercise of appellant's religion and in light of the direct financial assistance to religion that today's decision requires.

For these reasons I respectfully dissent from the opinion and judgment of the Court.

## *Lyng v. Northwest Indian Cemetery Protective Association*

485 U.S. 439 (1988)

O'CONNOR, J., DELIVERED THE OPINION OF THE COURT, IN WHICH REHNQUIST, C.J., AND WHITE, STEVENS, AND SCALIA, JJ., JOINED. BRENNAN, J., FILED A DISSENTING OPINION, IN WHICH MARSHALL AND BLACKMUN, JJ., JOINED. KENNEDY, J., TOOK NO PART IN THE CONSIDERATION OR DECISION OF THE CASE.

JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

This case requires us to consider whether the First Amendment's Free Exercise Clause prohibits the Government from permitting timber harvesting in, or constructing a road through, a portion of a National Forest that has traditionally been used for religious purposes by members of three American Indian tribes in northwestern California. We conclude that it does not.

### I

As part of a project to create a paved 75-mile road linking two California towns, Gasquet and Orleans, the United States Forest Service has upgraded 49 miles of previously unpaved roads on federal land. In order to complete this project (the G-O road), the Forest Service must build a 6-mile paved segment through the Chimney Rock section of the Six Rivers National Forest. That section of the forest is situated between two other portions of the road that are already complete.

In 1977, the Forest Service issued a draft environmental impact statement that discussed proposals for upgrading an existing unpaved road that runs through the Chimney Rock area. In response to comments on the draft statement, the Forest Service commissioned a study of American Indian cultural and religious sites in the area. The Hoopa Valley Indian Reservation adjoins the Six Rivers National Forest, and the Chimney Rock area has historically been used for religious purposes by Yurok, Karok, and Tolowa Indians. The commissioned study, which was completed in 1979, found that the entire area "is significant as an integral and indispensable part of Indian religious conceptualization and practice." Specific sites are used for certain rituals, and successful use of the [area] is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting. The study concluded that constructing a road along any of the available routes would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples. Accordingly, the report recommended that the G-O road not be completed.

In 1982, the Forest Service decided not to adopt this recommendation, and it prepared a final environmental impact statement for construction of the road. The Regional Forester selected a route that avoided archeological sites and was removed as far as possible from the sites used by contemporary Indians for

specific spiritual activities. Alternative routes that would have avoided the Chimney Rock area altogether were rejected because they would have required the acquisition of private land, had serious soil stability problems, and would in any event have traversed areas having ritualistic value to American Indians. At about the same time, the Forest Service adopted a management plan allowing for the harvesting of significant amounts of timber in this area of the forest. The management plan provided for one-half mile protective zones around all the religious sites identified in the report that had been commissioned in connection with the G-O road.

After exhausting their administrative remedies, respondents -- an Indian organization, individual Indians, nature organizations and individual members of those organizations, and the State of California -- challenged both the roadbuilding and timber harvesting decisions in the United States District Court for the Northern District of California. Respondents claimed that the Forest Service's decisions violated the Free Exercise Clause, the Federal Water Pollution Control Act (FWPCA), the National Environmental Policy Act of 1969 (NEPA), several other federal statutes, and governmental trust responsibilities to Indians living on the Hoopa Valley Reservation.

After a trial, the District Court issued a permanent injunction prohibiting the Government from constructing the Chimney Rock section of the G-O road or putting the timber harvesting management plan into effect. The court found that both actions would violate the Free Exercise Clause because they "would seriously damage the salient visual, aural, and environmental qualities of the high country." The court also found that both proposed actions would violate the FWPCA, and that the environmental impact statements for construction of the road were deficient under the NEPA. Finally, the court concluded that both projects would breach the Government's trust responsibilities to protect water and fishing rights reserved to the Hoopa Valley Indians.

While an appeal was pending before the United States Court of Appeals for the Ninth Circuit, Congress enacted the California Wilderness Act of 1984. Under that statute, much of the property covered by the Forest Service's management plan is now designated a wilderness area, which means that commercial activities such as timber harvesting are forbidden. The statute exempts a narrow strip of land, coinciding with the Forest Service's proposed route for the remaining segment of the G-O road, from the wilderness designation. The legislative history indicates that this exemption was adopted "to enable the completion of the Gasquet-Orleans Road project if the responsible authorities so decide." The existing unpaved section of road, however, lies within the wilderness area, and is therefore now closed to general traffic.

A panel of the Ninth Circuit affirmed in part. \*\*\* By a divided decision, the District Court's constitutional ruling was also affirmed. Relying primarily on the Forest Service's own commissioned study, the majority found that construction of the Chimney Rock section of the G-O road would have significant, though largely indirect, adverse effects on Indian religious practices. The majority concluded that the Government had failed to demonstrate a compelling interest in the completion of the road, and that it could have abandoned the road without thereby creating "a religious preserve for a single group in violation of the establishment clause." The majority apparently applied the same analysis to

logging operations that might be carried out in portions of the Chimney Rock area not covered by the California Wilderness Act. \*\*\*

## II

We begin by noting that the courts below did not articulate the bases of their decisions with perfect clarity. A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them, *Ashwander v. TVA* (1936) (Brandeis, J., concurring). This principle required the courts below to determine, before addressing the constitutional issue, whether a decision on that question could have entitled respondents to relief beyond that to which they were entitled on their statutory claims. If no additional relief would have been warranted, a constitutional decision would have been unnecessary, and therefore inappropriate. \*\*\*

Because it appears reasonably likely that the First Amendment issue was necessary to the decisions below, we believe that it would be inadvisable to vacate and remand without addressing that issue on the merits. This conclusion is strengthened by considerations of judicial economy. The Government, which petitioned for certiorari on the constitutional issue alone, has informed us that it believes it can cure the statutory defects identified below, intends to do so, and will not challenge the adverse statutory rulings. In this circumstance, it is difficult to see what principle would be vindicated by sending this case on what would almost certainly be a brief round trip to the courts below.

## III

### A

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." It is undisputed that the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion. Those respondents contend that the burden on their religious practices is heavy enough to violate the Free Exercise Clause unless the Government can demonstrate a compelling need to complete the G-O road or to engage in timber harvesting in the Chimney Rock area. We disagree.

In *Bowen v. Roy* (1986), we considered a challenge to a federal statute that required the States to use Social Security numbers in administering certain welfare programs. Two applicants for benefits under these programs contended that their religious beliefs prevented them from acceding to the use of a Social Security number for their 2-year-old daughter because the use of a numerical identifier would "rob the spirit" of [their] daughter and prevent her from attaining greater spiritual power." Similarly, in this case, it is said that disruption of the natural environment caused by the G-O road will diminish the sacredness of the area in question and create distractions that will interfere with training and ongoing religious experience of individuals using [sites within] the area for personal medicine and growth . . . and as integrated parts of a system of religious belief and practice which correlates ascending degrees of personal power with a geographic hierarchy of power.

The Court rejected this kind of challenge in *Roy*:

The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that [the Roys] engage in any set form of religious observance, so [they] may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter. . . .

. . . The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.

The building of a road or the harvesting of timber on publicly owned land cannot meaningfully be distinguished from the use of a Social Security number in *Roy*. In both cases, the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs. In neither case, however, would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.

We are asked to distinguish this case from *Roy* on the ground that the infringement on religious liberty here is "significantly greater," or on the ground that the Government practice in *Roy* was "purely mechanical," whereas this case involves "a case-by-case substantive determination as to how a particular unit of land will be managed." Similarly, we are told that this case can be distinguished from *Roy* because "the government action is not at some physically removed location where it places no restriction on what a practitioner may do." The State suggests that the Social Security number in *Roy* could be characterized as interfering with Roy's religious tenets from a subjective point of view, where the government's conduct of "its own internal affairs" was known to him only second-hand, and did not interfere with his ability to practice his religion.

In this case, however, it is said that the proposed road will "physically destro[y] the environmental conditions and the privacy without which the [religious] practices cannot be conducted."

These efforts to distinguish *Roy* are unavailing. This Court cannot determine the truth of the underlying beliefs that led to the religious objections here or in *Roy*, and accordingly cannot weigh the adverse effects on the appellees in *Roy* and compare them with the adverse effects on the Indian respondents. Without the ability to make such comparisons, we cannot say that the one form of incidental interference with an individual's spiritual activities should be subjected to a different constitutional analysis than the other.

Respondents insist, nonetheless, that the courts below properly relied on a factual inquiry into the degree to which the Indians' spiritual practices would become ineffectual if the G-O road were built. They rely on several cases in which this Court has sustained free exercise challenges to government programs that interfered with individuals' ability to practice their religion. See *Wisconsin v. Yoder* (1972) (compulsory school-attendance law); *Sherbert v. Verner*, (1963) (denial of unemployment benefits to applicant who refused to accept work requiring her to violate the Sabbath); *Thomas v. Review Board*,

*Indiana Employment Security Div.* (1981) (denial of unemployment benefits to applicant whose religion forbade him to fabricate weapons); *Hobbie v. Unemployment Appeals Comm'n of Florida* (1987) (denial of unemployment benefits to religious convert who resigned position that required her to work on the Sabbath).

Even apart from the inconsistency between *Roy* and respondents' reading of these cases, their interpretation will not withstand analysis. It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment. Thus, for example, ineligibility for unemployment benefits, based solely on a refusal to violate the Sabbath, has been analogized to a fine imposed on Sabbath worship. This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions. The crucial word in the constitutional text is "prohibit":

For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.

*Sherbert* (Douglas, J., concurring).

Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. The Government does not dispute, and we have no reason to doubt, that the logging and roadbuilding projects at issue in this case could have devastating effects on traditional Indian religious practices. Those practices are intimately and inextricably bound up with the unique features of the Chimney Rock area, which is known to the Indians as the "high country." Individual practitioners use this area for personal spiritual development; some of their activities are believed to be critically important in advancing the welfare of the Tribe, and indeed, of mankind itself. The Indians use this area, as they have used it for a very long time, to conduct a wide variety of specific rituals that aim to accomplish their religious goals. According to their beliefs, the rituals would not be efficacious if conducted at other sites than the ones traditionally used, and too much disturbance of the area's natural state would clearly render any meaningful continuation of traditional practices impossible. To be sure, the Indians themselves were far from unanimous in opposing the G-O road, and it seems less than certain that construction of the road will be so disruptive that it will doom their religion. Nevertheless, we can assume that the threat to the efficacy of at least some religious practices is extremely grave.

Even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O road will "virtually destroy the . . . Indians' ability to practice their religion," (opinion below), the Constitution simply does not provide a principle that could justify upholding respondents' legal claims. However much we might wish that it were otherwise, government simply could not

operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities -- from social welfare programs to foreign aid to conservation projects -- will always be considered essential to the spiritual wellbeing of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions. Cf. The Federalist No. 10 (suggesting that the effects of religious factionalism are best restrained through competition among a multiplicity of religious sects).

One need not look far beyond the present case to see why the analysis in *Roy*, but not respondents' proposed extension of *Sherbert* and its progeny, offers a sound reading of the Constitution. Respondents attempt to stress the limits of the religious servitude that they are now seeking to impose on the Chimney Rock area of the Six Rivers National Forest. While defending an injunction against logging operations and the construction of a road, they apparently do not at present object to the area's being used by recreational visitors, other Indians, or forest rangers. Nothing in the principle for which they contend, however, would distinguish this case from another lawsuit in which they (or similarly situated religious objectors) might seek to exclude all human activity but their own from sacred areas of the public lands. \*\*\* No disrespect for these practices is implied when one notes that such beliefs could easily require de facto beneficial ownership of some rather spacious tracts of public property. Even without anticipating future cases, the diminution of the Government's property rights, and the concomitant subsidy of the Indian religion, would in this case be far from trivial: the District Court's order permanently forbade commercial timber harvesting, or the construction of a two-lane road, anywhere within an area covering a full 27 sections (i.e. more than 17,000 acres) of public land.

The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions. Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land.

## B

Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents. It is worth emphasizing, therefore, that the Government has taken numerous steps in this very case to minimize the impact that construction of the G-O road will have on the Indians' religious activities. First, the Forest

Service commissioned a comprehensive study of the effects that the project would have on the cultural and religious value of the Chimney Rock area. The resulting 423-page report was so sympathetic to the Indians' interests that it has constituted the principal piece of evidence relied on by respondents throughout this litigation.

Although the Forest Service did not in the end adopt the report's recommendation that the project be abandoned, many other ameliorative measures were planned. No sites where specific rituals take place were to be disturbed. In fact, a major factor in choosing among alternative routes for the road was the relation of the various routes to religious sites: the route selected by the Regional Forester is, he noted,

the farthest removed from contemporary spiritual sites; thus, the adverse audible intrusions associated with the road would be less than all other alternatives.

Nor were the Forest Service's concerns limited to "audible intrusions." As the dissenting judge below observed, 10 specific steps were planned to reduce the visual impact of the road on the surrounding country.

Except for abandoning its project entirely, and thereby leaving the two existing segments of road to dead-end in the middle of a National Forest, it is difficult to see how the Government could have been more solicitous. Such solicitude accords with

the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

American Indian Religious Freedom Act (AIRFA), Pub.L. 95-341, 92 Stat. 469,42 U.S.C. §1996.

Respondents, however, suggest that AIRFA goes further, and in effect enacts their interpretation of the First Amendment into statutory law. Although this contention was rejected by the District Court, they seek to defend the judgment below by arguing that AIRFA authorizes the injunction against completion of the G-O road. This argument is without merit. After reciting several legislative findings, AIRFA "resolves" upon the policy quoted above. A second section of the statute, required an evaluation of federal policies and procedures, in consultation with native religious leaders, of changes necessary to protect and preserve the rights and practices in question. The required report dealing with this evaluation was completed and released in 1979. Nowhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights.

What is obvious from the face of the statute is confirmed by numerous indications in the legislative history. The sponsor of the bill that became AIRFA, Representative Udall, called it "a sense of Congress joint resolution," aimed at ensuring that

the basic right of the Indian people to exercise their traditional religious practices is not infringed without a clear decision on the part of the

Congress or the administrators that such religious practices must yield to some higher consideration.

Representative Udall emphasized that the bill would not "confer special religious rights on Indians," would "not change any existing State or Federal law," and in fact "has no teeth in it."

C

[omitted discussion of dissent]

IV

The decision of the court below, according to which the First Amendment precludes the Government from completing the G-O road or from permitting timber harvesting in the Chimney Rock area, is reversed. In order that the District Court's injunction may be reconsidered in light of this holding, and in the light of any other relevant events that may have intervened since the injunction issued, the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY TOOK NO PART IN THE CONSIDERATION OR DECISION OF THIS CASE.

JUSTICE BRENNAN, WITH WHOM JUSTICE MARSHALL AND JUSTICE BLACKMUN JOIN, DISSENTING.

"[T]he Free Exercise Clause," the Court explains today, "is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." (quoting *Sherbert v. Verner* (1963) (Douglas, J., concurring)). Pledging fidelity to this unremarkable constitutional principle, the Court nevertheless concludes that, even where the Government uses federal land in a manner that threatens the very existence of a Native American religion, the Government is simply not "doing" anything to the practitioners of that faith. Instead, the Court believes that Native Americans who request that the Government refrain from destroying their religion effectively seek to exact from the Government de facto beneficial ownership of federal property. These two astonishing conclusions follow naturally from the Court's determination that federal land use decisions that render the practice of a given religion impossible do not burden that religion in a manner cognizable under the Free Exercise Clause, because such decisions neither coerce conduct inconsistent with religious belief nor penalize religious activity. The constitutional guarantee we interpret today, however, draws no such fine distinctions between types of restraints on religious exercise, but rather is directed against any form of governmental action that frustrates or inhibits religious practice. Because the Court today refuses even to acknowledge the constitutional injury respondents will suffer, and because this refusal essentially leaves Native Americans with absolutely no constitutional protection against perhaps the gravest threat to their religious practices, I dissent.

I

For at least 200 years and probably much longer, the Yurok, Karok, and Tolowa Indians have held sacred an approximately 25-square-mile area of land situated in what is today the Blue Creek Unit of Six Rivers National Forest in northwestern California. As the Government readily concedes, regular visits to this area, known to respondent Indians as the "high country," have played and continue to play a "critical" role in the religious practices and rituals of these Tribes. Those beliefs, only briefly described in the Court's opinion, are crucial to a proper understanding of respondents' claims.

As the Forest Service's commissioned study, the Theodoratus Report, explains, for Native Americans religion is not a discrete sphere of activity separate from all others, and any attempt to isolate the religious aspects of Indian life "is in reality an exercise which forces Indian concepts into non-Indian categories." D. Theodoratus, *CULTURAL RESOURCES OF THE CHIMNEY ROCK SECTION, GASQUET-ORLEANS ROAD, SIX RIVERS NATIONAL FOREST* (1979). Thus, for most Native Americans, "[t]he area of worship cannot be delineated from social, political, cultur[al], and other areas o[f] Indian lifestyle." *American Indian Religious Freedom*, Hearings on S. J. Res. 102 before the Senate Select Committee on Indian Affairs, 95th Cong., 2d Sess., 86 (1978) (statement of Barney Old Coyote, Crow Tribe). A pervasive feature of this lifestyle is the individual's relationship with the natural world; this relationship, which can accurately though somewhat incompletely be characterized as one of stewardship, forms the core of what might be called, for want of a better nomenclature, the Indian religious experience. While traditional Western religions view creation as the work of a deity "who institutes natural laws which then govern the operation of physical nature," tribal religions regard creation as an ongoing process in which they are morally and religiously obligated to participate. Native Americans fulfill this duty through ceremonies and rituals designed to preserve and stabilize the earth and to protect humankind from disease and other catastrophes. Failure to conduct these ceremonies in the manner and place specified, adherents believe, will result in great harm to the earth and to the people whose welfare depends upon it.

In marked contrast to traditional Western religions, the belief systems of Native Americans do not rely on doctrines, creeds, or dogmas. Established or universal truths -- the mainstay of Western religions -- play no part in Indian faith. Ceremonies are communal efforts undertaken for specific purposes in accordance with instructions handed down from generation to generation. Commentaries on or interpretations of the rituals themselves are deemed absolute violations of the ceremonies, whose value lies not in their ability to explain the natural world or to enlighten individual believers, but in their efficacy as protectors and enhancers of tribal existence. Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land. The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being. See Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 *Am. Ind. L. Rev.* 1, 10 (1982). Rituals are performed in prescribed locations not merely as a matter of traditional orthodoxy, but because land, like all other living things, is unique, and specific sites possess different spiritual properties and significance. Within this belief system, therefore, land is not fungible; indeed, at the time of the Spanish

colonization of the American Southwest, all . . . Indians held in some form a belief in a sacred and indissoluble bond between themselves and the land in which their settlements were located. E. Spicer, *CYCLES OF CONQUEST: THE IMPACT OF SPAIN, MEXICO, AND THE UNITED STATES ON THE INDIANS OF THE SOUTHWEST, 1533-1960* (1962).

For respondent Indians, the most sacred of lands is the high country where, they believe, prehuman spirits moved with the coming of humans to the Earth. Because these spirits are seen as the source of religious power, or "medicine," many of the tribes' rituals and practices require frequent journeys to the area. Thus, for example, religious leaders preparing for the complex of ceremonies that underlie the Tribes' World Renewal efforts must travel to specific sites in the high country in order to attain the medicine necessary for successful renewal. Similarly, individual tribe members may seek curative powers for the healing of the sick, or personal medicine for particular purposes such as good luck in singing, hunting, or love. A period of preparation generally precedes such visits, and individuals must select trails in the sacred area according to the medicine they seek and their abilities, gradually moving to increasingly more powerful sites, which are typically located at higher altitudes. Among the most powerful of sites are Chimney Rock, Doctor Rock, and Peak 8, all of which are elevated rock outcroppings.

According to the Theodoratus Report, the qualities "of silence, the aesthetic perspective, and the physical attributes, are an extension of the sacredness of [each] particular site." The act of medicine-making is akin to meditation: the individual must integrate physical, mental, and vocal actions in order to communicate with the prehuman spirits. As a result,

successful use of the high country is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting.

Although few Tribe members actually make medicine at the most powerful sites, the entire Tribe's welfare hinges on the success of the individual practitioners.

Beginning in 1972, the Forest Service began preparing a multiple-use management plan for the Blue Creek Unit. \*\*\* Ultimately, however, the Service settled on a route running along the Chimney Rock Corridor, which traverses the Indians' sacred lands. \*\*\*

## II

The Court does not for a moment suggest that the interests served by the G-O road are in any way compelling, or that they outweigh the destructive effect construction of the road will have on respondents' religious practices. Instead, the Court embraces the Government's contention that its prerogative as landowner should always take precedence over a claim that a particular use of federal property infringes religious practices. Attempting to justify this rule, the Court argues that the First Amendment bars only outright prohibitions, indirect coercion, and penalties on the free exercise of religion. All other "incidental effects of government programs," it concludes, even those which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, simply do not give rise to constitutional concerns. Since our recognition nearly half a century ago that

restraints on religious conduct implicate the concerns of the Free Exercise Clause, see *Prince v. Massachusetts* (1944), we have never suggested that the protections of the guarantee are limited to so narrow a range of governmental burdens. The land use decision challenged here will restrain respondents from practicing their religion as surely and as completely as any of the governmental actions we have struck down in the past, and the Court's efforts simply to define away respondents' injury as nonconstitutional are both unjustified and ultimately unpersuasive.

