

Understanding Constitutional Law

Fourth Edition

2015 Supplement

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Preface

This 2015 Supplement focuses on significant decisions of the most recent U. S. Supreme Court terms. Some cases may be useful in multiple parts of a course.

In editing cases, we have at times deleted footnotes, case citations, and statutory references without so indicating.

The Supreme Court's monumental decision in National Federation of Independent Business v. Sebelius, which considered challenges to the constitutionality of the Affordable Care Act, touched on judicial behavior generally, as well as a range of issues relating to Congress's powers under the Commerce, Spending, Taxing and Necessary and Proper Clauses. Rather than divide the discussion accordingly, we are presenting a single essay discussing the decision. At various places, we have provided references to sections of the 4th Edition of UNDERSTANDING CONSTITUTIONAL LAW which will help readers consider it in the context of the topical discussions there.

Acknowledgements

We pay tribute to the late Bernard Schwartz and Norman Redlich. Bernard co-authored the first edition of UNDERSTANDING CONSTITUTIONAL LAW and Norman co-authored the first three editions. We are grateful to them for their contributions to those editions, for the inspiration they provided and for the opportunity to have been associated with them.

A number of people helped us produce this 2015 Supplement to UNDERSTANDING CONSTITUTIONAL LAW. We would like to thank Kathleen Spartana for her administrative and editing work. Since the Fourth Edition was published, we have benefited from the work of research assistants Mark Anderson, Paul Brusati, Alex Davis, Grant Ford, Eric Hoffmann, Sarah Honeycutt, Seth Jasoviak, Bryan McKown, Phong Tran, and Sam Wallach. We also thank Stephanie Haley, Brenda Aylesworth and Tina Brosseau for their invaluable assistance in producing this 2015 Supplement. As always, we appreciate the institutional support of the Dedman School of Law at Southern Methodist University and of Saint Louis University School of Law including through the latter's summer research program. Finally, we are grateful to Pali Chheda of LexisNexis Mathew Bender for her skillful editing.

Joel Goldstein is primarily responsible for the first seven chapters of this 2015 Supplement. John Attanasio prepared chapters 8 to 17 of this Supplement.

John Attanasio
Joel K. Goldstein
August, 2015

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UNDERSTANDING THE HEALTH CARE DECISION

NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS

132 S. Ct. 2566 (2012)

1. Introduction

Few Supreme Court cases have attracted as much public attention as *National Federation of Independent Business v. Sebelius* which addressed the constitutionality of the Patient Protection and Affordable Care Act of 2010 (ACA). Not since *Bush v. Gore*¹ resolved the 2000 presidential election has a Supreme Court case so captivated the nation. The case was widely discussed before and during the term in which it was argued, and the delivery of the decision was covered live by major television and radio networks and dominated media coverage during the following days.

Several factors helped explain why the case so riveted the nation. The case addressed the constitutionality of a major reform of the health care industry, a sector which accounts for a major slice of the nation's economy with ramifications for many Americans. Philosophically, the debate over ACA juxtaposed very different visions of the proper role of national government in regulating the economy. Two features of ACA drew particular controversy. Congress imposed an individual mandate which required some individuals to purchase health insurance even if they would prefer to remain uninsured. Congress also expanded Medicaid to include new recipients and provided that a State which was unwilling to cover the new population would forfeit all of its federal Medicaid funds. Politically, the case was unprecedented in addressing during a presidential election year a signature legislative accomplishment of an incumbent president which had been achieved on essentially a partisan vote. The fact that the president was seeking re-election added to the interest.

The nation's partisan division regarding the merits of ACA raised the stakes for the Court. Fairly or not, its decisions on controversial constitutional issues have often been perceived as following a similar partisan split between those justices appointed by Republican presidents (Chief Justice Roberts and Justices Scalia, Kennedy, Thomas and Alito) and those nominated by Democratic presidents (Justices Ginsburg, Breyer, Sotomayor, and Kagan). A decision which mirrored the perceived partisan split on the Court might encourage perceptions regarding the confluence between constitutional decisions and political preference.

Prior to oral argument in late March 2012, it seemed unlikely that the Court would issue an opinion overturning ACA to any significant degree.² After all, the Court had not struck down a Congressional regulation of economic matters as beyond Congress's powers under the

¹ 531 U.S. 98 (2000)

² See, e.g., Walter Dellinger, *Could the court's conservatives split the difference on Obamacare?*, Slate, June 22, 2012, http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/supreme_court_year_in_review/supreme_court_year_in_review_awaiting_a_decision_on_obamacare.html (stating expectation of 7-2 decision upholding individual mandate prior to oral argument).