A

\*\*\* Here, respondents have demonstrated that the Government's proposed activities will completely prevent them from practicing their religion, and such a showing, no less than those made out in *Hobbie*, *Thomas*, *Sherbert*, and *Yoder*, entitles them to the protections of the Free Exercise Clause.

B

Nor can I agree with the Court's assertion that respondents' constitutional claim is foreclosed by our decision in *Bowen v. Roy* (1986). There, applicants for certain welfare benefits objected to the use of a Social Security number in connection with the administration of their 2-year-old daughter's application for benefits, contending that such use would "rob the [child's] spirit," and thus interfere with her spiritual development. \*\*\* When the Government processes information, of course, it acts in a purely internal manner, and any free exercise challenge to such internal recordkeeping in effect seeks to dictate how the Government conducts its own affairs.

Federal land use decisions, by contrast, are likely to have substantial external effects that government decisions concerning office furniture and information storage obviously will not, and they are correspondingly subject to public scrutiny and public challenge in a host of ways that office equipment purchases are not. Indeed, in the American Indian Religious Freedom Act (AIRFA) Congress expressly recognized the adverse impact land use decisions and other governmental actions frequently have on the site-specific religious practices of Native Americans, and the Act accordingly directs agencies to consult with Native American religious leaders before taking actions that might impair those practices. Although I agree that the Act does not create any judicially enforceable rights, the absence of any private right of action in no way undermines the statute's significance as an express congressional determination that federal land management decisions are not "internal" Government "procedures," but are instead governmental actions that can and indeed are likely to burden Native American religious practices. That such decisions should be subject to constitutional challenge, and potential constitutional limitations, should hardly come as a surprise.

The Court today, however, ignores *Roy's* emphasis on the internal nature of the Government practice at issue there, and instead construes that case as further support for the proposition that governmental action that does not coerce conduct inconsistent with religious faith simply does not implicate the concerns of the Free Exercise Clause. That such a reading is wholly untenable, however, is demonstrated by the cruelly surreal result it produces here: governmental action that will virtually destroy a religion is nevertheless deemed not to "burden" that religion. \*\*\*

## C

In the final analysis, the Court's refusal to recognize the constitutional dimension of respondents' injuries stems from its concern that acceptance of respondents' claim could potentially strip the Government of its ability to manage and use vast tracts of federal property. In addition, the nature of respondents' site-specific religious practices raises the specter of future suits in which Native Americans seek to exclude all human activity from such areas. These concededly legitimate concerns lie at the very heart of this case, which represents yet another stress point in the longstanding conflict between two disparate cultures -- the dominant Western culture, which views land in terms of ownership and use, and that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred. Rather than address this conflict in any meaningful fashion, however, the Court disclaims all responsibility for balancing these competing and potentially irreconcilable interests, choosing instead to turn this difficult task over to the Federal Legislature. Such an abdication is more than merely indefensible as an institutional matter: by defining respondents' injury as "nonconstitutional," the Court has effectively bestowed on one party to this conflict the unilateral authority to resolve all future disputes in its favor, subject only to the Court's toothless exhortation to be "sensitive" to affected religions. In my view, however, Native Americans deserve -- and the Constitution demands -- more than this. \*\*\*

## III

Today, the Court holds that a federal land use decision that promises to destroy an entire religion does not burden the practice of that faith in a manner recognized by the Free Exercise Clause. \*\*\*

Having thus stripped respondents and all other Native Americans of any constitutional protection against perhaps the most serious threat to their age-old religious practices, and indeed to their entire way of life, the Court assures us that nothing in its decision "should be read to encourage governmental insensitivity to the religious needs of any citizen." \*\*\* Given today's ruling, that freedom amounts to nothing more than the right to believe that their religion will be destroyed. The safeguarding of such a hollow freedom not only makes a mockery of the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions, it fails utterly to accord with the dictates of the First Amendment. I dissent.

## **Employment Division, Department of Human Resources of Oregon v. Smith**

494 U.S. 872 (1990)

SCALIA, J., DELIVERED THE OPINION OF THE COURT, IN WHICH REHNQUIST, C. J., AND WHITE, STEVENS, AND KENNEDY, JJ., JOINED. O'CONNOR, J., FILED AN OPINION CONCURRING IN THE JUDGMENT, IN PARTS I AND II OF WHICH BRENNAN, MARSHALL, AND BLACKMUN, JJ., JOINED WITHOUT CONCURRING IN THE JUDGMENT. BLACKMUN, J., FILED A DISSENTING OPINION, IN WHICH BRENNAN AND MARSHALL, JJ., JOINED.

JUSTICE SCALIA DELIVERED THE OPINION OF THE COURT.

This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

I

Oregon law prohibits the knowing or intentional possession of a "controlled substance" unless the substance has been prescribed by a medical practitioner. The law defines "controlled substance" as a drug classified in Schedules I through V of the Federal Controlled Substances Act, as modified by the State Board of Pharmacy. Ore.Rev.Stat. §475.005(6) (1987). Persons who violate this provision by possessing a controlled substance listed on Schedule I are "guilty of a Class B felony." As compiled by the State Board of Pharmacy under its statutory authority, Schedule I contains the drug peyote, a hallucinogen derived from the plant *Lophophorawilliamsii* Lemaire.

Respondents Alfred Smith and Galen Black were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members. When respondents applied to petitioner Employment Division for unemployment compensation, they were determined to be ineligible for benefits because they had been discharged for work-related "misconduct". The Oregon Court of Appeals reversed that determination, holding that the denial of benefits violated respondents' free exercise rights under the First Amendment.

On appeal to the Oregon Supreme Court, petitioner argued that the denial of benefits was permissible because respondents' consumption of peyote was a crime under Oregon law. The Oregon Supreme Court reasoned, however, that the criminality of respondents' peyote use was irrelevant to resolution of their constitutional claim -- since the purpose of the "misconduct" provision under which respondents had been disqualified was not to enforce the State's criminal laws, but to preserve the financial integrity of the compensation fund, and since that purpose was inadequate to justify the burden that disqualification imposed on respondents' religious practice. Citing our decisions in *Sherbert v. Verner* (1963) and *Thomas v. Review Board, Indiana Employment Security Div.* (1981), the court concluded that respondents were entitled to payment of unemployment benefits. We granted certiorari.

Before this Court in 1987, petitioner continued to maintain that the illegality of respondents' peyote consumption was relevant to their constitutional claim. We agreed, concluding that

if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct.

*Employment Div., Dept. of Human Resources of Oregon v. Smith* (1988) (*Smith I*). We noted, however, that the Oregon Supreme Court had not decided whether respondents' sacramental use of peyote was in fact proscribed by Oregon's controlled substance law, and that this issue was a matter of dispute between the parties. Being "uncertain about the legality of the religious use of peyote in Oregon," we determined that it would not be "appropriate for us to decide whether the practice is protected by the Federal Constitution." Accordingly, we vacated the judgment of the Oregon Supreme Court and remanded for further proceedings.

On remand, the Oregon Supreme Court held that respondents' religiously inspired use of peyote fell within the prohibition of the Oregon statute, which "makes no exception for the sacramental use" of the drug. It then considered whether that prohibition was valid under the Free Exercise Clause, and concluded that it was not. The court therefore reaffirmed its previous ruling that the State could not deny unemployment benefits to respondents for having engaged in that practice.

We again granted certiorari.

## II

Respondents' claim for relief rests on our decisions in *Sherbert v. Verner*; *Thomas v. Review Board, Indiana Employment Security Div*; and *Hobbie v. Unemployment Appeals Comm'n of Florida* (1987), in which we held that a State could not condition the availability of unemployment insurance on an individual's willingness to forgo conduct required by his religion. As we observed in *Smith I*, however, the conduct at issue in those cases was not prohibited by law. We held that distinction to be critical, for if Oregon does prohibit the religious use of peyote, and if that prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon, and the State is free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation. Now that the Oregon Supreme Court has confirmed that Oregon does prohibit the religious use of peyote, we proceed to consider whether that prohibition is permissible under the Free Exercise Clause.

## A

The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*. . . ." U.S. Const. Am. I (emphasis added). The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs

as such." *Sherbert v. Verner*. The government may not compel affirmation of religious belief, see *Torcaso v. Watkins* (1961), punish the expression of religious doctrines it believes to be false, *United States v. Ballard* (1944), impose special disabilities on the basis of religious views or religious status or lend its power to one or the other side in controversies over religious authority or dogma.

But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

Respondents in the present case, however, seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful than it is to regard the same tax as "abridging the freedom . . . of the press" of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that, if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax, but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.

Our decisions reveal that the latter reading is the correct one. We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in *Minersville School Dist. Bd. of Educ. v. Gobitis* (1940):

Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.

(Footnote omitted.) We first had occasion to assert that principle in *Reynolds v. United States* (1879), where we rejected the claim that criminal laws against

polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," we said,

are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).

In *Prince v. Massachusetts* (1944), we held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding. We found no constitutional infirmity in "excluding [these children] from doing there what no other children may do." In *Braunfeld v. Brown* (1961) (plurality opinion), we upheld Sunday closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In *Gillette v. United States* (1971), we sustained the military selective service system against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds.\*\*\*

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell v. Connecticut* (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania* (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick* (1944) (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters* (1925), to direct the education of their children, see *Wisconsin v. Yoder* (1972) (invalidating compulsory school attendance laws as applied to Amish parents who refused on religious grounds to send their children to school). Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. *Wooley v. Maynard* (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Board of Education v. Barnette* (1943) (invalidating compulsory flag salute statute challenged by religious objectors). And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. Cf. *Roberts v. United States Jaycees* (1983) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed.").

The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right.

Respondents urge us to hold, quite simply, that when otherwise prohibitible conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls.

Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.

*Gillette v. United States* (1971).

## B

Respondents argue that, even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner* (1963). Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. Applying that test, we have, on three occasions, invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion. See *Sherbert v. Verner*; *Thomas v. Review Board, Indiana Employment Div.*; *Hobbie v. Unemployment Appeals Comm'n of Florida*. We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied, see *United States v. Lee* (1982); *Gillette v. United States*. In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all. In *Bowen v. Roy* (1986), we declined to apply *Sherbert* analysis to a federal statutory scheme that required benefit applicants and recipients to provide their Social Security numbers. The plaintiffs in that case asserted that it would violate their religious beliefs to obtain and provide a Social Security number for their daughter. We held the statute's application to the plaintiffs valid regardless of whether it was necessary to effectuate a compelling interest. In *Lynng v. Northwest Indian Cemetery Protective Assn.* (1988), we declined to apply *Sherbert* analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes, even though it was undisputed that the activities "could have devastating effects on traditional Indian religious practices." In *Goldman v. Weinberger* (1986), we rejected application of the *Sherbert* test to military dress regulations that forbade the wearing of yarmulkes. In *O'Lone v. Estate of Shabazz* (1987), we sustained, without mentioning the *Sherbert* test, a prison's refusal to excuse inmates from work requirements to attend worship services.

Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. As a plurality of the Court

noted in *Roy*, a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment \*\*\*

As the plurality pointed out in *Roy*, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason.

Whether or not the decisions are that limited, they at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct. \*\*\* We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Lyng*. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling" -- permitting him, by virtue of his beliefs, "to become a law unto himself," *Reynolds v. United States* -- contradicts both constitutional tradition and common sense.

The "compelling government interest" requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, *see, e.g., Palsmore v. Sidoti* (1984), or before the government may regulate the content of speech, *see, e.g., Sable Communications of California v. FCC* (1989), is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields -- equality of treatment, and an unrestricted flow of contending speech -- are constitutional norms; what it would produce here -- a private right to ignore generally applicable laws -- is a constitutional anomaly.

Nor is it possible to limit the impact of respondents' proposal by requiring a "compelling state interest" only when the conduct prohibited is "central" to the individual's religion. *Cf. Lyng v. Northwest Indian Cemetery Protective Assn.* (BRENNAN, J., dissenting). It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." \*\*\* Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.

If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting

anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld v. Brown*, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind -- ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. The First Amendment's protection of religious liberty does not require this.

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use. But to say that a nondiscriminatory religious practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug. The decision of the Oregon Supreme Court is accordingly reversed.

*It is so ordered.*

JUSTICE O'CONNOR, WITH WHOM JUSTICE BRENNAN, JUSTICE MARSHALL, AND JUSTICE BLACKMUN JOIN AS TO PARTS I AND II CONCURRING IN THE JUDGMENT.

Although I agree with the result the Court reaches in this case, I cannot join its opinion. In my view, today's holding dramatically departs from well settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty.

## I

At the outset, I note that I agree with the Court's implicit determination that the constitutional question upon which we granted review -- whether the Free Exercise Clause protects a person's religiously motivated use of peyote from the reach of a State's general criminal law prohibition -- is properly presented in this case. \*\*\*

## II

The Court today extracts from our long history of free exercise precedents the single categorical rule that

if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.

Indeed, the Court holds that, where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply. To reach this sweeping result, however, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.

### A

\*\*\* The Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them "hybrid" decisions, but there is no denying that both cases expressly relied on the Free Exercise Clause, and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence. Moreover, in each of the other cases cited by the Court to support its categorical rule, we rejected the particular constitutional claims before us only after carefully weighing the competing interests. See *Prince v. Massachusetts* (1944) (state interest in regulating children's activities justifies denial of religious exemption from child labor laws); *Braunfeld v. Brown* (1961) (plurality opinion) (state interest in uniform day of rest justifies denial of religious exemption from Sunday closing law); *Gillette* (state interest in military affairs justifies denial of religious exemption from conscription laws); *Lee* (state interest in comprehensive social security system justifies denial of religious exemption from mandatory participation requirement). That we rejected the free exercise claims in those cases hardly calls into question the applicability of First Amendment doctrine in the first place. Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us.

### B

Respondents, of course, do not contend that their conduct is automatically immune from all governmental regulation simply because it is motivated by their sincere religious beliefs. The Court's rejection of that argument, might therefore be regarded as merely harmless dictum. Rather, respondents invoke our traditional compelling interest test to argue that the Free Exercise Clause requires the State to grant them a limited exemption from its general criminal prohibition against the possession of peyote. The Court today, however, denies them even the opportunity to make that argument, concluding that "the sounder approach, and the approach in accord with the vast majority of our

precedents, is to hold the [compelling interest] test inapplicable to" challenges to general criminal prohibitions.

In my view, however, the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community. \*\*\*

A State that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the severest manner possible, for it "results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution."*Braunfeld*. I would have thought it beyond argument that such laws implicate free exercise concerns.

Indeed, we have never distinguished between cases in which a State conditions receipt of a benefit on conduct prohibited by religious beliefs and cases in which a State affirmatively prohibits such conduct. The *Sherbert* compelling interest test applies in both kinds of cases. \*\*\*

To me, the sounder approach -- the approach more consistent with our role as judges to decide each case on its individual merits -- is to apply this test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant, and whether the particular criminal interest asserted by the State before us is compelling. Even if, as an empirical matter, a government's criminal laws might usually serve a compelling interest in health, safety, or public order, the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim. Given the range of conduct that a State might legitimately make criminal, we cannot assume, merely because a law carries criminal sanctions and is generally applicable, that the First Amendment never requires the State to grant a limited exemption for religiously motivated conduct.

Moreover, we have not "rejected" or "declined to apply" the compelling interest test in our recent cases. \*\*\*

The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion. Although the Court suggests that the compelling interest test, as applied to generally applicable laws, would result in a "constitutional anomaly," the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a "constitutional nor[m]," not an "anomaly." Nor would application of our established free exercise doctrine to this case necessarily be incompatible with our equal protection cases. We have, in any event, recognized that the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause. As the language of the Clause itself makes clear, an individual's free exercise of religion is a preferred constitutional activity. A law that makes criminal such an activity therefore triggers constitutional concern -- and heightened judicial scrutiny -- even if it

does not target the particular religious conduct at issue. Our free speech cases similarly recognize that neutral regulations that affect free speech values are subject to a balancing, rather than categorical, approach. The Court's parade of horrors not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests.

Finally, the Court today suggests that the disfavoring of minority religions is an "unavoidable consequence" under our system of government, and that accommodation of such religions must be left to the political process. In my view, however, the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish. Indeed, the words of Justice Jackson in *West Virginia Board of Education v. Barnette* (overruling *Minersville School District v. Gobitis* (1940)) are apt.

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

*See also United States v. Ballard*, 322 U.S. 78, 87 (1944) ("The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of, the lack of any one religions creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views"). The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a "luxury," is to denigrate "[t]he very purpose of a Bill of Rights."

### III

The Court's holding today not only misreads settled First Amendment precedent; it appears to be unnecessary to this case. I would reach the same result applying our established free exercise jurisprudence. \*\*\*

I would therefore adhere to our established free exercise jurisprudence and hold that the State in this case has a compelling interest in regulating peyote use by its citizens, and that accommodating respondents' religiously motivated conduct "will unduly interfere with fulfillment of the governmental interest." Accordingly, I concur in the judgment of the Court.

JUSTICE BLACKMUN, WITH WHOM JUSTICE BRENNAN AND JUSTICE MARSHALL JOIN, DISSENTING.

This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens

the free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.

Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence. The majority, however, perfunctorily dismisses it as a "constitutional anomaly." As carefully detailed in Justice O'Connor's concurring opinion, the majority is able to arrive at this view only by mischaracterizing this Court's precedents. The Court discards leading free exercise cases such as *Cantwell v. Connecticut* (1940), and *Wisconsin v. Yoder* (1972), as "hybrid." The Court views traditional free exercise analysis as somehow inapplicable to criminal prohibitions (as opposed to conditions on the receipt of benefits), and to state laws of general applicability (as opposed, presumably, to laws that expressly single out religious practices). The Court cites cases in which, due to various exceptional circumstances, we found strict scrutiny inapposite, to hint that the Court has repudiated that standard altogether. In short, it effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution. One hopes that the Court is aware of the consequences, and that its result is not a product of overreaction to the serious problems the country's drug crisis has generated.

This distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a "luxury" that a well-ordered society cannot afford, and that the repression of minority religions is an "unavoidable consequence of democratic government." I do not believe the Founders thought their dearly bought freedom from religious persecution a "luxury," but an essential element of liberty -- and they could not have thought religious intolerance "unavoidable," for they drafted the Religion Clauses precisely in order to avoid that intolerance.

For these reasons, I agree with Justice O'Connor's analysis of the applicable free exercise doctrine, and I join parts I and II of her opinion. As she points out,

the critical question in this case is whether exempting respondents from the State's general criminal prohibition "will unduly interfere with fulfillment of the governmental interest."

I do disagree, however, with her specific answer to that question.

#### I

In weighing respondents' clear interest in the free exercise of their religion against Oregon's asserted interest in enforcing its drug laws, it is important to articulate in precise terms the state interest involved. It is not the State's broad interest in fighting the critical "war on drugs" that must be weighed against respondents' claim, but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote. \*\*\*

The State's interest in enforcing its prohibition, in order to be sufficiently compelling to outweigh a free exercise claim, cannot be merely abstract or symbolic. The State cannot plausibly assert that unbending application of a criminal prohibition is essential to fulfill any compelling interest if it does not, in fact, attempt to enforce that prohibition. In this case, the State actually has not evinced any concrete interest in enforcing its drug laws against religious

users of peyote. Oregon has never sought to prosecute respondents, and does not claim that it has made significant enforcement efforts against other religious users of peyote. The State's asserted interest thus amounts only to the symbolic preservation of an unenforced prohibition. But a government interest in "symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs," *Treasury Employees v. Von Raab* (1989) (SCALIA, J., dissenting), cannot suffice to abrogate the constitutional rights of individuals.

Similarly, this Court's prior decisions have not allowed a government to rely on mere speculation about potential harms, but have demanded evidentiary support for a refusal to allow a religious exception. \*\*\*

The State proclaims an interest in protecting the health and safety of its citizens from the dangers of unlawful drugs. It offers, however, no evidence that the religious use of peyote has ever harmed anyone. The factual findings of other courts cast doubt on the State's assumption that religious use of peyote is harmful. \*\*\*

The fact that peyote is classified as a Schedule I controlled substance does not, by itself, show that any and all uses of peyote, in any circumstance, are inherently harmful and dangerous. The Federal Government, which created the classifications of unlawful drugs from which Oregon's drug laws are derived, apparently does not find peyote so dangerous as to preclude an exemption for religious use. Moreover, other Schedule I drugs have lawful uses.

The carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs. The Native American Church's internal restrictions on, and supervision of, its members' use of peyote substantially obviate the State's health and safety concerns.

\*\*\* Far from promoting the lawless and irresponsible use of drugs, Native American Church members' spiritual code exemplifies values that Oregon's drug laws are presumably intended to foster.

The State also seeks to support its refusal to make an exception for religious use of peyote by invoking its interest in abolishing drug trafficking. There is, however, practically no illegal traffic in peyote. \*\*\*Peyote simply is not a popular drug; its distribution for use in religious rituals has nothing to do with the vast and violent traffic in illegal narcotics that plagues this country.

Finally, the State argues that granting an exception for religious peyote use would erode its interest in the uniform, fair, and certain enforcement of its drug laws. The State fears that, if it grants an exemption for religious peyote use, a flood of other claims to religious exemptions will follow. It would then be placed in a dilemma, it says, between allowing a patchwork of exemptions that would hinder its law enforcement efforts, and risking a violation of the Establishment Clause by arbitrarily limiting its religious exemptions. This argument, however, could be made in almost any free exercise case. This Court, however, consistently has rejected similar arguments in past free exercise cases, and it should do so here as well.

The State's apprehension of a flood of other religious claims is purely speculative. Almost half the States, and the Federal Government, have

maintained an exemption for religious peyote use for many years, and apparently have not found themselves overwhelmed by claims to other religious exemptions. Allowing an exemption for religious peyote use would not necessarily oblige the State to grant a similar exemption to other religious groups. The unusual circumstances that make the religious use of peyote compatible with the State's interests in health and safety and in preventing drug trafficking would not apply to other religious claims. \*\*\*

## II

Finally, although I agree with Justice O'Connor that courts should refrain from delving into questions of whether, as a matter of religious doctrine, a particular practice is "central" to the religion, I do not think this means that the courts must turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion.

Respondents believe, and their sincerity has never been at issue, that the peyote plant embodies their deity, and eating it is an act of worship and communion. Without peyote, they could not enact the essential ritual of their religion.

If Oregon can constitutionally prosecute them for this act of worship, they, like the Amish, may be "forced to migrate to some other and more tolerant region." *Yoder*. This potentially devastating impact must be viewed in light of the federal policy -- reached in reaction to many years of religious persecution and intolerance -- of protecting the religious freedom of Native Americans. See American Indian Religious Freedom Act, 92 Stat. 469, 42 U.S.C. §1996("it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . , including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonies and traditional rites"). Congress recognized that certain substances, such as peyote,

have religious significance because they are sacred, they have power, they heal, they are necessary to the exercise of the rites of the religion, they are necessary to the cultural integrity of the tribe, and, therefore, religious survival.

H.R.Rep. No. 95-1308 (1978).

The American Indian Religious Freedom Act, in itself, may not create rights enforceable against government action restricting religious freedom, but this Court must scrupulously apply its free exercise analysis to the religious claims of Native Americans, however unorthodox they may be. Otherwise, both the First Amendment and the stated policy of Congress will offer to Native Americans merely an unfulfilled and hollow promise.

## III

For these reasons, I conclude that Oregon's interest in enforcing its drug laws against religious use of peyote is not sufficiently compelling to outweigh respondents' right to the free exercise of their religion. Since the State could not constitutionally enforce its criminal prohibition against respondents, the interests underlying the State's drug laws cannot justify its denial of unemployment benefits. Absent such justification, the State's regulatory interest in denying benefits for religiously motivated "misconduct," is

indistinguishable from the state interests this Court has rejected in *Frazee*, *Hobbie*, *Thomas*, and *Sherbert*. The State of Oregon cannot, consistently with the Free Exercise Clause, deny respondents unemployment benefits.

I dissent.

### III. Legislating Free Exercise

#### A. RFRA

#### *Text of Religious Freedom Restoration Act (RFRA)*

The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993), codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4, was specifically passed to counteract the Court’s decision in *Smith* and “restore” a higher level of scrutiny.

42 U.S. Code § 2000bb provides:

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws “neutral” toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S. Code § 2000bb-1 articulated the appropriate test:

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

### ***Note: The Constitutionality of RFRA***

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the United States Supreme Court held that imposing RFRA's requirements on the states exceeded Congressional power under §5 of the Fourteenth Amendment. Justice Kennedy's opinion for the Court stated that the §5 power "to enforce" is only preventive or "remedial:" "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." RFRA, the Court concluded, altered the Free Exercise Clause's meaning and thus cannot be said to be enforcing the Clause. "Congress does not enforce a constitutional right by changing what the right is." The Court also noted that the least restrictive means requirement in RFRA was not used in the pre-*Smith* jurisprudence RFRA purported to codify.

### ***Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal***

546 U.S. 418 (2006)

ROBERTS, C. J., DELIVERED THE OPINION OF THE COURT, IN WHICH ALL OTHER MEMBERS JOINED, EXCEPT ALITO, J., WHO TOOK NO PART IN THE CONSIDERATION OR DECISION OF THE CASE.

CHIEF JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

A religious sect with origins in the Amazon Rainforest receives communion by drinking a sacramental tea, brewed from plants unique to the region, that contains a hallucinogen regulated under the Controlled Substances Act by the Federal Government. The Government concedes that this practice is a sincere exercise of religion, but nonetheless sought to prohibit the small American branch of the sect from engaging in the practice, on the ground that the

Controlled Substances Act bars all use of the hallucinogen. The sect sued to block enforcement against it of the ban on the sacramental tea, and moved for a preliminary injunction.

It relied on the Religious Freedom Restoration Act of 1993, which prohibits the Federal Government from substantially burdening a person's exercise of religion, unless the Government "demonstrates that application of the burden to the person" represents the least restrictive means of advancing a compelling interest. 42 U.S.C. § 2000bb-1(b). The District Court granted the preliminary injunction, and the Court of Appeals affirmed. We granted the Government's petition for certiorari. Before this Court, the Government's central submission is that it has a compelling interest in the *uniform* application of the Controlled Substances Act, such that no exception to the ban on use of the hallucinogen can be made to accommodate the sect's sincere religious practice. We conclude that the Government has not carried the burden expressly placed on it by Congress in the Religious Freedom Restoration Act, and affirm the grant of the preliminary injunction.

## I

In *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990), this Court held that the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws. In *Smith*, we rejected a challenge to an Oregon statute that denied unemployment benefits to drug users, including Native Americans engaged in the sacramental use of peyote. In so doing, we rejected the interpretation of the Free Exercise Clause announced in *Sherbert v. Verner* (1963), and, in accord with earlier cases, held that the Constitution does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws.

Congress responded by enacting the Religious Freedom Restoration Act of 1993 (RFRA), which adopts a statutory rule comparable to the constitutional rule rejected in *Smith*. Under RFRA, the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, "even if the burden results from a rule of general applicability." § 2000bb-1(a). The only exception recognized by the statute requires the Government to satisfy the compelling interest test—to "demonstrat[e] that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." § 2000bb-1(b). A person whose religious practices are burdened in violation of RFRA "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief." § 2000bb-1(c).

The Controlled Substances Act regulates the importation, manufacture, distribution, and use of psychotropic substances. The Act classifies substances into five schedules based on their potential for abuse, the extent to which they have an accepted medical use, and their safety. Substances listed in Schedule I of the Act are subject to the most comprehensive restrictions, including an outright ban on all importation and use, except pursuant to strictly regulated research projects. The Act authorizes the imposition of a criminal sentence for simple possession of Schedule I substances, and mandates the imposition of a

criminal sentence for possession "with intent to manufacture, distribute, or dispense" such substances.

O Centro Espírita Beneficente União do Vegetal (UDV) is a Christian Spiritist sect based in Brazil, with an American branch of approximately 130 individuals. Central to the UDV's faith is receiving communion through *hoasca* (pronounced "wass-ca"), a sacramental tea made from two plants unique to the Amazon region. One of the plants, *psychotriaviridis*, contains dimethyltryptamine (DMT), a hallucinogen whose effects are enhanced by alkaloids from the other plant, *banisteriopsis caapi*. DMT, as well as "any material, compound, mixture, or preparation, which contains any quantity of [DMT]," is listed in Schedule I of the Controlled Substances Act.

In 1999, United States Customs inspectors intercepted a shipment to the American UDV containing three drums of *hoasca*. A subsequent investigation revealed that the UDV had received 14 prior shipments of *hoasca*. The inspectors seized the intercepted shipment and threatened the UDV with prosecution.

The UDV filed suit against the Attorney General and other federal law enforcement officials, seeking declaratory and injunctive relief. The complaint alleged, *inter alia*, that applying the Controlled Substances Act to the UDV's sacramental use of *hoasca* violates RFRA. Prior to trial, the UDV moved for a preliminary injunction, so that it could continue to practice its faith pending trial on the merits.

At a hearing on the preliminary injunction, the Government conceded that the challenged application of the Controlled Substances Act would substantially burden a sincere exercise of religion by the UDV. The Government argued, however, that this burden did not violate RFRA, because applying the Controlled Substances Act in this case was the least restrictive means of advancing three compelling governmental interests: protecting the health and safety of UDV members, preventing the diversion of *hoasca* from the church to recreational users, and complying with the 1971 United Nations Convention on Psychotropic Substances, a treaty signed by the United States and implemented by the Act.

The District Court heard evidence from both parties on the health risks of *hoasca* and the potential for diversion from the church. The Government presented evidence to the effect that use of *hoasca*, or DMT more generally, can cause psychotic reactions, cardiac irregularities, and adverse drug interactions. The UDV countered by citing studies documenting the safety of its sacramental use of *hoasca* and presenting evidence that minimized the likelihood of the health risks raised by the Government. With respect to diversion, the Government pointed to a general rise in the illicit use of hallucinogens, and cited interest in the illegal use of DMT and *hoasca* in particular; the UDV emphasized the thinness of any market for *hoasca*, the relatively small amounts of the substance imported by the church, and the absence of any diversion problem in the past.

The District Court concluded that the evidence on health risks was "in equipoise," and similarly that the evidence on diversion was "virtually balanced." In the face of such an even showing, the court reasoned that the

Government had failed to demonstrate a compelling interest justifying what it acknowledged was a substantial burden on the UDV's sincere religious exercise. The court also rejected the asserted interest in complying with the 1971 Convention on Psychotropic Substances, holding that the Convention does not apply to *hoasca*.

The court entered a preliminary injunction prohibiting the Government from enforcing the Controlled Substances Act with respect to the UDV's importation and use of *hoasca*. The injunction requires the church to import the tea pursuant to federal permits, to restrict control over the tea to persons of church authority, and to warn particularly susceptible UDV members of the dangers of *hoasca*. The injunction also provides that "if [the Government] believe[s] that evidence exists that *hoasca* has negatively affected the health of UDV members," or "that a shipment of *hoasca* contain[s] particularly dangerous levels of DMT, [the Government] may apply to the Court for an expedite[d] determination of whether the evidence warrants suspension or revocation of [the UDV's authority to use *hoasca*]."

The Government appealed the preliminary injunction and a panel of the Court of Appeals for the Tenth Circuit affirmed, as did a majority of the Circuit sitting en banc. We granted certiorari.

## II

Although its briefs contain some discussion of the potential for harm and diversion from the UDV's use of *hoasca*, the Government does not challenge the District Court's factual findings or its conclusion that the evidence submitted on these issues was evenly balanced. Instead, the Government maintains that such evidentiary equipoise is an insufficient basis for issuing a preliminary injunction against enforcement of the Controlled Substances Act. \*\*\*

## III

The Government's second line of argument rests on the Controlled Substances Act itself. The Government contends that the Act's description of Schedule I substances as having "a high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use . . . under medical supervision," by itself precludes any consideration of individualized exceptions such as that sought by the UDV. The Government goes on to argue that the regulatory regime established by the Act—a "closed" system that prohibits all use of controlled substances except as authorized by the Act itself — "cannot function with its necessary rigor and comprehensiveness if subjected to judicial exemptions." According to the Government, there would be no way to cabin religious exceptions once recognized, and "the public will misread" such exceptions as signaling that the substance at issue is not harmful after all. Under the Government's view, there is no need to assess the particulars of the UDV's use or weigh the impact of an exemption for that specific use, because the Controlled Substances Act serves a compelling purpose and simply admits of no exceptions.

## A

RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach. RFRA requires the

Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened. RFRA expressly adopted the compelling interest test "as set forth in *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972)." In each of those cases, this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants. In *Yoder*, for example, we permitted an exemption for Amish children from a compulsory school attendance law. We recognized that the State had a "paramount" interest in education, but held that "despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing *the claimed Amish exemption*." (emphasis added). The Court explained that the State needed "to show with more particularity how its admittedly strong interest . . . would be adversely affected by granting an exemption *to the Amish*." (emphasis added).

In *Sherbert*, the Court upheld a particular claim to a religious exemption from a state law denying unemployment benefits to those who would not work on Saturdays, but explained that it was not announcing a constitutional right to unemployment benefits for "*all* persons whose religious convictions are the cause of their unemployment." (emphasis added). The Court distinguished the case "in which an employee's religious convictions serve to make him a nonproductive member of society." Outside the Free Exercise area as well, the Court has noted that "[c]ontext matters" in applying the compelling interest test, *Grutter v. Bollinger* (2003), and has emphasized that "strict scrutiny *does* take 'relevant differences' into account—indeed, that is its fundamental purpose," *Adarand Constructors, Inc. v. Peña* (1995).

## B

Under the more focused inquiry required by RFRA and the compelling interest test, the Government's mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day. It is true, of course, that Schedule I substances such as DMT are exceptionally dangerous. Nevertheless, there is no indication that Congress, in classifying DMT, considered the harms posed by the particular use at issue here—the circumscribed, sacramental use of *hoasca* by the UDV. The question of the harms from the sacramental use of *hoasca* by the UDV *was* litigated below. Before the District Court found that the Government had not carried its burden of showing a compelling interest in preventing such harms, the court noted that it could not "ignore that the legislative branch of the government elected to place materials containing DMT in Schedule I of the [Act], reflecting findings that substances containing DMT have 'a high potential for abuse,' and 'no currently accepted medical use in treatment in the United States,' and that '[t]here is a lack of accepted safety for use of [DMT] under medical supervision.'" But Congress' determination that DMT should be listed under Schedule I simply does not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA.

This conclusion is reinforced by the Controlled Substances Act itself. The Act contains a provision authorizing the Attorney General to "waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety." The fact that the Act itself contemplates that exempting certain people from its requirements would be "consistent with the public health and safety" indicates that congressional findings with respect to Schedule I substances should not carry the determinative weight, for RFRA purposes, that the Government would ascribe to them.

And in fact an exception has been made to the Schedule I ban for religious use. For the past 35 years, there has been a regulatory exemption for use of peyote—a Schedule I substance—by the Native American Church. In 1994, Congress extended that exemption to all members of every recognized Indian Tribe. Everything the Government says about the DMT in *hoasca*—that, as a Schedule I substance, Congress has determined that it "has a high potential for abuse," "has no currently accepted medical use," and has "a lack of accepted safety for use . . . under medical supervision" —applies in equal measure to the mescaline in peyote, yet both the Executive and Congress itself have decreed an exception from the Controlled Substances Act for Native American religious use of peyote. If such use is permitted in the face of the congressional findings in § 812(b)(1) for hundreds of thousands of Native Americans practicing their faith, it is difficult to see how those same findings alone can preclude any consideration of a similar exception for the 130 or so American members of the UDV who want to practice theirs.

The Government responds that there is a "unique relationship" between the United States and the Tribes, but never explains what about that "unique" relationship justifies overriding the same congressional findings on which the Government relies in resisting any exception for the UDV's religious use of *hoasca*. In other words, if any Schedule I substance is in fact *always* highly dangerous in any amount no matter how used, what about the unique relationship with the Tribes justifies allowing their use of peyote? Nothing about the unique political status of the Tribes makes their members immune from the health risks the Government asserts accompany any use of a Schedule I substance, nor insulates the Schedule I substance the Tribes use in religious exercise from the alleged risk of diversion.

The Government argues that the existence of a *congressional* exemption for peyote does not indicate that the Controlled Substances Act is amenable to *judicially crafted* exceptions. RFRA, however, plainly contemplates that *courts* would recognize exceptions—that is how the law works. Congress' role in the peyote exemption—and the Executive's —confirms that the findings in the Controlled Substances Act do not preclude exceptions altogether; RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.

### C

The well-established peyote exception also fatally undermines the Government's broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions under RFRA. The Government argues that the effectiveness of the Controlled Substances Act will be

"necessarily . . . undercut" if the Act is not uniformly applied, without regard to burdens on religious exercise. The peyote exception, however, has been in place since the outset of the Controlled Substances Act, and there is no evidence that it has "undercut" the Government's ability to enforce the ban on peyote use by non-Indians.

The Government points to some pre-*Smith* cases relying on a need for uniformity in rejecting claims for religious exemptions under the Free Exercise Clause, but those cases strike us as quite different from the present one. Those cases did not embrace the notion that a general interest in uniformity justified a substantial burden on religious exercise; they instead scrutinized the asserted need and explained why the denied exemptions could not be accommodated. In *United States v. Lee* (1982), for example, the Court rejected a claimed exception to the obligation to pay Social Security taxes, noting that "mandatory participation is indispensable to the fiscal vitality of the social security system" and that the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." See also *Hernandez v. Commissioner* (1989) (same). In *Braunfeld v. Brown* (1961) (plurality opinion), the Court denied a claimed exception to Sunday closing laws, in part because allowing such exceptions "might well provide [the claimants] with an economic advantage over their competitors who must remain closed on that day." The whole point of a "uniform day of rest for all workers" would have been defeated by exceptions. These cases show that the Government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program.

Here the Government's argument for uniformity is different; it rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law. The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rule[s] of general applicability." Congress determined that the legislated test "is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." This determination finds support in our cases; in *Sherbert*, for example, we rejected a slippery-slope argument similar to the one offered in this case, dismissing as "no more than a possibility" the State's speculation "that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work" would drain the unemployment benefits fund.

\*\*\* We do not doubt that there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA. But it would have been surprising to find that this was such a case, given the longstanding exemption from the Controlled Substances Act for religious use of peyote, and the fact that the very reason Congress enacted RFRA was to respond to a decision denying a claimed right to sacramental use of a controlled substance. And in fact the Government has not offered evidence demonstrating

that granting the UDV an exemption would cause the kind of administrative harm recognized as a compelling interest in *Lee, Hernandez, and Braunfeld*. The Government failed to convince the District Court at the preliminary injunction hearing that health or diversion concerns provide a compelling interest in banning the UDV's sacramental use of *hoasca*. It cannot compensate for that failure now with the bold argument that there can be no RFRA exceptions at all to the Controlled Substances Act. See Tr. of Oral Arg. 17 (Deputy Solicitor General statement that exception could not be made even for "rigorously policed" use of "one drop" of substance "once a year").

#### IV

Before the District Court, the Government also asserted an interest in compliance with the 1971 United Nations Convention on Psychotropic Substances. The Convention, signed by the United States and implemented by the Controlled Substances Act, calls on signatories to prohibit the use of hallucinogens, including DMT. The Government argues that it has a compelling interest in meeting its international obligations by complying with the Convention.

The District Court rejected this interest because it found that the Convention does not cover *hoasca*. \*\*\*

We do not agree. \*\*\*

The fact that *hoasca* is covered by the Convention, however, does not automatically mean that the Government has demonstrated a compelling interest in applying the Controlled Substances Act, which implements the Convention, to the UDV's sacramental use of the tea. At the present stage, it suffices to observe that the Government did not even *submit* evidence addressing the international consequences of granting an exemption for the UDV. The Government simply submitted two affidavits by State Department officials attesting to the general importance of honoring international obligations and of maintaining the leadership position of the United States in the international war on drugs. We do not doubt the validity of these interests, any more than we doubt the general interest in promoting public health and safety by enforcing the Controlled Substances Act, but under RFRA invocation of such general interests, standing alone, is not enough.

The Government repeatedly invokes Congress' findings and purposes underlying the Controlled Substances Act, but Congress had a reason for enacting RFRA, too. Congress recognized that "laws `neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise," and legislated "the compelling interest test" as the means for the courts to "stri[k]e sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. §§ 2000bb(a)(2), (5).

We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one. Indeed, the very sort of difficulties highlighted by the Government here were cited by this Court in deciding that the approach later mandated by Congress under RFRA was not required as a matter of constitutional law under the Free Exercise Clause. But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular

practice at issue. Applying that test, we conclude that the courts below did not err in determining that the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the UDV's sacramental use of *hoasca*.

The judgment of the United States Court of Appeals for the Tenth Circuit is affirmed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

## ***Burwell v. Hobby Lobby Stores, Inc.***

573 U.S. \_\_\_ (2014)

ALITO, J., DELIVERED THE OPINION OF THE COURT, IN WHICH ROBERTS, C. J., AND SCALIA, KENNEDY, AND THOMAS, JJ., JOINED. KENNEDY, J., FILED A CONCURRING OPINION. GINSBURG, J., FILED A DISSENTING OPINION, IN WHICH SOTOMAYOR, J., JOINED, AND IN WHICH BREYER AND KAGAN, JJ., JOINED AS TO ALL BUT PART III-C-1. BREYER AND KAGAN, JJ., FILED A DISSENTING OPINION.

JUSTICE ALITO DELIVERED THE OPINION OF THE COURT.

We must decide in these cases whether the Religious Freedom Restoration Act of 1993 (RFRA), 107Stat. 1488, 42 U.S.C. §2000bb et seq., permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners. We hold that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.

In holding that the HHS mandate is unlawful, we reject HHS's argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships. The plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.

Since RFRA applies in these cases, we must decide whether the challenged HHS regulations substantially burden the exercise of religion, and we hold that they do. The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as \$1.3 million per day, or about \$475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would.

Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS regulations satisfy this requirement. But in order for the HHS

mandate to be sustained, it must also constitute the least restrictive means of serving that interest, and the mandate plainly fails that test. There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all FDA-approved contraceptives.

In fact, HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage. The employees of these religious nonprofit corporations still have access to insurance coverage without cost sharing for all FDA-approved contraceptives; and according to HHS, this system imposes no net economic burden on the insurance companies that are required to provide or secure the coverage.

Although HHS has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections. We therefore conclude that this system constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty. And under RFRA, that conclusion means that enforcement of the HHS contraceptive mandate against the objecting parties in these cases is unlawful.

As this description of our reasoning shows, our holding is very specific. We do not hold, as the principal dissent alleges, that for-profit corporations and other commercial enterprises can “opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.” (opinion of Ginsburg, J.). Nor do we hold, as the dissent implies, that such corporations have free rein to take steps that impose “disadvantages ... on others” or that require “the general public [to] pick up the tab.” And we certainly do not hold or suggest that “RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on ... thousands of women employed by Hobby Lobby.” The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.

I

A

[discussion of RFRA and *Smith* omitted].

B

At issue in these cases are HHS regulations promulgated under the Patient Protection and Affordable Care Act of 2010 (ACA). ACA generally requires employers with 50 or more full-time employees to offer “a group health plan or group health insurance coverage” that provides “minimum essential coverage.” Any covered employer that does not provide such coverage must pay a substantial price. Specifically, if a covered employer provides group health insurance but its plan fails to comply with ACA’s group-health-plan requirements, the employer may be required to pay \$100 per day for each affected “individual.” And if the employer decides to stop providing health

insurance altogether and at least one full-time employee enrolls in a health plan and qualifies for a subsidy on one of the government-run ACA exchanges, the employer must pay \$2,000 per year for each of its full-time employees.

Unless an exception applies, ACA requires an employer's group health plan or group-health-insurance coverage to furnish "preventive care and screenings" for women without "any cost sharing requirements." Congress itself, however, did not specify what types of preventive care must be covered. Instead, Congress authorized the Health Resources and Services Administration (HRSA), a component of HHS, to make that important and sensitive decision. The HRSA in turn consulted the Institute of Medicine, a nonprofit group of volunteer advisers, in determining which preventive services to require.

In August 2011, based on the Institute's recommendations, the HRSA promulgated the Women's Preventive Services Guidelines. The Guidelines provide that nonexempt employers are generally required to provide "coverage, without cost sharing" for "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling." Although many of the required, FDA-approved methods of contraception work by preventing the fertilization of an egg, four of those methods (those specifically at issue in these cases) may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus.

HHS also authorized the HRSA to establish exemptions from the contraceptive mandate for "religious employers." That category encompasses "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order." In its Guidelines, HRSA exempted these organizations from the requirement to cover contraceptive services.

In addition, HHS has effectively exempted certain religious nonprofit organizations, described under HHS regulations as "eligible organizations," from the contraceptive mandate. An "eligible organization" means a nonprofit organization that "holds itself out as a religious organization" and "opposes providing coverage for some or all of any contraceptive services required to be covered ... on account of religious objections." To qualify for this accommodation, an employer must certify that it is such an organization. When a group-health-insurance issuer receives notice that one of its clients has invoked this provision, the issuer must then exclude contraceptive coverage from the employer's plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries. Although this procedure requires the issuer to bear the cost of these services, HHS has determined that this obligation will not impose any net expense on issuers because its cost will be less than or equal to the cost savings resulting from the services.

In addition to these exemptions for religious organizations, ACA exempts a great many employers from most of its coverage requirements. Employers providing "grandfathered health plans"—those that existed prior to March 23, 2010, and that have not made specified changes after that date—need not comply with

many of the Act's requirements, including the contraceptive mandate. And employers with fewer than 50 employees are not required to provide health insurance at all.

All told, the contraceptive mandate "presently does not apply to tens of millions of people." This is attributable, in large part, to grandfathered health plans: Over one-third of the 149 million nonelderly people in America with employer-sponsored health plans were enrolled in grandfathered plans in 2013. The count for employees working for firms that do not have to provide insurance at all because they employ fewer than 50 employees is 34 million workers.

## II

### A

Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church, a Christian denomination. The Mennonite Church opposes abortion and believes that "[t]he fetus in its earliest stages ... shares humanity with those who conceived it."

Fifty years ago, Norman Hahn started a wood-working business in his garage, and since then, this company, Conestoga Wood Specialties, has grown and now has 950 employees. Conestoga is organized under Pennsylvania law as a for-profit corporation. The Hahns exercise sole ownership of the closely held business; they control its board of directors and hold all of its voting shares. One of the Hahn sons serves as the president and CEO.

The Hahns believe that they are required to run their business "in accordance with their religious beliefs and moral principles." To that end, the company's mission, as they see it, is to "operate in a professional environment founded upon the highest ethical, moral, and Christian principles." (internal quotation marks omitted). The company's "Vision and Values Statements" affirms that Conestoga endeavors to "ensur[e] a reasonable profit in [a] manner that reflects [the Hahns'] Christian heritage."

As explained in Conestoga's board-adopted "Statement on the Sanctity of Human Life," the Hahns believe that "human life begins at conception." It is therefore "against [their] moral conviction to be involved in the termination of human life" after conception, which they believe is a "sin against God to which they are held accountable." The Hahns have accordingly excluded from the group-health-insurance plan they offer to their employees certain contraceptive methods that they consider to be abortifacients.

The Hahns and Conestoga sued HHS and other federal officials and agencies under RFRA and the Free Exercise Clause of the First Amendment, seeking to enjoin application of ACA's contraceptive mandate insofar as it requires them to provide health-insurance coverage for four FDA-approved contraceptives that may operate after the fertilization of an egg. These include two forms of emergency contraception commonly called "morning after" pills and two types of intrauterine devices.

In opposing the requirement to provide coverage for the contraceptives to which they object, the Hahns argued that "it is immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs." The District Court denied a preliminary injunction, and the Third Circuit

affirmed in a divided opinion, holding that “for-profit, secular corporations cannot engage in religious exercise” within the meaning of RFRA or the First Amendment. The Third Circuit also rejected the claims brought by the Hahns themselves because it concluded that the HHS “[m]andate does not impose any requirements on the Hahns” in their personal capacity.

## B

David and Barbara Green and their three children are Christians who own and operate two family businesses. Forty-five years ago, David Green started an arts-and-crafts store that has grown into a nationwide chain called Hobby Lobby. There are now 500 Hobby Lobby stores, and the company has more than 13,000 employees. Hobby Lobby is organized as a for-profit corporation under Oklahoma law.

One of David’s sons started an affiliated business, Mardel, which operates 35 Christian bookstores and employs close to 400 people. Mardel is also organized as a for-profit corporation under Oklahoma law.

Though these two businesses have expanded over the years, they remain closely held, and David, Barbara, and their children retain exclusive control of both companies. David serves as the CEO of Hobby Lobby, and his three children serve as the president, vice president, and vice CEO.

Hobby Lobby’s statement of purpose commits the Greens to “[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles.” Each family member has signed a pledge to run the businesses in accordance with the family’s religious beliefs and to use the family assets to support Christian ministries. In accordance with those commitments, Hobby Lobby and Mardel stores close on Sundays, even though the Greens calculate that they lose millions in sales annually by doing so. The businesses refuse to engage in profitable transactions that facilitate or promote alcohol use; they contribute profits to Christian missionaries and ministries; and they buy hundreds of full-page newspaper ads inviting people to “know Jesus as Lord and Savior.”

Like the Hahns, the Greens believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point. They specifically object to the same four contraceptive methods as the Hahns and, like the Hahns, they have no objection to the other 16 FDA-approved methods of birth control. Although their group-health-insurance plan predates the enactment of ACA, it is not a grandfathered plan because Hobby Lobby elected not to retain grandfathered status before the contraceptive mandate was proposed.

The Greens, Hobby Lobby, and Mardel sued HHS and other federal agencies and officials to challenge the contraceptive mandate under RFRA and the Free Exercise Clause. The District Court denied a preliminary injunction, and the plaintiffs appealed, moving for initial en banc consideration. The Tenth Circuit granted that motion and reversed in a divided opinion. Contrary to the conclusion of the Third Circuit, the Tenth Circuit held that the Greens’ two for-profit businesses are “persons” within the meaning of RFRA and therefore may bring suit under that law.

The court then held that the corporations had established a likelihood of success on their RFRA claim. The court concluded that the contraceptive mandate substantially burdened the exercise of religion by requiring the companies to choose between “compromis[ing] their religious beliefs” and paying a heavy fee—either “close to \$475 million more in taxes every year” if they simply refused to provide coverage for the contraceptives at issue, or “roughly \$26 million” annually if they “drop[ped] health-insurance benefits for all employees.”

The court next held that HHS had failed to demonstrate a compelling interest in enforcing the mandate against the Greens’ businesses and, in the alternative, that HHS had failed to prove that enforcement of the mandate was the “least restrictive means” of furthering the Government’s asserted interests. After concluding that the companies had “demonstrated irreparable harm,” the court reversed and remanded for the District Court to consider the remaining factors of the preliminary-injunction test.

We granted certiorari.

### III

#### A

RFRA prohibits the “Government [from] substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability” unless the Government “demonstrates that application of the burden to *the person*—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. §§2000bb–1(a), (b) (emphasis added). The first question that we must address is whether this provision applies to regulations that govern the activities of for-profit corporations like Hobby Lobby, Conestoga, and Mardel.

HHS contends that neither these companies nor their owners can even be heard under RFRA. According to HHS, the companies cannot sue because they seek to make a profit for their owners, and the owners cannot be heard because the regulations, at least as a formal matter, apply only to the companies and not to the owners as individuals. HHS’s argument would have dramatic consequences.

Consider this Court’s decision in *Braunfeld v. Brown* (1961) (plurality opinion). In that case, five Orthodox Jewish merchants who ran small retail businesses in Philadelphia challenged a Pennsylvania Sunday closing law as a violation of the Free Exercise Clause. Because of their faith, these merchants closed their shops on Saturday, and they argued that requiring them to remain shut on Sunday threatened them with financial ruin. The Court entertained their claim (although it ruled against them on the merits), and if a similar claim were raised today under RFRA against a jurisdiction still subject to the Act, the merchants would be entitled to be heard. According to HHS, however, if these merchants chose to incorporate their businesses—without in any way changing the size or nature of their businesses—they would forfeit all RFRA (and free-exercise) rights. HHS would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.

As we have seen, RFRA was designed to provide very broad protection for religious liberty. By enacting RFRA, Congress went far beyond what this Court

has held is constitutionally required. Is there any reason to think that the Congress that enacted such sweeping protection put small-business owners to the choice that HHS suggests? An examination of RFRA's text, to which we turn in the next part of this opinion, reveals that Congress did no such thing.

As we will show, Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA's definition of "persons." But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends.  
\*\*\*

Corporations, "separate and apart from" the human beings who own, run, and are employed by them, cannot do anything at all.

B

1

\*\*\* Under the Dictionary Act, "the wor[d] 'person' ... include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." ; Thus, unless there is something about the RFRA context that "indicates otherwise," the Dictionary Act provides a quick, clear, and affirmative answer to the question whether the companies involved in these cases may be heard. \*\*\*

2

The principal argument advanced by HHS and the principal dissent regarding RFRA protection for Hobby Lobby, Conestoga, and Mardel focuses not on the statutory term "person," but on the phrase "exercise of religion." According to HHS and the dissent, these corporations are not protected by RFRA because they cannot exercise religion. Neither HHS nor the dissent, however, provides any persuasive explanation for this conclusion.

Is it because of the corporate form? The corporate form alone cannot provide the explanation because, as we have pointed out, HHS concedes that nonprofit corporations can be protected by RFRA. The dissent suggests that nonprofit corporations are special because furthering their religious "autonomy . . . often furthers individual religious freedom as well." But this principle applies equally to for-profit corporations: Furthering their religious freedom also "furthers individual religious freedom." In these cases, for example, allowing Hobby Lobby, Conestoga, and Mardel to assert RFRA claims protects the religious liberty of the Greens and the Hahns.

If the corporate form is not enough, what about the profit-making objective? In *Braunfeld*, we entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants, and the Court never even hinted that this objective precluded their claims. As the Court explained in a later case, the "exercise of religion" involves "not only belief and profession but the performance of (or abstention from) physical acts" that are "engaged in for religious reasons." Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition. Thus, a law that "operates so as to make the practice of ... religious beliefs more expensive" in the context of business activities imposes a burden on the exercise of religion.

If, as *Braunfeld* recognized, a sole proprietorship that seeks to make a profit may assert a free-exercise claim, why can't Hobby Lobby, Conestoga, and Mardel do the same? \*\*\*

HHS would draw a sharp line between nonprofit corporations (which, HHS concedes, are protected by RFRA) and for-profit corporations (which HHS would leave unprotected), but the actual picture is less clear-cut. Not all corporations that decline to organize as nonprofits do so in order to maximize profit. For example, organizations with religious and charitable aims might organize as for-profit corporations because of the potential advantages of that corporate form, such as the freedom to participate in lobbying for legislation or campaigning for political candidates who promote their religious or charitable goals. \*\*\*

3

HHS and the principal dissent make one additional argument in an effort to show that a for-profit corporation cannot engage in the “exercise of religion” within the meaning of RFRA: HHS argues that RFRA did no more than codify this Court’s pre-*Smith* Free Exercise Clause precedents, and because none of those cases squarely held that a for-profit corporation has free-exercise rights, RFRA does not confer such protection. This argument has many flaws.

First, nothing in the text of RFRA as originally enacted suggested that the statutory phrase “exercise of religion under the First Amendment” was meant to be tied to this Court’s pre-*Smith* interpretation of that Amendment. \*\*\*

Second, if the original text of RFRA was not clear enough on this point—and we think it was—the amendment of RFRA through RLUIPA surely dispels any doubt. \*\*\*

Third, the one pre-*Smith* case involving the free-exercise rights of a for-profit corporation suggests, if anything, that for-profit corporations possess such rights. In *Gallagher v. Crown Kosher Super Market of Mass., Inc.* (1961), the Massachusetts Sunday closing law was challenged by a kosher market that was organized as a for-profit corporation, by customers of the market, and by a rabbi. The Commonwealth argued that the corporation lacked “standing” to assert a free-exercise claim, but not one member of the Court expressed agreement with that argument. The plurality opinion for four Justices rejected the First Amendment claim on the merits based on the reasoning in *Braunfeld*, and reserved decision on the question whether the corporation had “standing” to raise the claim. The three dissenters, Justices Douglas, Brennan, and Stewart, found the law unconstitutional as applied to the corporation and the other challengers and thus implicitly recognized their right to assert a free-exercise claim. Finally, Justice Frankfurter’s opinion, which was joined by Justice Harlan, upheld the Massachusetts law on the merits but did not question or reserve decision on the issue of the right of the corporation or any of the other challengers to be heard. It is quite a stretch to argue that RFRA, a law enacted to provide very broad protection for religious liberty, left for-profit corporations unprotected simply because in *Gallagher*—the only pre-*Smith* case in which the issue was raised—a majority of the Justices did not find it necessary to decide whether the kosher market’s corporate status barred it from raising a free-exercise claim.

Finally, the results would be absurd if RFRA merely restored this Court's pre-*Smith* decisions in ossified form and did not allow a plaintiff to raise a RFRA claim unless that plaintiff fell within a category of plaintiffs one of whom had brought a free-exercise claim that this Court entertained in the years before *Smith*. For example, we are not aware of any pre-*Smith* case in which this Court entertained a free-exercise claim brought by a resident noncitizen. Are such persons also beyond RFRA's protective reach simply because the Court never addressed their rights before *Smith*? \*\*\*

4

Finally, HHS contends that Congress could not have wanted RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere "beliefs" of a corporation. HHS goes so far as to raise the specter of "divisive, polarizing proxy battles over the religious identity of large, publicly traded corporations such as IBM or General Electric."

These cases, however, do not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims.\*\*\*

For all these reasons, we hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA.

#### IV

Because RFRA applies in these cases, we must next ask whether the HHS contraceptive mandate "substantially burden[s]" the exercise of religion. 42 U.S.C. §2000bb-1(a). We have little trouble concluding that it does.

#### A

As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.

If the Hahns and Greens and their companies do not yield to this demand, the economic consequences will be severe. If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed \$100 per day for each affected individual. For Hobby Lobby, the bill could amount to \$1.3 million per day or about \$475 million per year; for Conestoga, the assessment could be \$90,000 per day or \$33 million per year; and for Mardel, it could be \$40,000 per day or about \$15 million per year. These sums are surely substantial.

It is true that the plaintiffs could avoid these assessments by dropping insurance coverage altogether and thus forcing their employees to obtain health insurance on one of the exchanges established under ACA. But if at least one of their full-time employees were to qualify for a subsidy on one of the government-run exchanges, this course would also entail substantial economic consequences. The companies could face penalties of \$2,000 per employee each year. These penalties would amount to roughly \$26 million for Hobby Lobby, \$1.8 million for Conestoga, and \$800,000 for Mardel.

## B

Although these totals are high, amici supporting HHS have suggested that the \$2,000 per-employee penalty is actually less than the average cost of providing health insurance, and therefore, they claim, the companies could readily eliminate any substantial burden by forcing their employees to obtain insurance in the government exchanges. We do not generally entertain arguments that were not raised below and are not advanced in this Court by any party.\*\*\*

Even if we were to reach this argument, we would find it unpersuasive. As an initial matter, it entirely ignores the fact that the Hahns and Greens and their companies have religious reasons for providing health-insurance coverage for their employees. Before the advent of ACA, they were not legally compelled to provide insurance, but they nevertheless did so—in part, no doubt, for conventional business reasons, but also in part because their religious beliefs govern their relations with their employees. \*\*\*

## C

In taking the position that the HHS mandate does not impose a substantial burden on the exercise of religion, HHS's main argument (echoed by the principal dissent) is basically that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated. HHS and the dissent note that providing the coverage would not itself result in the destruction of an embryo; that would occur only if an employee chose to take advantage of the coverage and to use one of the four methods at issue.

This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable). The Hahns and Greens believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step. \*\*\*

## V

Since the HHS contraceptive mandate imposes a substantial burden on the exercise of religion, we must move on and decide whether HHS has shown that the mandate both “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”

## A

HHS asserts that the contraceptive mandate serves a variety of important interests, but many of these are couched in very broad terms, such as promoting “public health” and “gender equality.” RFRA, however, contemplates a “more focused” inquiry: It “requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.” *O’Centro*. This requires us to “loo[k] beyond broadly formulated interests” and to “scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants”—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases. *O Centro*.

In addition to asserting these very broadly framed interests, HHS maintains that the mandate serves a compelling interest in ensuring that all women have access to all FDA-approved contraceptives without cost sharing. \*\*\* [But] As we have noted, many employees—those covered by grandfathered plans and those who work for employers with fewer than 50 employees—may have no contraceptive coverage without cost sharing at all.

HHS responds that many legal requirements have exceptions and the existence of exceptions does not in itself indicate that the principal interest served by a law is not compelling. Even a compelling interest may be outweighed in some circumstances by another even weightier consideration. In these cases, however, the interest served by one of the biggest exceptions, the exception for grandfathered plans, is simply the interest of employers in avoiding the inconvenience of amending an existing plan. Grandfathered plans are required “to comply with a subset of the Affordable Care Act’s health reform provisions” that provide what HHS has described as “particularly significant protections.” But the contraceptive mandate is expressly excluded from this subset.

We find it unnecessary to adjudicate this issue. We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA, and we will proceed to consider the final prong of the RFRA test, i.e., whether HHS has shown that the contraceptive mandate is “the least restrictive means of furthering that compelling governmental interest.”

## B

The least-restrictive-means standard is exceptionally demanding, see *City of Boerne*, and it is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases.

The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers’ religious objections. This would certainly be less restrictive of the plaintiffs’ religious liberty, and HHS has not shown, that this is not a viable alternative. HHS has not provided any estimate of the average cost per employee of providing access to these contraceptives, two of which, according to the FDA, are designed primarily for emergency use. Nor has HHS provided any statistics regarding the number of employees who might be affected because

they work for corporations like Hobby Lobby, Conestoga, and Mardel. Nor has HHS told us that it is unable to provide such statistics. It seems likely, however, that the cost of providing the forms of contraceptives at issue in these cases (if not all FDA-approved contraceptives) would be minor when compared with the overall cost of ACA. According to one of the Congressional Budget Office's most recent forecasts, ACA's insurance-coverage provisions will cost the Federal Government more than \$1.3 trillion through the next decade. If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required under RFRA to pay anything in order to achieve this important goal.

HHS contends that RFRA does not permit us to take this option into account because "RFRA cannot be used to require creation of entirely new programs." But we see nothing in RFRA that supports this argument, and drawing the line between the "creation of an entirely new program" and the modification of an existing program (which RFRA surely allows) would be fraught with problems. We do not doubt that cost may be an important factor in the least-restrictive-means analysis, but both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs. HHS's view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law.

In the end, however, we need not rely on the option of a new, government-funded program in order to conclude that the HHS regulations fail the least-restrictive-means test. HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs. As we explained above, HHS has already established an accommodation for nonprofit organizations with religious objections. Under that accommodation, the organization can self-certify that it opposes providing coverage for particular contraceptive services. If the organization makes such a certification, the organization's insurance issuer or third-party administrator must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan" and "[p]rovide separate payments for any contraceptive services required to be covered" without imposing "any cost-sharing requirements ... on the eligible organization, the group health plan, or plan participants or beneficiaries."

We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims. At a minimum, however, it does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well.

The principal dissent identifies no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate, and there is none. \*\*\*

C

HHS and the principal dissent argue that a ruling in favor of the objecting parties in these cases will lead to a flood of religious objections regarding a wide variety of medical procedures and drugs, such as vaccinations and blood transfusions, but HHS has made no effort to substantiate this prediction. \*\*\*

In any event, our decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.

HHS also raises for the first time in this Court the argument that applying the contraceptive mandate to for-profit employers with sincere religious objections is essential to the comprehensive health-insurance scheme that ACA establishes. HHS analogizes the contraceptive mandate to the requirement to pay Social Security taxes, which we upheld in *Lee* despite the religious objection of an employer, but these cases are quite different. \*\*\*

*Lee* was a free-exercise, not a RFRA, case, but if the issue in *Lee* were analyzed under the RFRA framework, the fundamental point would be that there simply is no less restrictive alternative to the categorical requirement to pay taxes. \*\*\*

\*\*\*Congress, in enacting RFRA, took the position that “the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.” 42 U.S.C. §2000bb(a)(5). The wisdom of Congress's judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful.

The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by *Conestoga* and the *Hahns*.

The judgment of the Tenth Circuit in No. 13–354 is affirmed; the judgment of the Third Circuit in No. 13–356 is reversed, and that case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE KENNEDY, CONCURRING.

It seems to me appropriate, in joining the Court's opinion, to add these few remarks. At the outset it should be said that the Court's opinion does not have the breadth and sweep ascribed to it by the respectful and powerful dissent.

The Court and the dissent disagree on the proper interpretation of the Religious Freedom and Restoration Act of 1993 (RFRA), but do agree on the purpose of that statute. It is to ensure that interests in religious freedom are protected.

\*\*\* Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling. In these cases the means to reconcile those two priorities are at hand in the existing accommodation the Government has designed, identified, and used for circumstances closely parallel to those presented here. RFRA requires the Government to use this less restrictive means. As the Court explains, this existing model, designed precisely for this problem, might well suffice to distinguish the instant cases from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise.

For these reasons and others put forth by the Court, I join its opinion.

JUSTICE BREYER AND JUSTICE KAGAN, DISSENTING.

We agree with Justice Ginsburg that the plaintiffs' challenge to the contraceptive coverage requirement fails on the merits. We need not and do not decide whether either for-profit corporations or their owners may bring claims under the Religious Freedom Restoration Act of 1993. Accordingly, we join all but Part III-C-1 of Justice Ginsburg's dissenting opinion.

JUSTICE GINSBURG, WITH WHOM JUSTICE SOTOMAYOR JOINS, AND WITH WHOM JUSTICE BREYER AND JUSTICE KAGAN JOIN AS TO ALL BUT PART III-C-1, DISSENTING.

In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others, hold no sway, the Court decides, at least when there is a "less restrictive alternative." And such an alternative, the Court suggests, there always will be whenever, in lieu of tolling an enterprise claiming a religion-based exemption, the government, i.e., the general public, can pick up the tab.

The Court does not pretend that the First Amendment's Free Exercise Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score. Instead, the Court holds that Congress, in the Religious Freedom Restoration Act of 1993 (RFRA), dictated the extraordinary religion-based exemptions today's decision endorses. In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court's judgment can introduce, I dissent.

I

“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” *Planned Parenthood of Southeastern Pa. v. Casey* (1992) . Congress acted on that understanding when, as part of a nationwide insurance program intended to be comprehensive, it called for coverage of preventive care responsive to women’s needs. Carrying out Congress’ direction, the Department of Health and Human Services (HHS), in consultation with public health experts, promulgated regulations requiring group health plans to cover all forms of contraception approved by the Food and Drug Administration (FDA). The genesis of this coverage should enlighten the Court’s resolution of these cases.

A

The Affordable Care Act (ACA), in its initial form, specified three categories of preventive care that health plans must cover at no added cost to the plan participant or beneficiary. Particular services were to be recommended by the U.S. Preventive Services Task Force, an independent panel of experts. The scheme had a large gap, how-ever; it left out preventive services that “many women’s health advocates and medical professionals believe are critically important.” (statement of Sen. Boxer). To correct this oversight, Senator Barbara Mikulski introduced the Women’s Health Amendment, which added to the ACA’s minimum coverage requirements a new category of preventive services specific to women’s health.

Women paid significantly more than men for preventive care, the amendment’s proponents noted; in fact, cost barriers operated to block many women from obtaining needed care at all. (statement of Sen. Feinstein) (“Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men.”); (statement of Sen. Mikulski) (“copayments are [often] so high that [women] avoid getting [preventive and screening services] in the first place”). And increased access to contraceptive services, the sponsors comprehended, would yield important public health gains. (statement of Sen. Durbin) (“This bill will expand health insurance coverage to the vast majority of [the 17 million women of reproductive age in the United States who are uninsured] .... This expanded access will reduce unintended pregnancies.”).

As altered by the Women’s Health Amendment’s passage, the ACA requires new insurance plans to include coverage without cost sharing of “such additional preventive care and screenings ... as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)],” a unit of HHS. Thus charged, the HRSA developed recommendations in consultation with the Institute of Medicine (IOM). The IOM convened a group of independent experts, including “specialists in disease prevention [and] women’s health”; those experts prepared a report evaluating the efficacy of a number of preventive services. Consistent with the findings of “[n]umerous health professional associations” and other organizations, the IOM experts determined that preventive coverage should include the “full range” of FDA-approved contraceptive methods.

In making that recommendation, the IOM’s report expressed concerns similar to those voiced by congressional proponents of the Women’s Health Amendment. The report noted the disproportionate burden women carried for comprehensive

health services and the adverse health consequences of excluding contraception from preventive care available to employees without cost sharing. (“[W]omen are consistently more likely than men to report a wide range of cost-related barriers to receiving ... medical tests and treatments and to filling prescriptions for themselves and their families.”); (pregnancy may be contraindicated for women with certain medical conditions, for example, some congenital heart diseases, pulmonary hypertension, and Marfan syndrome, and contraceptives may be used to reduce risk of endometrial cancer, among other serious medical conditions); (women with unintended pregnancies are more likely to experience depression and anxiety, and their children face “increased odds of preterm birth and low birth weight”).

In line with the IOM’s suggestions, the HRSA adopted guidelines recommending coverage of “[a]ll [FDA-]approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.” Thereafter, HHS, the Department of Labor, and the Department of Treasury promulgated regulations requiring group health plans to include coverage of the contraceptive services recommended in the HRSA guidelines, subject to certain exceptions. This opinion refers to these regulations as the contraceptive coverage requirement.

## B

While the Women’s Health Amendment succeeded, a countermove proved unavailing. The Senate voted down the so-called “conscience amendment,” which would have enabled any employer or insurance provider to deny coverage based on its asserted “religious beliefs or moral convictions.” That amendment, Senator Mikulski observed, would have “pu[t] the personal opinion of employers and insurers over the practice of medicine.” Rejecting the “conscience amendment,” Congress left health care decisions—including the choice among contraceptive methods—in the hands of women, with the aid of their health care providers.

## II

Any First Amendment Free Exercise Clause claim Hobby Lobby or Conestoga might assert is foreclosed by this Court’s decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990) . In *Smith* \*\*\*

Even if *Smith* did not control, the Free Exercise Clause would not require the exemption Hobby Lobby and Conestoga seek. Accommodations to religious beliefs or observances, the Court has clarified, must not significantly impinge on the interests of third parties.

The exemption sought by Hobby Lobby and Conestoga would override significant interests of the corporations’ employees and covered dependents. It would deny legions of women who do not hold their employers’ beliefs access to contraceptive coverage that the ACA would otherwise secure. In sum, with respect to free exercise claims no less than free speech claims, “[y]our right to swing your arms ends just where the other man’s nose begins.” Chafee, *Freedom of Speech in War Time*, 32 Harv. L.Rev. 932, 957 (1919).

## III

## A

Lacking a tenable claim under the Free Exercise Clause, Hobby Lobby and Conestoga rely on RFRA, a statute instructing that “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless the government shows that application of the burden is “the least restrictive means” to further a “compelling governmental interest.” In RFRA, Congress “adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*.” *Gonzales v. O Centro Espírita Beneficente União do Vegetal* (2006) .

RFRA’s purpose is specific and written into the statute itself. \*\*\* In line with this restorative purpose, Congress expected courts considering RFRA claims to “look to free exercise cases decided prior to *Smith* for guidance.” In short, the Act reinstates the law as it was prior to *Smith*, without “creat[ing] ... new rights for any religious practice or for any potential litigant.” (statement of Sen. Kennedy). Given the Act’s moderate purpose, it is hardly surprising that RFRA’s enactment in 1993 provoked little controversy. (RFRA was approved by a 97-to-3 vote in the Senate and a voice vote in the House of Representatives).

## B

Despite these authoritative indications, the Court sees RFRA as a bold initiative departing from, rather than restoring, pre-*Smith* jurisprudence. To support its conception of RFRA as a measure detached from this Court’s decisions, one that sets a new course, the Court points first to the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) \*\*\*

Next, the Court highlights RFRA’s requirement that the government, if its action substantially burdens a person’s religious observance, must demonstrate that it chose the least restrictive means for furthering a compelling interest. “[B]y imposing a least-restrictive-means test,” the Court suggests, RFRA “went beyond what was required by our pre-*Smith* decisions.” But as RFRA’s statements of purpose and legislative history make clear, Congress intended only to restore, not to scrap or alter, the balancing test as this Court had applied it pre-*Smith*. Senate Report (RFRA’s “compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith*.”); House Report (same).

The Congress that passed RFRA correctly read this Court’s pre-*Smith* case law as including within the “compelling interest test” a “least restrictive means” requirement. \*\*\*

Our decision in *City of Boerne*, it is true, states that the least restrictive means requirement “was not used in the pre-*Smith* jurisprudence RFRA purported to codify.” As just indicated, however, that statement does not accurately convey the Court’s pre-*Smith* jurisprudence.

## C

With RFRA’s restorative purpose in mind, I turn to the Act’s application to the instant lawsuits. That task, in view of the positions taken by the Court, requires consideration of several questions, each potentially dispositive of Hobby Lobby’s and Conestoga’s claims: Do for-profit corporations rank among “person[s]” who “exercise ... religion”? Assuming that they do, does the contraceptive coverage requirement “substantially burden” their religious exercise? If so, is the

requirement “in furtherance of a compelling government interest”? And last, does the requirement represent the least restrictive means for furthering that interest?

Misguided by its errant premise that RFRA moved beyond the pre-*Smith* case law, the Court falters at each step of its analysis.

1

RFRA’s compelling interest test, as noted, applies to government actions that “substantially burden a person’s exercise of religion.” This reference, the Court submits, incorporates the definition of “person” found in the Dictionary Act, 1 U.S.C. §1, which extends to “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” The Dictionary Act’s definition, however, controls only where “context” does not “indicat[e] otherwise.” Here, context does so indicate. RFRA speaks of “a person’s exercise of religion.” Whether a corporation qualifies as a “person” capable of exercising religion is an inquiry one cannot answer without reference to the “full body” of pre-*Smith* “free-exercise caselaw.” There is in that case law no support for the notion that free exercise rights pertain to for-profit corporations.

Until this litigation, no decision of this Court recognized a for-profit corporation’s qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA. The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities. As Chief Justice Marshall observed nearly two centuries ago, a corporation is “an artificial being, invisible, intangible, and existing only in contemplation of law.” *Trustees of Dartmouth College v. Woodward* (1819). Corporations, Justice Stevens more recently reminded, “have no consciences, no beliefs, no feelings, no thoughts, no desires.” *Citizens United v. Federal Election Comm’n*, (2010) (opinion concurring in part and dissenting in part).

The First Amendment’s free exercise protections, the Court has indeed recognized, shelter churches and other nonprofit religion-based organizations. \*\*\* The Court’s “special solicitude to the rights of religious organizations,” *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012) however, is just that. No such solicitude is traditional for commercial organizations. Indeed, until today, religious exemptions had never been extended to any entity operating in “the commercial, profit-making world.”

The reason why is hardly obscure. Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations. (Title VII requires reasonable accommodation of an employee’s religious exercise, but such accommodation must not come “at the expense of other[ employees]”). The distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs, clear as it is, constantly escapes the Court’s attention. One can only wonder why the Court shuts this key difference from sight.

Reading RFRA, as the Court does, to require extension of religion-based exemptions to for-profit corporations surely is not grounded in the pre-*Smith* precedent Congress sought to preserve. Had Congress intended RFRA to initiate a change so huge, a clarion statement to that effect likely would have been made in the legislation. \*\*\*

The Court notes that for-profit corporations may support charitable causes and use their funds for religious ends, and therefore questions the distinction between such corporations and religious nonprofit organizations. Again, the Court forgets that religious organizations exist to serve a community of believers. For-profit corporations do not fit that bill. Moreover, history is not on the Court's side. Recognition of the discrete characters of "ecclesiastical and lay" corporations dates back to Blackstone (1765), and was reiterated by this Court centuries before the enactment of the Internal Revenue Code. To reiterate, "for-profit corporations are different from religious non-profits in that they use labor to make a profit, rather than to perpetuate [the] religious value[s] [shared by a community of believers]." \*\*\*

The Court's determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private. Little doubt that RFRA claims will proliferate, for the Court's expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith.

2

Even if Hobby Lobby and Conestoga were deemed RFRA "person[s]," to gain an exemption, they must demonstrate that the contraceptive coverage requirement "substantially burden[s] [their] exercise of religion." Congress no doubt meant the modifier "substantially" to carry weight. In the original draft of RFRA, the word "burden" appeared unmodified. The word "substantially" was inserted pursuant to a clarifying amendment offered by Senators Kennedy and Hatch. In proposing the amendment, Senator Kennedy stated that RFRA, in accord with the Court's pre-*Smith* case law, "does not require the Government to justify every action that has some effect on religious exercise."

The Court barely pauses to inquire whether any burden imposed by the contraceptive coverage requirement is substantial. Instead, it rests on the Greens' and Hahns' "belie[f] that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage." I agree with the Court that the Green and Hahn families' religious convictions regarding contraception are sincerely held. But those beliefs, however deeply held, do not suffice to sustain a RFRA claim. RFRA, properly understood, distinguishes between "factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature," which a court must accept as true, and the "legal conclusion ... that [plaintiffs'] religious exercise is substantially burdened," an inquiry the court must undertake.

That distinction is a facet of the pre-*Smith* jurisprudence RFRA incorporates. *Bowen v. Roy* (1986) is instructive. There, the Court rejected a free exercise

challenge to the Government's use of a Native American child's Social Security number for purposes of administering benefit programs. Without questioning the sincerity of the father's religious belief that "use of [his daughter's Social Security] number may harm [her] spirit," the Court concluded that the Government's internal uses of that number "place[d] [no] restriction on what [the father] may believe or what he may do." Recognizing that the father's "religious views may not accept" the position that the challenged uses concerned only the Government's internal affairs, the Court explained that "for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference." Inattentive to this guidance, today's decision elides entirely the distinction between the sincerity of a challenger's religious belief and the substantiality of the burden placed on the challenger.

Undertaking the inquiry that the Court forgoes, I would conclude that the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial. The requirement carries no command that Hobby Lobby or Conestoga purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans. Those plans, in order to comply with the ACA, must offer contraceptive coverage without cost sharing, just as they must cover an array of other preventive services.

Importantly, the decisions whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents, in consultation with their health care providers. Should an employee of Hobby Lobby or Conestoga share the religious beliefs of the Greens and Hahns, she is of course under no compulsion to use the contraceptives in question. But "[n]o individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer's] decision or action." It is doubtful that Congress, when it specified that burdens must be "substantial[ly]," had in mind a linkage thus interrupted by independent decisionmakers (the woman and her health counselor) standing between the challenged government action and the religious exercise claimed to be infringed. Any decision to use contraceptives made by a woman covered under Hobby Lobby's or Conestoga's plan will not be propelled by the Government, it will be the woman's autonomous choice, informed by the physician she consults.

3

Even if one were to conclude that Hobby Lobby and Conestoga meet the substantial burden requirement, the Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women's well being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence. To recapitulate, the mandated contraception coverage enables women to avoid the health problems unintended pregnancies may visit on them and their children. The coverage helps safeguard the health of women for whom pregnancy may be hazardous,

even life threatening. And the mandate secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders, and pelvic pain.

That Hobby Lobby and Conestoga resist coverage for only 4 of the 20 FDA-approved contraceptives does not lessen these compelling interests. Notably, the corporations exclude intrauterine devices (IUDs), devices significantly more effective, and significantly more expensive than other contraceptive methods. Moreover, the Court's reasoning appears to permit commercial enterprises like Hobby Lobby and Conestoga to exclude from their group health plans all forms of contraceptives. See Tr. of Oral Arg. 38–39 (counsel for Hobby Lobby acknowledged that his “argument ... would apply just as well if the employer said ‘no contraceptives.’”

Perhaps the gravity of the interests at stake has led the Court to assume, for purposes of its RFRA analysis, that the compelling interest criterion is met in these cases. It bears note in this regard that the cost of an IUD is nearly equivalent to a month's full-time pay for workers earning the minimum wage; that almost one-third of women would change their contraceptive method if costs were not a factor; and that only one-fourth of women who request an IUD actually have one inserted after finding out how expensive it would be.

Stepping back from its assumption that compelling interests support the contraceptive coverage requirement, the Court notes that small employers and grandfathered plans are not subject to the requirement. If there is a compelling interest in contraceptive coverage, the Court suggests, Congress would not have created these exclusions.

Federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by these statutes. See, e.g., Family and Medical Leave Act of 1993 (applicable to employers with 50 or more employees); Age Discrimination in Employment Act of 1967 (originally exempting employers with fewer than 50 employees, the statute now governs employers with 20 or more employees); Americans With Disabilities Act, (applicable to employers with 15 or more employees); Title VII (originally exempting employers with fewer than 25 employees, the statute now governs employers with 15 or more employees).

The ACA's grandfathering provision, allows a phasing-in period for compliance with a number of the Act's requirements (not just the contraceptive coverage or other preventive services provisions). Once specified changes are made, grandfathered status ceases. Hobby Lobby's own situation is illustrative. By the time this litigation commenced, Hobby Lobby did not have grandfathered status. Asked why by the District Court, Hobby Lobby's counsel explained that the “grandfathering requirements mean that you can't make a whole menu of changes to your plan that involve things like the amount of co-pays, the amount of co-insurance, deductibles, that sort of thing.” Counsel acknowledged that, “just because of economic realities, our plan has to shift over time. I mean, insurance plans, as everyone knows, shif[t] over time.” The percentage of employees in grandfathered plans is steadily declining, having dropped from 56% in 2011 to 48% in 2012 to 36% in 2013. In short, far from ranking as a categorical exemption, the grandfathering provision is “temporary, intended to be a means for gradually transitioning employers into mandatory coverage.”

The Court ultimately acknowledges a critical point: RFRA's application "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect.

4

After assuming the existence of compelling government interests, the Court holds that the contraceptive coverage requirement fails to satisfy RFRA's least restrictive means test. But the Government has shown that there is no less restrictive, equally effective means that would both (1) satisfy the challengers' religious objections to providing insurance coverage for certain contraceptives (which they believe cause abortions); and (2) carry out the objective of the ACA's contraceptive coverage requirement, to ensure that women employees receive, at no cost to them, the preventive care needed to safeguard their health and well being. A "least restrictive means" cannot require employees to relinquish benefits accorded them by federal law in order to ensure that their commercial employers can adhere unreservedly to their religious tenets.

Then let the government pay (rather than the employees who do not share their employer's faith), the Court suggests. "The most straightforward [alternative]," the Court asserts, "would be for the Government to assume the cost of providing ... contraceptives ... to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." The ACA, however, requires coverage of preventive services through the existing employer-based system of health insurance "so that [employees] face minimal logistical and administrative obstacles." Impeding women's receipt of benefits "by requiring them to take steps to learn about, and to sign up for, a new [government funded and administered] health benefit" was scarcely what Congress contemplated. More-over, Title X of the Public Health Service Act, "is the nation's only dedicated source of federal funding for safety net family planning services." "Safety net programs like Title X are not designed to absorb the unmet needs of ... insured individuals." Note, too, that Congress declined to write into law the preferential treatment Hobby Lobby and Conestoga describe as a less restrictive alternative.

And where is the stopping point to the "let the government pay" alternative? Suppose an employer's sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, or according women equal pay for substantially similar work? Does it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection? Because the Court cannot easily answer that question, it proposes something else: Extension to commercial enterprises of the accommodation already afforded to nonprofit religion-based organizations. "At a minimum," according to the Court, such an approach would not "impinge on [Hobby Lobby's and Conestoga's] religious belief." I have already discussed the "special solicitude" generally accorded nonprofit religion-based organizations that exist to serve a community of believers, solicitude never before accorded to commercial enterprises comprising employees of diverse faiths.

Ultimately, the Court hedges on its proposal to align for-profit enterprises with nonprofit religion-based organizations. “We do not decide today whether [the] approach [the opinion advances] complies with RFRA for purposes of all religious claims.” Counsel for Hobby Lobby was similarly noncommittal. Asked at oral argument whether the Court-proposed alternative was acceptable, counsel responded: “We haven’t been offered that accommodation, so we haven’t had to decide what kind of objection, if any, we would make to that.”

Conestoga suggests that, if its employees had to acquire and pay for the contraceptives (to which the corporation objects) on their own, a tax credit would qualify as a less restrictive alternative. A tax credit, of course, is one variety of “let the government pay.” In addition to departing from the existing employer-based system of health insurance, Conestoga’s alternative would require a woman to reach into her own pocket in the first instance, and it would do nothing for the woman too poor to be aided by a tax credit.

In sum, in view of what Congress sought to accomplish, i.e., comprehensive preventive care for women furnished through employer-based health plans, none of the proffered alternatives would satisfactorily serve the compelling interests to which Congress responded.

#### IV

Among the pathmarking pre-*Smith* decisions RFRA preserved is *United States v. Lee* (1982). Lee, a sole proprietor engaged in farming and carpentry, was a member of the Old Order Amish. He sincerely believed that withholding Social Security taxes from his employees or paying the employer’s share of such taxes would violate the Amish faith. This Court held that, although the obligations imposed by the Social Security system conflicted with Lee’s religious beliefs, the burden was not unconstitutional. The Government urges that *Lee* should control the challenges brought by Hobby Lobby and Conestoga. In contrast, today’s Court dismisses *Lee* as a tax case. Indeed, it was a tax case and the Court in *Lee* homed in on “[t]he difficulty in attempting to accommodate religious beliefs in the area of taxation.”

But the *Lee* Court made two key points one cannot confine to tax cases. “When followers of a particular sect enter into commercial activity as a matter of choice,” the Court observed, “the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on statutory schemes which are binding on others in that activity.” The statutory scheme of employer-based comprehensive health coverage involved in these cases is surely binding on others engaged in the same trade or business as the corporate challengers here, Hobby Lobby and Conestoga. Further, the Court recognized in *Lee* that allowing a religion-based exemption to a commercial employer would “operat[e] to impose the employer’s religious faith on the employees.” No doubt the Greens and Hahns and all who share their beliefs may decline to acquire for themselves the contraceptives in question. But that choice may not be imposed on employees who hold other beliefs. Working for Hobby Lobby or Conestoga, in other words, should not deprive employees of the preventive care available to workers at the shop next door, at least in the absence of directions from the Legislature or Administration to do so.

Why should decisions of this order be made by Congress or the regulatory authority, and not this Court? Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs. [Examples: (owner of restaurant chain refused to serve black patrons based on his religious beliefs opposing racial integration); (born-again Christians who owned closely held, for-profit health clubs believed that the Bible proscribed hiring or retaining an “individual living with but not married to a person of the opposite sex,” “a young, single woman working without her father’s consent or a married woman working without her husband’s consent,” and any person “antagonistic to the Bible,” including “fornicators and homosexuals”); (for-profit photography business owned by a husband and wife refused to photograph a lesbian couple’s commitment ceremony based on the religious beliefs of the company’s owners).] Would RFRA require exemptions in cases of this ilk? And if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not? Isn’t the Court disarmed from making such a judgment given its recognition that “courts must not presume to determine ... the plausibility of a religious claim”?

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah’s Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)? According to counsel for Hobby Lobby, “each one of these cases ... would have to be evaluated on its own ... apply[ing] the compelling interest-least restrictive alternative test.” Not much help there for the lower courts bound by today’s decision.

The Court, however, sees nothing to worry about. Today’s cases, the Court concludes, are “concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer’s religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.” But the Court has assumed, for RFRA purposes, that the interest in women’s health and well being is compelling and has come up with no means adequate to serve that interest, the one motivating Congress to adopt the Women’s Health Amendment.

There is an overriding interest, I believe, in keeping the courts “out of the business of evaluating the relative merits of differing religious claims,” Lee (Stevens, J., concurring in judgment), or the sincerity with which an asserted religious belief is held. Indeed, approving some religious claims while deeming others unworthy of accommodation could be “perceived as favoring one religion over another,” the very “risk the Establishment Clause was designed to preclude.” The Court, I fear, has ventured into a minefield, by its immoderate reading of RFRA. I would confine religious exemptions under that Act to organizations formed “for a religious purpose,” “engage[d] primarily in carrying

out that religious purpose,” and not “engaged ... substantially in the exchange of goods or services for money beyond nominal amounts.”

For the reasons stated, I would reverse the judgment of the Court of Appeals for the Tenth Circuit and affirm the judgment of the Court of Appeals for the Third Circuit.

## B. RLUIPA

### *Text of RLUIPA*

The “Religious Land Use and Institutionalized Persons Act of 2000” (RLUIPA) was passed by Congress following the Court’s decision in *City of Boerne v. Flores*. As the title indicates, RLUIPA singles out two types of state actions that it covers: land use (as in *City of Boerne*) and institutionalized persons, including prisoners.

42 U.S.C. §2000cc, Protection of land use as religious exercise

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

42 U.S. Code § 2000cc-1 - Protection of religious exercise of institutionalized persons

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which—

- (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
- (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

Relevant Additional provisions

42 U.S. Code § 2000cc-2 - Judicial relief

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

\*\*\*

42 U.S. Code § 2000cc-3 - Rules of construction

(a) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated

Nothing in this chapter shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

\*\*\*

g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

42 U.S. Code § 2000cc-5 - Definitions

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(7) Religious exercise

(A) In general

The term “religious exercise” includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

## Note: The Relevance of RLUIPA for RFRA

RLUIPA, 114 STAT. 806 (2000), also amended RFRA:

### SEC. 7. AMENDMENTS TO RELIGIOUS FREEDOM RESTORATION ACT.

(a) DEFINITIONS.—Section 5 of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb–2) is amended—

(1) in paragraph (1), by striking “a State, or a subdivision of a State” and inserting “or of a covered entity”;

(2) in paragraph (2), by striking “term” and all that follows through “includes” and inserting “term ‘covered entity’ means”; and

(3) in paragraph (4), by striking all after “means” and inserting “religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000.”. (b) CONFORMING AMENDMENT.—Section 6(a) of the Religious

Freedom Restoration Act of 1993 (42 U.S.C. 2000bb–3(a)) is amended by striking “and State”.

In the majority opinion in *Hobby Lobby*, Justice Alito discussed the relevance of this amendment:

Following our decision in *City of Boerne*, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U.S.C. §2000cc et seq. That statute, enacted under Congress’s Commerce and Spending Clause powers, imposes the same general test as RFRA but on a more limited category of governmental actions. See *Cutter v. Wilkinson* (2005). And, what is most relevant for present purposes, RLUIPA amended RFRA’s definition of the “exercise of religion.” See §2000bb–2(4) (importing RLUIPA definition). Before RLUIPA, RFRA’s definition made reference to the First Amendment. See §2000bb–2(4) (1994 ed.) (defining “exercise of religion” as “the exercise of religion under the First Amendment”). In RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the “exercise of religion” to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” §2000cc–5(7)(A). And Congress mandated that this concept “be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” §2000cc–3(g).

In the dissenting opinion in *Hobby Lobby*, Justice Ginsburg disagreed:

Despite these authoritative indications, the Court sees RFRA as a bold initiative departing from, rather than restoring, pre-*Smith* jurisprudence. To support its conception of RFRA as a measure detached from this Court’s decisions, one that sets a new course, the Court points first to the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §2000cc et seq. \*\*\* which altered RFRA’s definition of the term “exercise of religion.” RFRA, as originally enacted, defined that term to mean “the exercise of religion under the First Amendment to the Constitution.” As amended by RLUIPA, RFRA’s definition now includes “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” That definitional change, according to the Court, reflects “an obvious effort to effect a complete separation from First Amendment case law.”

The Court's reading is not plausible. RLUIPA's alteration clarifies that courts should not question the centrality of a particular religious exercise. But the amendment in no way suggests that Congress meant to expand the class of entities qualified to mount religious accommodation claims, nor does it relieve courts of the obligation to inquire whether a government action substantially burdens a religious exercise.

Who do you think has the better argument?

### **Note: Prison Litigation Under RLUIPA**

Writing for a unanimous Court in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), Justice Ginsburg upheld the constitutionality of RLUIPA's section 3, 42 U.S.C. § 2000cc—1(a)(1)—(2), providing that “No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution,” unless the burden furthers “a compelling governmental interest,” and does so by “the least restrictive means.” The prison officials had argued that that this provision, on its face, improperly advanced religion in violation of the First Amendment's Establishment Clause as impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights. The Court noted that religious accommodation in prison would be adjudicated with “particular sensitivity” to security concerns.

In another unanimous opinion, the Court in *Holt (Muhammad) v. Hobbs*, 574 US \_\_ (2015), held that the Arkansas Department of Correction's grooming policy violated RLUIPA to the extent that it prohibited petitioner from growing a ½ inch beard in accordance with his religious beliefs. Writing for the Court, Justice Alito rejected the Department of Correction's beard ban as the least restrictive way of furthering prison safety and security including hiding contraband (an argument that was "hard to take seriously" in the context of the ½ inch beard) and concealing identities (an argument that suffered in comparison to other institutions and the Arkansas DOC's allowance of ¼ inch beards and mustaches).

The Court's rejection of the Arkansas DOC's argument as not meriting serious attention does raise the issue of the Eighth Circuit's and district judge's crediting of that argument in their rulings against the pro se prisoner.

Additionally, Justice Ginsburg concurred separately to state:

Unlike the exemption this Court approved in *Burwell v. Hobby Lobby Stores, Inc.*, accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief. On that understanding, I join the Court's opinion.

## IV. Targeting Religion and Ministerial Employees

### *Church of the Lukumi Babalu Aye v. City of Hialeah*

508 U.S. 520 (1993)

KENNEDY, J., DELIVERED THE OPINION OF THE COURT WITH RESPECT TO PARTS I, III, AND IV, IN WHICH REHNQUIST, C. J., AND WHITE, STEVENS, SCALIA, SOUTER, AND THOMAS, JJ., JOINED, THE OPINION OF THE COURT WITH RESPECT TO PART II-B, IN WHICH REHNQUIST, C. J., AND WHITE, STEVENS, SCALIA, AND THOMAS, JJ., JOINED, THE OPINION OF THE COURT WITH RESPECT TO PARTS II-A-L AND II-A-3, IN WHICH REHNQUIST, C. J., AND STEVENS, SCALIA, AND THOMAS, JJ., JOINED, AND AN OPINION WITH RESPECT TO PART II-A-2, IN WHICH STEVENS, J., JOINED. SCALIA, J., FILED AN OPINION CONCURRING IN PART AND CONCURRING IN THE JUDGMENT, IN WHICH REHNQUIST, C. J., JOINED. SOUTER, J., FILED AN OPINION CONCURRING IN PART AND CONCURRING IN THE JUDGMENT. BLACKMUN, J., FILED AN OPINION CONCURRING IN THE JUDGMENT, IN WHICH O'CONNOR, J., JOINED.

JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT, EXCEPT AS TO PART II-A-2.

Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom. The challenged laws had an impermissible object; and in all events the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs. We invalidate the challenged enactments and reverse the judgment of the Court of Appeals.

I

A

This case involves practices of the Santeria religion, which originated in the 19th century. When hundreds of thousands of members of the Yoruba people were brought as slaves from western Africa to Cuba, their traditional African religion absorbed significant elements of Roman Catholicism. The resulting syncretion, or fusion, is Santeria, "the way of the saints." The Cuban Yoruba express their devotion to spirits, called oris has, through the iconography of Catholic saints, Catholic symbols are often present at Santeria rites, and Santeria devotees attend the Catholic sacraments.

The Santeria faith teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of the oris has. The basis of the Santeria religion is the nurture of a personal relation with the oris has, and one of the principal forms of devotion is an animal sacrifice. The sacrifice of animals as part of religious rituals has ancient roots. Animal sacrifice is mentioned throughout the Old Testament, and it played an important role in the practice of Judaism before destruction of the second Temple in Jerusalem. In modern Islam, there is an annual sacrifice commemorating Abraham's sacrifice of a ram in the stead of his son.

According to Santeria teaching, the orishas are powerful but not immortal. They depend for survival on the sacrifice. Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration. Animals sacrificed in Santeria rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles. The animals are killed by the cutting of the carotid arteries in the neck. The sacrificed animal is cooked and eaten, except after healing and death rituals.

Santeria adherents faced widespread persecution in Cuba, so the religion and its rituals were practiced in secret. The open practice of Santeria and its rites remains infrequent. The religion was brought to this Nation most often by exiles from the Cuban revolution. The District Court estimated that there are at least 50,000 practitioners in South Florida today.

#### B

Petitioner Church of the Lukumi Babalu Aye, Inc. (Church), is a not-for-profit corporation organized under Florida law in 1973. The Church and its congregants practice the Santeria religion. The president of the Church is petitioner Ernesto Pichardo, who is also the Church's priest and holds the religious title of Italero, the second highest in the Santeria faith. In April 1987, the Church leased land in the city of Hialeah, Florida, and announced plans to establish a house of worship as well as a school, cultural center, and museum. Pichardo indicated that the Church's goal was to bring the practice of the Santeria faith, including its ritual of animal sacrifice, into the open. The Church began the process of obtaining utility service and receiving the necessary licensing, inspection, and zoning approvals. Although the Church's efforts at obtaining the necessary licenses and permits were far from smooth, it appears that it received all needed approvals by early August 1987.

The prospect of a Santeria church in their midst was distressing to many members of the Hialeah community, and the announcement of the plans to open a Santeria church in Hialeah prompted the city council to hold an emergency public session on June 9, 1987. \*\*\*

A summary suffices here, beginning with the enactments passed at the June 9 meeting. First, the city council adopted Resolution 87-66, which noted the "concern" expressed by residents of the city "that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and declared that "[t]he City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety." Next, the council approved an emergency ordinance, Ordinance 87-40, which incorporated in full, except as to penalty, Florida's animal cruelty laws. Fla. Stat. ch. 828 (1987). Among other things, the incorporated state law subjected to criminal punishment "[w]hoever ... unnecessarily or cruelly ... kills any animal." § 828.12

The city council desired to undertake further legislative action, but Florida law prohibited a municipality from enacting legislation relating to animal cruelty that conflicted with state law. To obtain clarification, Hialeah's city attorney requested an opinion from the attorney general of Florida as to whether § 828.12 prohibited "a religious group from sacrificing an animal in a religious ritual or practice" and whether the city could enact ordinances "making

religious animal sacrifice unlawful." The attorney general responded in mid-July. He concluded that the "ritual sacrifice of animals for purposes other than food consumption" was not a "necessary" killing and so was prohibited by § 828.12. Fla. Op. Atty. Gen. 87-56 (1988). The attorney general appeared to define "unnecessary" as "done without any useful motive, in a spirit of wanton cruelty or for the mere pleasure of destruction without being in any sense beneficial or useful to the person killing the animal." He advised that religious animal sacrifice was against state law, so that a city ordinance prohibiting it would not be in conflict.

The city council responded at first with a hortatory enactment, Resolution 87-90, that noted its residents' "great concern regarding the possibility of public ritualistic animal sacrifices" and the state-law prohibition. The resolution declared the city policy "to oppose the ritual sacrifices of animals" within Hialeah and announced that any person or organization practicing animal sacrifice "will be prosecuted."

In September 1987, the city council adopted three substantive ordinances addressing the issue of religious animal sacrifice. Ordinance 87-52 defined "sacrifice" as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption," and prohibited owning or possessing an animal "intending to use such animal for food purposes." It restricted application of this prohibition, however, to any individual or group that "kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed." The ordinance contained an exemption for slaughtering by "licensed establishment[s]" of animals "specifically raised for food purposes." Declaring, moreover, that the city council "has determined that the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals of the community," the city council adopted Ordinance 87-71. That ordinance defined "sacrifice" as had Ordinance 87-52, and then provided that "[i]t shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida." The final Ordinance, 87-72, defined "slaughter" as "the killing of animals for food" and prohibited slaughter outside of areas zoned for slaughterhouse use. The ordinance provided an exemption, however, for the slaughter or processing for sale of "small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law." All ordinances and resolutions passed the city council by unanimous vote. Violations of each of the four ordinances were punishable by fines not exceeding \$500 or imprisonment not exceeding 60 days, or both.

Following enactment of these ordinances, the Church and Pichardo filed this action pursuant to 42 U. S. C. § 1983 in the United States District Court for the Southern District of Florida. Named as defendants were the city of Hialeah and its mayor and members of its city council in their individual capacities. Alleging violations of petitioners' rights under, inter alia, the Free Exercise Clause, the complaint sought a declaratory judgment and injunctive and monetary relief. The District Court granted summary judgment to the individual defendants, finding that they had absolute immunity for their legislative acts and that the

ordinances and resolutions adopted by the council did not constitute an official policy of harassment, as alleged by petitioners.

After a 9-day bench trial on the remaining claims, the District Court ruled for the city, finding no violation of petitioners' rights under the Free Exercise Clause. Although acknowledging that "the ordinances are not religiously neutral," and that the city's concern about animal sacrifice was "prompted" by the establishment of the Church in the city, the District Court concluded that the purpose of the ordinances was not to exclude the Church from the city but to end the practice of animal sacrifice, for whatever reason practiced. The court also found that the ordinances did not target religious conduct "on their face," though it noted that in any event "specifically regulating [religious] conduct" does not violate the First Amendment "when [the conduct] is deemed inconsistent with public health and welfare." Thus, the court concluded that, at most, the ordinances' effect on petitioners' religious conduct was "incidental to [their] secular purpose and effect."

The District Court proceeded to determine whether the governmental interests underlying the ordinances were compelling and, if so, to balance the "governmental and religious interests." The court noted that "[t]his 'balance depends upon the cost to the government of altering its activity to allow the religious practice to continue unimpeded versus the cost to the religious interest imposed by the government activity.'" The court found four compelling interests. First, the court found that animal sacrifices present a substantial health risk, both to participants and the general public. According to the court, animals that are to be sacrificed are often kept in unsanitary conditions and are uninspected, and animal remains are found in public places. Second, the court found emotional injury to children who witness the sacrifice of animals. Third, the court found compelling the city's interest in protecting animals from cruel and unnecessary killing. The court determined that the method of killing used in Santeria sacrifice was "unreliable and not humane, and that the animals, before being sacrificed, are often kept in conditions that produce a great deal of fear and stress in the animal." Fourth, the District Court found compelling the city's interest in restricting the slaughter or sacrifice of animals to areas zoned for slaughterhouse use. This legal determination was not accompanied by factual findings.

Balancing the competing governmental and religious interests, the District Court concluded the compelling governmental interests "fully justify the absolute prohibition on ritual sacrifice" accomplished by the ordinances. The court also concluded that an exception to the sacrifice prohibition for religious conduct would "'unduly interfere with fulfillment of the governmental interest'" because any more narrow restrictions-e. g., regulation of disposal of animal carcasses-would be unenforceable as a result of the secret nature of the Santeria religion. A religious exemption from the city's ordinances, concluded the court, would defeat the city's compelling interests in enforcing the prohibition.

The Court of Appeals for the Eleventh Circuit affirmed in a one-paragraph per curiam opinion. Choosing not to rely on the District Court's recitation of a compelling interest in promoting the welfare of children, the Court of Appeals stated simply that it concluded the ordinances were consistent with the

Constitution. It declined to address the effect of *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990), decided after the District Court's opinion, because the District Court "employed an arguably stricter standard" than that applied in *Smith*.

## II

The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* .... " (Emphasis added.) The city does not argue that Santeria is not a "religion" within the meaning of the First Amendment. Nor could it. Although the practice of animal sacrifice may seem abhorrent to some, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Given the historical association between animal sacrifice and religious worship, petitioners' assertion that animal sacrifice is an integral part of their religion "cannot be deemed bizarre or incredible." Neither the city nor the courts below, moreover, have questioned the sincerity of petitioners' professed desire to conduct animal sacrifices for religious reasons. We must consider petitioners' First Amendment claim.

In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. *Employment Div., Dept. of Human Resources of Ore. v. Smith*. Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. These ordinances fail to satisfy the *Smith* requirements. We begin by discussing neutrality.

## A

In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general. These cases, however, for the most part have addressed governmental efforts to benefit religion or particular religions, and so have dealt with a question different, at least in its formulation and emphasis, from the issue here. Petitioners allege an attempt to disfavor their religion because of the religious ceremonies it commands, and the Free Exercise Clause is dispositive in our analysis.

At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. These principles, though not often at issue in our Free Exercise Clause cases, have played a role in some. In *McDaniel v. Paty* (1978), for example, we invalidated a state law that disqualified members of the clergy from holding certain public offices, because it "impose[d] special disabilities on the basis of ... religious status." On the same principle, in *Fowler v. Rhode Island* (1953) we found that a municipal ordinance

was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service.

1

Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context. Petitioners contend that three of the ordinances fail this test of facial neutrality because they use the words "sacrifice" and "ritual," words with strong religious connotations. We agree that these words are consistent with the claim of facial discrimination, but the argument is not conclusive. The words "sacrifice" and "ritual" have a religious origin, but current use admits also of secular meanings. The ordinances, furthermore, define "sacrifice" in secular terms, without referring to religious practices.

We reject the contention advanced by the city that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality," and "covert suppression of particular religious beliefs." Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Walz v. Tax Comm'n of New York City* (1970) (Harlan, J., concurring).

The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances. First, though use of the words "sacrifice" and "ritual" does not compel a finding of improper targeting of the Santeria religion, the choice of these words is support for our conclusion. There are further respects in which the text of the city council's enactments discloses the improper attempt to target Santeria.

Resolution 87-66, adopted June 9, 1987, recited that "residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and "reiterate[d]" the city's commitment to prohibit "any and all [such] acts of any and all religious groups." No one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than Santeria.

It becomes evident that these ordinances target Santeria sacrifice when the ordinances' operation is considered. Apart from the text, the effect of a law in its real operation is strong evidence of its object. To be sure, adverse impact will

not always lead to a finding of impermissible targeting. For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination. *McGowan v. Maryland*. See, e. g., *Reynolds v. United States* (1879); *Davis v. Beason* (1890). The subject at hand does implicate, of course, multiple concerns unrelated to religious animosity, for example, the suffering or mistreatment visited upon the sacrificed animals and health hazards from improper disposal. But the ordinances when considered together disclose an object remote from these legitimate concerns. The design of these laws accomplishes instead a "religious gerrymander," *Walz v. Tax Comm'n of New York City* (Harlan, J., concurring), an impermissible attempt to target petitioners and their religious practices.

It is a necessary conclusion that almost the only conduct subject to Ordinances 87-40, 87-52, and 87-71 is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result. We begin with Ordinance 87-71. It prohibits the sacrifice of animals, but defines sacrifice as "to unnecessarily kill ... an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." The definition excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting kosher slaughter. We need not discuss whether this differential treatment of two religions is itself an independent constitutional violation. It suffices to recite this feature of the law as support for our conclusion that Santeria alone was the exclusive legislative concern. The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to make an offering to the oris has, not food consumption. Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished.

Operating in similar fashion is Ordinance 87-52, which prohibits the "possess[ion], sacrifice, or slaughter" of an animal with the "inten[t] to use such animal for food purposes." This prohibition, extending to the keeping of an animal as well as the killing itself, applies if the animal is killed in "any type of ritual" and there is an intent to use the animal for food, whether or not it is in fact consumed for food. The ordinance exempts, however, "any licensed [food] establishment" with regard to "any animals which are specifically raised for food purposes," if the activity is permitted by zoning and other laws. This exception, too, seems intended to cover kosher slaughter. Again, the burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others: If the killing is-unlike most Santeria sacrifices-unaccompanied by the intent to use the animal for food, then it is not prohibited by Ordinance 87-52; if the killing is specifically for food but does not occur during the course of "any type of ritual," it again falls outside the prohibition; and if the killing is for food and occurs during the course of a ritual, it is still exempted if it occurs in a properly zoned and licensed establishment and involves animals "specifically raised for food purposes." A pattern of exemptions parallels the pattern of narrow prohibitions. Each contributes to the gerrymander.

Ordinance 87-40 incorporates the Florida animal cruelty statute, Fla. Stat. § 828.12 (1987). Its prohibition is broad on its face, punishing "[w]hoever ... unnecessarily ... kills any animal." The city claims that this ordinance is the epitome of a neutral prohibition. The problem, however, is the interpretation given to the ordinance by respondent and the Florida attorney general. Killings for religious reasons are deemed unnecessary, whereas most other killings fall outside the prohibition. The city, on what seems to be a per se basis, deems hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia as necessary. There is no indication in the record that respondent has concluded that hunting or fishing for sport is unnecessary. Indeed, one of the few reported Florida cases decided under § 828.12 concludes that the use of live rabbits to train greyhounds is not unnecessary. Further, because it requires an evaluation of the particular justification for the killing, this ordinance represents a system of "individualized governmental assessment of the reasons for the relevant conduct," *Employment Div., Dept. of Human Resources of Ore. v. Smith*. As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment.

We also find significant evidence of the ordinances' improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends. It is not unreasonable to infer, at least when there are no persuasive indications to the contrary, that a law which visits "gratuitous restrictions" on religious conduct, *McGowan v. Maryland* (opinion of Frankfurter, J.), seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation.

The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a fiat prohibition of all Santeria sacrificial practice. If improper disposal, not the sacrifice itself, is the harm to be prevented, the city could have imposed a general regulation on the disposal of organic garbage. It did not do so. Indeed, counsel for the city conceded at oral argument that, under the ordinances, Santeria sacrifices would be illegal even if they occurred in licensed, inspected, and zoned slaughterhouses. Thus, these broad ordinances prohibit Santeria sacrifice even when it does not threaten the city's

Under similar analysis, narrower regulation would achieve the city's interest in preventing cruelty to animals. With regard to the city's interest in ensuring the adequate care of animals, regulation of conditions and treatment, regardless of why an animal is kept, is the logical response to the city's concern, not a prohibition on possession for the purpose of sacrifice. The same is true for the city's interest in prohibiting cruel methods of killing. Under federal and Florida law and Ordinance 87-40, which incorporates Florida law in this regard, killing an animal by the "simultaneous and instantaneous severance of the carotid arteries with a sharp instrument"-the method used in kosher slaughter-is approved as humane. The District Court found that, though Santeria sacrifice

also results in severance of the carotid arteries, the method used during sacrifice is less reliable and therefore not humane. If the city has a real concern that other methods are less humane, however, the subject of the regulation should be the method of slaughter itself, not a religious classification that is said to bear some general relation to it.

Ordinance 87-72-unlike the three other ordinances does appear to apply to substantial nonreligious conduct and not to be overbroad. For our purposes here, however, the four substantive ordinances may be treated as a group for neutrality purposes. Ordinance 87-72 was passed the same day as Ordinance 87-71 and was enacted, as were the three others, in direct response to the opening of the Church. It would be implausible to suggest that the three other ordinances, but not Ordinance 87-72, had as their object the suppression of religion. We need not decide whether Ordinance 87-72 could survive constitutional scrutiny if it existed separately; it must be invalidated because it functions, with the rest of the enactments in question, to suppress Santeria religious worship.

2

[plurality]

In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases. As Justice Harlan noted in the related context of the Establishment Clause, "[n]eutrality in its application requires an equal protection mode of analysis." *Walz v. Tax Comm'n of New York City* (concurring opinion). Here, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence. Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body. These objective factors bear on the question of discriminatory object. *Personnel Administrator of Mass. v. Feeney* (1979).

That the ordinances were enacted "'because of,' not merely 'in spite of,'" their suppression of Santeria religious practice is revealed by the events preceding their enactment. Although respondent claimed at oral argument that it had experienced significant problems resulting from the sacrifice of animals within the city before the announced opening of the Church, the city council made no attempt to address the supposed problem before its meeting in June 1987, just weeks after the Church announced plans to open. The minutes and taped excerpts of the June 9 session, both of which are in the record, evidence significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice. The public crowd that attended the June 9 meetings interrupted statements by council members critical of Santeria with cheers and the brief comments of Pichardo with taunts. When Councilman Martinez, a supporter of the ordinances, stated that in prerevolution Cuba "people were put in jail for practicing this religion," the audience applauded.

Other statements by members of the city council were in a similar vein. For example, Councilman Martinez, after noting his belief that Santeria was

outlawed in Cuba, questioned: "[I]f we could not practice this [religion] in our homeland [Cuba], why bring it to this country?" Councilman Cardoso said that Santeria devotees at the Church "are in violation of everything this country stands for." Councilman Mejides indicated that he was "totally against the sacrificing of animals" and distinguished kosher slaughter because it had a "real purpose." The "Bible says we are allowed to sacrifice an animal for consumption," he continued, "but for any other purposes, I don't believe that the Bible allows that." The president of the city council, Councilman Echevarria, asked: "What can we do to prevent the Church from opening?"

Various Hialeah city officials made comparable comments.

The chaplain of the Hialeah Police Department told the city council that Santeria was a sin, "foolishness," "an abomination to the Lord," and the worship of "demons." He advised the city council: "We need to be helping people and sharing with them the truth that is found in Jesus Christ." He concluded: "I would exhort you ... not to permit this Church to exist." The city attorney commented that Resolution 87-66 indicated: "This community will not tolerate religious practices which are abhorrent to its citizens ...." Similar comments were made by the deputy city attorney. This history discloses the object of the ordinances to target animal sacrifice by Santeria worshippers because of its religious motivation.

### 3

In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense. These ordinances are not neutral, and the court below committed clear error in failing to reach this conclusion.

### B

We turn next to a second requirement of the Free Exercise Clause, the rule that laws burdening religious practice must be of general applicability. *Employment Div., Dept. of Human Resources of Ore. v. Smith*. All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice. The Free Exercise Clause "protect[s] religious observers against unequal treatment," *Hobbie v. Unemployment Appeals Comm'n of Fla.* (1987) (Stevens, J., concurring in judgment), and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.

The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause. The principle underlying the general applicability requirement has parallels in our First Amendment jurisprudence. In this case we need not define with precision the standard used to evaluate whether a prohibition is of general

application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.

Respondent claims that Ordinances 87-40, 87-52, and 87-71 advance two interests: protecting the public health and preventing cruelty to animals. The ordinances are underinclusive for those ends. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does. The underinclusion is substantial, not inconsequential. Despite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice. Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. For example, fishing - which occurs in Hialeah, -is legal. Extermination of mice and rats within a home is also permitted. Florida law incorporated by Ordinance 87-40 sanctions euthanasia of "stray, neglected, abandoned, or unwanted animals;" destruction of animals judicially removed from their owners "for humanitarian reasons" or when the animal "is of no commercial value;" the infliction of pain or suffering "in the interest of medical science;" the placing of poison in one's yard or enclosure; and the use of a live animal "to pursue or take wildlife or to participate in any hunting," and "to hunt wild hogs."

The city concedes that "neither the State of Florida nor the City has enacted a generally applicable ban on the killing of animals." It asserts, however, that animal sacrifice is "different" from the animal killings that are permitted by law. According to the city, it is "self-evident" that killing animals for food is "important"; the eradication of insects and pests is "obviously justified"; and the euthanasia of excess animals "makes sense." These *ipse dixits* do not explain why religion alone must bear the burden of the ordinances, when many of these secular killings fall within the city's interest in preventing the cruel treatment of animals.

The ordinances are also underinclusive with regard to the city's interest in public health, which is threatened by the disposal of animal carcasses in open public places and the consumption of uninspected meat. Neither interest is pursued by respondent with regard to conduct that is not motivated by religious conviction. The health risks posed by the improper disposal of animal carcasses are the same whether Santeria sacrifice or some nonreligious killing preceded it. The city does not, however, prohibit hunters from bringing their kill to their houses, nor does it regulate disposal after their activity. Despite substantial testimony at trial that the same public health hazards result from improper disposal of garbage by restaurants, restaurants are outside the scope of the ordinances. Improper disposal is a general problem that causes substantial health risks, but which respondent addresses only when it results from religious exercise.

The ordinances are underinclusive as well with regard to the health risk posed by consumption of uninspected meat. Under the city's ordinances, hunters may eat their kill and fishermen may eat their catch without undergoing governmental inspection. Likewise, state law requires inspection of meat that is sold but exempts meat from animals raised for the use of the owner and "members of his household and nonpaying guests and employees." The asserted

interest in inspected meat is not pursued in contexts similar to that of religious animal sacrifice.

Ordinance 87-72, which prohibits the slaughter of animals outside of areas zoned for slaughterhouses, is underinclusive on its face. The ordinance includes an exemption for "any person, group, or organization" that "slaughters or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law." Respondent has not explained why commercial operations that slaughter "small numbers" of hogs and cattle do not implicate its professed desire to prevent cruelty to animals and preserve the public health. Although the city has classified Santeria sacrifice as slaughter, subjecting it to this ordinance, it does not regulate other killings for food in like manner.

We conclude, in sum, that each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances "ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself." This precise evil is what the requirement of general applicability is designed to prevent.

### III

A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "interests of the highest order" and must be narrowly tailored in pursuit of those interests. The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not "water[ed] ... down" but "really means what it says." A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. It follows from what we have already said that these ordinances cannot withstand this scrutiny.

First, even were the governmental interests compelling, the ordinances are not drawn in narrow terms to accomplish those interests. As we have discussed, all four ordinances are overbroad or underinclusive in substantial respects. The proffered objectives are not pursued with respect to analogous nonreligious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree. The absence of narrow tailoring suffices to establish the invalidity of the ordinances.

Respondent has not demonstrated, moreover, that, in the context of these ordinances, its governmental interests are compelling. Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest 'of the highest order' ... when it leaves appreciable damage to that supposedly vital interest unprohibited." As we show above, the ordinances are underinclusive to a substantial extent with respect to each of the interests that respondent has asserted, and it is only conduct motivated by religious conviction that bears the

weight of the governmental restrictions. There can be no serious claim that those interests justify the ordinances.

#### IV

The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.

*Reversed.*

JUSTICE SCALIA, WITH WHOM THE CHIEF JUSTICE JOINS, CONCURRING IN PART AND CONCURRING IN THE JUDGMENT.

The Court analyzes the "neutrality" and the "general applicability" of the Hialeah ordinances in separate sections (Parts II-A and II-B, respectively), and allocates various invalidating factors to one or the other of those sections. If it were necessary to make a clear distinction between the two terms, I would draw a line somewhat different from the Court's. But I think it is not necessary, and would frankly acknowledge that the terms are not only "interrelated," but substantially overlap.

The terms "neutrality" and "general applicability" are not to be found within the First Amendment itself, of course, but are used in *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990), and earlier cases to describe those characteristics which cause a law that prohibits an activity a particular individual wishes to engage in for religious reasons nonetheless not to constitute a "law ... prohibiting the free exercise" of religion within the meaning of the First Amendment. In my view, the defect of lack of neutrality applies primarily to those laws that by their terms impose disabilities on the basis of religion (e. g., a law excluding members of a certain sect from public benefits; whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment. But certainly a law that is not of general applicability (in the sense I have described) can be considered "nonneutral"; and certainly no law that is nonneutral (in the relevant sense) can be thought to be of general applicability. Because I agree with most of the invalidating factors set forth in Part II of the Court's opinion, and because it seems to me a matter of no consequence under which rubric ("neutrality," Part II-A, or "general applicability," Part II-B) each invalidating factor is discussed, I join the judgment of the Court and all of its opinion except section 2 of Part II-A.

I do not join that section because it departs from the opinion's general focus on the object of the laws at issue to consider the subjective motivation of the lawmakers, i. e., whether the Hialeah City Council actually intended to disfavor

the religion of Santeria. As I have noted elsewhere, it is virtually impossible to determine the singular "motive" of a collective legislative body, and this Court has a long tradition of refraining from such inquiries, see, e. g., *Fletcher v. Peck* (1810) (Marshall, C. J.); *United States v. O'Brien* (1968).

Perhaps there are contexts in which determination of legislative motive must be undertaken. But I do not think that is true of analysis under the First Amendment. \*\*\* Had the ordinances here been passed with no motive on the part of any councilman except the ardent desire to prevent cruelty to animals (as might in fact have been the case), they would nonetheless be invalid.

JUSTICE SOUTER, CONCURRING IN PART AND CONCURRING IN THE JUDGMENT.

This case turns on a principle about which there is no disagreement, that the Free Exercise Clause bars government action aimed at suppressing religious belief or practice. The Court holds that Hialeah's animal-sacrifice laws violate that principle, and I concur in that holding without reservation.

Because prohibiting religious exercise is the object of the laws at hand, this case does not present the more difficult issue addressed in our last free-exercise case, *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990), which announced the rule that a "neutral, generally applicable" law does not run afoul of the Free Exercise Clause even when it prohibits religious exercise in effect. The Court today refers to that rule in dicta, and despite my general agreement with the Court's opinion I do not join Part II, where the dicta appear, for I have doubts about whether the Smith rule merits adherence. I write separately to explain why the Smith rule is not germane to this case and to express my view that, in a case presenting the issue, the Court should reexamine the rule Smith declared. \*\*\*

JUSTICE BLACKMUN, WITH WHOM JUSTICE O'CONNOR JOINS, CONCURRING IN THE JUDGMENT.

The Court holds today that the city of Hialeah violated the First and Fourteenth Amendments when it passed a set of restrictive ordinances explicitly directed at petitioners' religious practice. With this holding I agree. I write separately to emphasize that the First Amendment's protection of religion extends beyond those rare occasions on which the government explicitly targets religion (or a particular religion) for disfavored treatment, as is done in this case. In my view, a statute that burdens the free exercise of religion "may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means." *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990) (dissenting opinion). The Court, however, applies a different test. It applies the test announced in *Smith*, under which "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." I continue to believe that *Smith* was wrongly decided, because it ignored the value of religious freedom as an affirmative individual liberty and treated the Free Exercise Clause as no more than an antidiscrimination principle. Thus,

while I agree with the result the Court reaches in this case, I arrive at that result by a different route. \*\*\*

## ***Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission***

565 U.S. \_\_\_ (2012)

ROBERTS, C. J., DELIVERED THE OPINION FOR A UNANIMOUS COURT. THOMAS, J., FILED A CONCURRING OPINION. ALITO, J., FILED A CONCURRING OPINION, IN WHICH KAGAN, J., JOINED.

CHIEF JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

Certain employment discrimination laws authorize employees who have been wrongfully terminated to sue their employers for reinstatement and damages. The question presented is whether the Establishment and Free Exercise Clauses of the First Amendment bar such an action when the employer is a religious group and the employee is one of the group's ministers.

I

A

Petitioner Hosanna-Tabor Evangelical Lutheran Church and School is a member congregation of the Lutheran Church-Missouri Synod, the second largest Lutheran denomination in America. Hosanna-Tabor operated a small school in Redford, Michigan, offering a "Christ-centered education" to students in kindergarten through eighth grade.

The Synod classifies teachers into two categories: "called" and "lay." "Called" teachers are regarded as having been called to their vocation by God through a congregation. To be eligible to receive a call from a congregation, a teacher must satisfy certain academic requirements. One way of doing so is by completing a "colloquy" program at a Lutheran college or university. The program requires candidates to take eight courses of theological study, obtain the endorsement of their local Synod district, and pass an oral examination by a faculty committee. A teacher who meets these requirements may be called by a congregation. Once called, a teacher receives the formal title "Minister of Religion, Commissioned." A commissioned minister serves for an open-ended term; at Hosanna-Tabor, a call could be rescinded only for cause and by a supermajority vote of the congregation.

"Lay" or "contract" teachers, by contrast, are not required to be trained by the Synod or even to be Lutheran. At Hosanna-Tabor, they were appointed by the school board, without a vote of the congregation, to one-year renewable terms. Although teachers at the school generally performed the same duties regardless of whether they were lay or called, lay teachers were hired only when called teachers were unavailable.

Respondent Cheryl Perich was first employed by Hosanna-Tabor as a lay teacher in 1999. After Perich completed her colloquy later that school year, Hosanna-Tabor asked her to become a called teacher. Perich accepted the call and received a "diploma of vocation" designating her a commissioned minister.

Perich taught kindergarten during her first four years at Hosanna-Tabor and fourth grade during the 2003-2004 school year. She taught math, language arts, social studies, science, gym, art, and music. She also taught a religion class four days a week, led the students in prayer and devotional exercises each day, and attended a weekly school-wide chapel service. Perich led the chapel service herself about twice a year.

Perich became ill in June 2004 with what was eventually diagnosed as narcolepsy. Symptoms included sudden and deep sleeps from which she could not be roused. Because of her illness, Perich began the 2004-2005 school year on disability leave. On January 27, 2005, however, Perich notified the school principal, Stacey Hoeft, that she would be able to report to work the following month. Hoeft responded that the school had already contracted with a lay teacher to fill Perich's position for the remainder of the school year. Hoeft also expressed concern that Perich was not yet ready to return to the classroom.

On January 30, Hosanna-Tabor held a meeting of its congregation at which school administrators stated that Perich was unlikely to be physically capable of returning to work that school year or the next. The congregation voted to offer Perich a "peaceful release" from her call, whereby the congregation would pay a portion of her health insurance premiums in exchange for her resignation as a called teacher. Perich refused to resign and produced a note from her doctor stating that she would be able to return to work on February 22. The school board urged Perich to reconsider, informing her that the school no longer had a position for her, but Perich stood by her decision not to resign.

On the morning of February 22--the first day she was medically cleared to return to work--Perich presented herself at the school. Hoeft asked her to leave but she would not do so until she obtained written documentation that she had reported to work. Later that afternoon, Hoeft called Perich at home and told her that she would likely be fired. Perich responded that she had spoken with an attorney and intended to assert her legal rights.

Following a school board meeting that evening, board chairman Scott Salo sent Perich a letter stating that Hosanna-Tabor was reviewing the process for rescinding her call in light of her "regrettable" actions. Salo subsequently followed up with a letter advising Perich that the congregation would consider whether to rescind her call at its next meeting. As grounds for termination, the letter cited Perich's "insubordination and disruptive behavior" on February 22, as well as the damage she had done to her "working relationship" with the school by "threatening to take legal action." The congregation voted to rescind Perich's call on April 10, and Hosanna-Tabor sent her a letter of termination the next day.

## B

Perich filed a charge with the Equal Employment Opportunity Commission, alleging that her employment had been terminated in violation of the Americans with Disabilities Act (1990). The ADA prohibits an employer from discriminating against a qualified individual on the basis of disability. It also prohibits an employer from retaliating "against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such

individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA]."

The EEOC brought suit against Hosanna-Tabor, alleging that Perich had been fired in retaliation for threatening to file an ADA lawsuit. Perich intervened in the litigation, claiming unlawful retaliation under both the ADA and the Michigan Persons with Disabilities Civil Rights Act. The EEOC and Perich sought Perich's reinstatement to her former position (or frontpay in lieu thereof), along with backpay, compensatory and punitive damages, attorney's fees, and other injunctive relief.

Hosanna-Tabor moved for summary judgment. Invoking what is known as the "ministerial exception," the Church argued that the suit was barred by the First Amendment because the claims at issue concerned the employment relationship between a religious institution and one of its ministers. According to the Church, Perich was a minister, and she had been fired for a religious reason--namely, that her threat to sue the Church violated the Synod's belief that Christians should resolve their disputes internally.

The District Court agreed that the suit was barred by the ministerial exception and granted summary judgment in Hosanna-Tabor's favor. \*\*\*

The Court of Appeals for the Sixth Circuit vacated and remanded, directing the District Court to proceed to the merits of Perich's retaliation claims. The Court of Appeals recognized the existence of a ministerial exception barring certain employment discrimination claims against religious institutions--an exception "rooted in the First Amendment's guarantees of religious freedom." The court concluded, however, that Perich did not qualify as a "minister" under the exception, noting in particular that her duties as a called teacher were identical to her duties as a lay teacher. Judge White concurred. She viewed the question whether Perich qualified as a minister to be closer than did the majority, but agreed that the "fact that the duties of the contract teachers are the same as the duties of the called teachers is telling."

We granted certiorari.

## II

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." We have said that these two Clauses "often exert conflicting pressures," *Cutter v. Wilkinson* (2005), and that there can be "internal tension ... between the Establishment Clause and the Free Exercise Clause," *Tilton v. Richardson* (1971) (plurality opinion). Not so here. Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.

## A

Controversy between church and state over religious offices is hardly new. In 1215, the issue was addressed in the very first clause of Magna Carta. There, King John agreed that "the English church shall be free, and shall have its rights undiminished and its liberties unimpaired." The King in particular accepted the "freedom of elections," a right "thought to be of the greatest necessity and importance to the English church."

That freedom in many cases may have been more theoretical than real. See, *e.g.*, W. Warren, *Henry II* 312 (1973) (recounting the writ sent by Henry II to the electors of a bishopric in Winchester, stating: "I order you to hold a free election, but forbid you to elect anyone but Richard my clerk"). In any event, it did not survive the reign of Henry VIII, even in theory. The Act of Supremacy of 1534, 26 Hen.8, ch.1, made the English monarch the supreme head of the Church, and the Act in Restraint of Annates, 25 Hen. 8, ch.20, passed that same year, gave him the authority to appoint the Church's high officials. See G. Elton, *The Tudor Constitution: Documents and Commentary* 331-332 (1960). Various Acts of Uniformity, enacted subsequently, tightened further the government's grip on the exercise of religion. The Uniformity Act of 1662, for instance, limited service as a minister to those who formally assented to prescribed tenets and pledged to follow the mode of worship set forth in the Book of Common Prayer. Any minister who refused to make that pledge was "deprived of all his Spiritual Promotions."

Seeking to escape the control of the national church, the Puritans fled to New England, where they hoped to elect their own ministers and establish their own modes of worship. William Penn, the Quaker proprietor of what would eventually become Pennsylvania and Delaware, also sought independence from the Church of England. The charter creating the province of Pennsylvania contained no clause establishing a religion.

Colonists in the South, in contrast, brought the Church of England with them. But even they sometimes chafed at the control exercised by the Crown and its representatives over religious offices. In Virginia, for example, the law vested the governor with the power to induct ministers presented to him by parish vestries, 2 Hening's Statutes at Large 46 (1642), but the vestries often refused to make such presentations and instead chose ministers on their own. Controversies over the selection of ministers also arose in other Colonies with Anglican establishments, including North Carolina. There, the royal governor insisted that the right of presentation lay with the Bishop of London, but the colonial assembly enacted laws placing that right in the vestries. Authorities in England intervened, repealing those laws as inconsistent with the rights of the Crown.

It was against this background that the First Amendment was adopted. Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church. See 1 Annals of Cong. 730-731 (1789) (noting that the Establishment Clause addressed the fear that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform" (remarks of J. Madison)). By forbidding the "establishment of religion" and guaranteeing the "free exercise thereof," the Religion Clauses ensured that the new Federal Government--unlike the English Crown--would have no role in filling ecclesiastical offices. The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.

This understanding of the Religion Clauses was reflected in two events involving James Madison, "the leading architect of the religion clauses of the First Amendment." *Arizona Christian School Tuition Organization v. Winn* (2011). The first occurred in 1806, when John Carroll, the first Catholic bishop in the

United States, solicited the Executive's opinion on who should be appointed to direct the affairs of the Catholic Church in the territory newly acquired by the Louisiana Purchase. After consulting with President Jefferson, then-Secretary of State Madison responded that the selection of church "functionaries" was an "entirely ecclesiastical" matter left to the Church's own judgment. Letter from James Madison to Bishop Carroll (Nov. 20, 1806). The "scrupulous policy of the Constitution in guarding against a political interference with religious affairs," Madison explained, prevented the Government from rendering an opinion on the "selection of ecclesiastical individuals."

The second episode occurred in 1811, when Madison was President. Congress had passed a bill incorporating the Protestant Episcopal Church in the town of Alexandria in what was then the District of Columbia. Madison vetoed the bill, on the ground that it "exceeds the rightful authority to which Governments are limited, by the essential distinction between civil and religious functions, and violates, in particular, the article of the Constitution of the United States, which declares, that 'Congress shall make no law respecting a religious establishment.'" Madison explained:

"The bill enacts into, and establishes by law, sundry rules and proceedings relative purely to the organization and polity of the church incorporated, *and comprehending even the election and removal of the Minister of the same*; so that no change could be made therein by the particular society, or by the general church of which it is a member, and whose authority it recognises." (emphasis added).

## B

Given this understanding of the Religion Clauses--and the absence of government employment regulation generally--it was some time before questions about government interference with a church's ability to select its own ministers came before the courts. This Court touched upon the issue indirectly, however, in the context of disputes over church property. Our decisions in that area confirm that it is impermissible for the government to contradict a church's determination of who can act as its ministers.

In *Watson v. Jones* (1872), the Court considered a dispute between antislavery and proslavery factions over who controlled the property of the Walnut Street Presbyterian Church in Louisville, Kentucky. The General Assembly of the Presbyterian Church had recognized the antislavery faction, and this Court--applying not the Constitution but a "broad and sound view of the relations of church and state under our system of laws"--declined to question that determination. We explained that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them." As we would put it later, our opinion in *Watson* "radiates ... a spirit of freedom for religious organizations, an independence from secular control or manipulation--in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America* (1952).

Confronting the issue under the Constitution for the first time in *Kedroff*, the Court recognized that the "[f]reedom to select the clergy, where no improper methods of choice are proven," is "part of the free exercise of religion" protected by the First Amendment against government interference. At issue in *Kedroff* was the right to use a Russian Orthodox cathedral in New York City. \*\*\* We explained that the controversy over the right to use the cathedral was "strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America." \*\*\*

This Court reaffirmed these First Amendment principles in *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich* (1976), a case involving a dispute over control of the American-Canadian Diocese of the Serbian Orthodox Church, including its property and assets. The Church had removed Dionisije Milivojevich as bishop of the American-Canadian Diocese because of his defiance of the church hierarchy. Following his removal, Dionisije brought a civil action in state court challenging the Church's decision, and the Illinois Supreme Court "purported in effect to reinstate Dionisije as Diocesan Bishop," on the ground that the proceedings resulting in his removal failed to comply with church laws and regulations.

Reversing that judgment, this Court explained that the First Amendment "permit[s] hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters." When ecclesiastical tribunals decide such disputes, we further explained, "the Constitution requires that civil courts accept their decisions as binding upon them." We thus held that by inquiring into whether the Church had followed its own procedures, the State Supreme Court had "unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals" of the Church.

### C

Until today, we have not had occasion to consider whether this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment. The Courts of Appeals, in contrast, have had extensive experience with this issue. Since the passage of Title VII of the Civil Rights Act of 1964, and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a "ministerial exception," grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers.

We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals

will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

The EEOC and Perich acknowledge that employment discrimination laws would be unconstitutional as applied to religious groups in certain circumstances. They grant, for example, that it would violate the First Amendment for courts to apply such laws to compel the ordination of women by the Catholic Church or by an Orthodox Jewish seminary. According to the EEOC and Perich, religious organizations could successfully defend against employment discrimination claims in those circumstances by invoking the constitutional right to freedom of association--a right "implicit" in the First Amendment. The EEOC and Perich thus see no need--and no basis--for a special rule for ministers grounded in the Religion Clauses themselves.

We find this position untenable. The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC's and Perich's view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.

The EEOC and Perich also contend that our decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990), precludes recognition of a ministerial exception. In *Smith*, \*\*\*

It is true that the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability. But a church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.

### III

Having concluded that there is a ministerial exception grounded in the Religion Clauses of the First Amendment, we consider whether the exception applies in this case. We hold that it does.

Every Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of a religious congregation, and we agree. We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.

To begin with, Hosanna-Tabor held Perich out as a minister, with a role distinct from that of most of its members. When Hosanna-Tabor extended her a call, it issued her a "diploma of vocation" according her the title "Minister of Religion, Commissioned." She was tasked with performing that office "according to the Word of God and the confessional standards of the Evangelical Lutheran

Church as drawn from the Sacred Scriptures." The congregation prayed that God "bless [her] ministrations to the glory of His holy name, [and] the building of His church." In a supplement to the diploma, the congregation undertook to periodically review Perich's "skills of ministry" and "ministerial responsibilities," and to provide for her "continuing education as a professional person in the ministry of the Gospel."

Perich's title as a minister reflected a significant degree of religious training followed by a formal process of commissioning. To be eligible to become a commissioned minister, Perich had to complete eight college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher. She also had to obtain the endorsement of her local Synod district by submitting a petition that contained her academic transcripts, letters of recommendation, personal statement, and written answers to various ministry-related questions. Finally, she had to pass an oral examination by a faculty committee at a Lutheran college. It took Perich six years to fulfill these requirements. And when she eventually did, she was commissioned as a minister only upon election by the congregation, which recognized God's call to her to teach. At that point, her call could be rescinded only upon a supermajority vote of the congregation--a protection designed to allow her to "preach the Word of God boldly."

Perich held herself out as a minister of the Church by accepting the formal call to religious service, according to its terms. She did so in other ways as well. For example, she claimed a special housing allowance on her taxes that was available only to employees earning their compensation "in the exercise of the ministry." In a form she submitted to the Synod following her termination, Perich again indicated that she regarded herself as a minister at Hosanna-Tabor, stating: "I feel that God is leading me to serve in the teaching ministry .... I am anxious to be in the teaching ministry again soon."

Perich's job duties reflected a role in conveying the Church's message and carrying out its mission. Hosanna-Tabor expressly charged her with "lead[ing] others toward Christian maturity" and "teach[ing] faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church." In fulfilling these responsibilities, Perich taught her students religion four days a week, and led them in prayer three times a day. Once a week, she took her students to a school-wide chapel service, and--about twice a year--she took her turn leading it, choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible. During her last year of teaching, Perich also led her fourth graders in a brief devotional exercise each morning. As a source of religious instruction, Perich performed an important role in transmitting the Lutheran faith to the next generation.

In light of these considerations--the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church--we conclude that Perich was a minister covered by the ministerial exception.

\*\*\* Although the Sixth Circuit did not adopt the extreme position pressed here by the EEOC, it did regard the relative amount of time Perich spent performing

religious functions as largely determinative. The issue before us, however, is not one that can be resolved by a stopwatch. The amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations discussed above.

Because Perich was a minister within the meaning of the exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer. The EEOC and Perich originally sought an order reinstating Perich to her former position as a called teacher. By requiring the Church to accept a minister it did not want, such an order would have plainly violated the Church's freedom under the Religion Clauses to select its own ministers.

Perich no longer seeks reinstatement, having abandoned that relief before this Court. But that is immaterial. Perich continues to seek frontpay in lieu of reinstatement, backpay, compensatory and punitive damages, and attorney's fees. An award of such relief would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination. Such relief would depend on a determination that Hosanna-Tabor was wrong to have relieved Perich of her position, and it is precisely such a ruling that is barred by the ministerial exception.

The EEOC and Perich suggest that Hosanna-Tabor's asserted religious reason for firing Perich--that she violated the Synod's commitment to internal dispute resolution--was pretextual. That suggestion misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful - a matter "strictly ecclesiastical," - is the church's alone.

#### IV

The EEOC and Perich foresee a parade of horrors that will follow our recognition of a ministerial exception to employment discrimination suits. According to the EEOC and Perich, such an exception could protect religious organizations from liability for retaliating against employees for reporting criminal misconduct or for testifying before a grand jury or in a criminal trial. What is more, the EEOC contends, the logic of the exception would confer on religious employers "unfettered discretion" to violate employment laws by, for example, hiring children or aliens not authorized to work in the United States.

Hosanna-Tabor responds that the ministerial exception would not in any way bar criminal prosecutions for interfering with law enforcement investigations or other proceedings. Nor, according to the Church, would the exception bar government enforcement of general laws restricting eligibility for employment, because the exception applies only to suits by or on behalf of ministers themselves. Hosanna-Tabor also notes that the ministerial exception has been around in the lower courts for 40 years and has not given rise to the dire consequences predicted by the EEOC and Perich.

The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.

The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.

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

*It is so ordered.*

JUSTICE THOMAS, CONCURRING.

I join the Court's opinion. I write separately to note that, in my view, the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister. \*\*\*

JUSTICE ALITO, WITH WHOM JUSTICE KAGAN JOINS, CONCURRING.

I join the Court's opinion, but I write separately to clarify my understanding of the significance of formal ordination and designation as a "minister" in determining whether an "employee" of a religious group falls within the so-called "ministerial" exception. The term "minister" is commonly used by many Protestant denominations to refer to members of their clergy, but the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists. In addition, the concept of ordination as understood by most Christian churches and by Judaism has no clear counterpart in some Christian denominations and some other religions. Because virtually every religion in the world is represented in the population of the United States, it would be a mistake if the term "minister" or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one. Instead, courts should focus on the function performed by persons who work for religious bodies. \*\*\*

The "ministerial" exception should \*\*\* apply to any "employee" who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith. If a religious group believes that the ability of such an employee to perform these key functions has been compromised, then the constitutional guarantee of religious freedom protects the group's right to remove the employee from his or her position.

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II  
B

\*\*\* The ministerial exception applies to respondent because, as the Court notes, she played a substantial role in "conveying the Church's message and carrying out its mission." She taught religion to her students four days a week and took them to chapel on the fifth day. She led them in daily devotional exercises, and led them in prayer three times a day. She also alternated with the other teachers in planning and leading worship services at the school chapel, choosing liturgies, hymns, and readings, and composing and delivering a message based on Scripture.

It makes no difference that respondent also taught secular subjects. While a purely secular teacher would not qualify for the "ministerial" exception, the constitutional protection of religious teachers is not somehow diminished when they take on secular functions in addition to their religious ones. What matters is that respondent played an important role as an instrument of her church's religious message and as a leader of its worship activities. Because of these important religious functions, Hosanna-Tabor had the right to decide for itself whether respondent was religiously qualified to remain in her office.

Hosanna-Tabor discharged respondent because she threatened to file suit against the church in a civil court. This threat contravened the Lutheran doctrine that disputes among Christians should be resolved internally without resort to the civil court system and all the legal wrangling it entails. In Hosanna-Tabor's view, respondent's disregard for this doctrine compromised her religious function, disqualifying her from serving effectively as a voice for the church's faith. Respondent does not dispute that the Lutheran Church subscribes to a doctrine of internal dispute resolution, but she argues that this was a mere pretext for her firing, which was really done for nonreligious reasons.

For civil courts to engage in the pretext inquiry that respondent and the Solicitor General urge us to sanction would dangerously undermine the religious autonomy that lower court case law has now protected for nearly four decades. In order to probe the *real reason* for respondent's firing, a civil court--and perhaps a jury--would be required to make a judgment about church doctrine. The credibility of Hosanna-Tabor's asserted reason for terminating respondent's employment could not be assessed without taking into account both the importance that the Lutheran Church attaches to the doctrine of internal dispute resolution and the degree to which that tenet compromised respondent's religious function. If it could be shown that this belief is an obscure and minor part of Lutheran doctrine, it would be much more plausible for respondent to argue that this doctrine was not the real reason for her firing. If, on the other hand, the doctrine is a central and universally known tenet of Lutheranism, then the church's asserted reason for her discharge would seem much more likely to be nonpretextual. But whatever the truth of the matter might be, the mere adjudication of such questions would pose grave problems for religious autonomy: It would require calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission.

At oral argument, both respondent and the United States acknowledged that a pretext inquiry would sometimes be prohibited by principles of religious autonomy, and both conceded that a Roman Catholic priest who is dismissed for getting married could not sue the church and claim that his dismissal was actually based on a ground forbidden by the federal antidiscrimination laws. But there is no principled basis for proscribing a pretext inquiry in such a case while permitting it in a case like the one now before us. The Roman Catholic Church's insistence on clerical celibacy may be much better known than the Lutheran Church's doctrine of internal dispute resolution, but popular familiarity with a religious doctrine cannot be the determinative factor.

What matters in the present case is that Hosanna-Tabor believes that the religious function that respondent performed made it essential that she abide by the doctrine of internal dispute resolution; and the civil courts are in no position to second-guess that assessment. This conclusion rests not on respondent's ordination status or her formal title, but rather on her functional status as the type of employee that a church must be free to appoint or dismiss in order to exercise the religious liberty that the First Amendment guarantees.

## Notes

1. How far does *Hosanna-Tabor* extend? Consider whether a religious school that employs secular teachers may terminate a teacher if she is unmarried and becomes pregnant. What about a yoga studio?
2. Would a statute seeking to extend employment protections to persons working for “religious institutions” be consistent with *Church of the Lukumi Babalu Aye*?
3. Reconsider the relationship between the Establishment Clause and the Free Exercise Clause. Given current doctrine, how would you respond Justice Jackson in *Everson* that religious schools - - - and presumably other entities and individuals - - - want it “both ways”?

### Note: The “Play in the Joints”

In *Locke v. Davey*, 540 U.S. 712 (2004), the Court upheld the constitutionality of the Washington State “Promise Scholarship” that excluded “devotional theology” from eligibility. Writing for the majority, CJ Rehnquist wrote that the Free Exercise Clause and Establishment Clause are frequently “in tension” but that there is “play in the joints” between the two clauses. The Court held that the exemption was not hostility (or a targeting) of religion under *Church of Lukumi*, but was consistent with the state’s anti-Establishment Clause concerns. Importantly, Washington had a so-called Blaine Amendment in its state constitution which prohibits government financial support of religion. Also

importantly, the Promise Scholarship did include religion and religious studies, as well as students at religious schools.

The United States Supreme Court has granted certiorari for the 2016-2017 Term to *Trinity Lutheran Church of Columbia, Mo. v. Pauley* regarding a Free Exercise and Equal Protection challenge to a denial of state funding that was based on a state constitutional provision prohibiting state funds be given to religious organizations.

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