Commerce Clause for more than 75 years. Moreover, prior opinions suggested some likelihood that some conservative justices would regard ACA as within Congress's power. Justices Scalia and Kennedy had joined opinions recognizing fairly expansive federal power under the Commerce and Necessary and Proper Clauses in *Gonzales v. Raich*³ and Chief Justice Roberts and Justices Kennedy and Alito had taken fairly expansive views of the latter clause in *United States v. Comstock*.⁴ Based on prior positions, Justice Thomas appeared to be the only certain vote to overturn ACA prior to the oral argument. Indeed, Harvard law professor Charles Fried, who had served as solicitor general during the Reagan administration, wrote that the argument that ACA transcended Congress's powers "bordered on the frivolous."⁵

At argument, however, four of the conservative justices⁶ posed a barrage of questions which suggested considerable doubts regarding the constitutionality of ACA. Although the tenor of questions at oral argument often does not predict ultimate outcomes, the optimism of ACA's supporters faded and an opinion overturning all or much of ACA seemed possible, perhaps likely.

The ultimate decision on June 28, 2012, followed a confusing course which few anticipated. By a 5-4 majority, the Court upheld the individual mandate but it did so under Congress's power to tax, not its powers under the Commerce and/or Necessary and Proper Clause. Of the five who concluded that Congress lacked power to adopt the individual mandate under the Commerce and Necessary and Proper Clauses (Roberts, Scalia, Kennedy, Thomas, Alito) only one (Roberts) thought that the Tax Clause conferred that power. Of the five who concluded that the individual mandate was within Congress's tax power (Roberts, Ginsburg, Breyer, Sotomayor, Kagan), none thought viewing that feature as a tax was the best reading of Congress's intent and only one (Roberts) thought that rationale the best basis to uphold the individual mandate. The Court also held, 7-2,⁷ that Congress could not, under the Spending Clause, withhold all Medicaid funds from states which refused to join in the proposed expansion of eligibility for that program but held, 5-4,⁸ that it could deny new funds to those states.

Chief Justice Roberts, accordingly, emerged as the pivotal vote. His action angered, even infuriated, many conservatives. The other conservative members of the Court abandoned usual decorum and refused to join even those parts of Chief Justice Roberts's opinion with which they essentially agreed. In fact, they essentially refused to even acknowledge his opinion save for a passing reference. Instead, they issued an opinion which implicitly denounced the Chief Justice's opinion as "a vast judicial overreaching" which was "invented and atextual." Some read their decision to issue a "joint opinion," which identified all four as co-authors rather than follow the normal practice, as a further rebuke to the Chief Justice. The conservative

³ 545 U.S. 1 (2005).

⁴ 560 U.S. 126 (2010).

⁵ Charles Fried, *The June surprises: Balls, strikes, and the fog of war*, Aug. 2, 2012, SCOTUSblog <http://www.scotusblog.com/2012/08/the-june-surprises-balls-strikes-and-the-fog-of-war/>.

⁶ All but Justice Thomas who, consistent with his practice for more than the last six years, asked no questions.

⁷ Justices Breyer and Kagan joined Chief Justice Roberts and Justices Scalia, Kennedy, Thomas and Alito in reaching this result; Justices Ginsburg and Sotomayor dissented.

⁸ Justices Ginsburg, Breyer, Sotomayor and Kagan joined the Chief Justice; Justices Scalia, Kennedy, Thomas, and Alito dissented.

blogosphere lambasted the Chief Justice, and even called for the impeachment of this prior conservative icon.⁹

Some speculated that Chief Justice Roberts's institutional commitment to the Court which bears his name may have figured in his thinking. The Chief Justice may have been influenced by his perception of the impact on the Court's stature of a 5-4 decision overturning ACA in which the justices divided along lines predicted by the appointing president (i.e. Reagan, Bush, Bush vs. Clinton, Obama).¹⁰ As it was, his opinion had something of the flavor of Chief Justice John Marshall's opinion in *Marbury v. Madison*¹¹ in which the great Chief Justice strategically established some important foundations of the Court's power but did so in a way which avoided the confrontation with President Thomas Jefferson and Secretary of State James Madison in which he knew he could not prevail.¹² One Roberts admirer labeled his resolution "a stroke of judicial genius. A *Marbury* for our time."¹³

2. Commerce Clause (Chapter 4, § 4.09, Page 154)

The first area of controversy regarding the ACA resided in the individual mandate which required most Americans to maintain some health insurance or to pay a penalty. The Government justified the individual mandate as a valid exercise of congressional power under the Commerce and Necessary and Proper Clauses. In essence, the mandate addressed the problem of extensive cost-shifting in the provision of health services. Although all need health care at some time, its expense often places it beyond the means of many Americans who lack health insurance. Since federal and state laws obligate hospitals to serve some who cannot afford their services, these costs are effectively shifted to those who do purchase health insurance. Congress sought to avoid this cost-shifting by broadening the pool of insureds.

Five justices (Roberts, Scalia, Kennedy, Thomas, Alito) concluded in two separate opinions that Congress lacked power under the Commerce Clause to impose the individual mandate to require individuals to purchase health insurance. Although consistent with prior precedent Chief Justice Roberts recognized the conventional doctrine that Congress had power under the Commerce Clause to regulate activities which, by themselves or when aggregated with similar activities by others, have a substantial effect on interstate commerce, he concluded that the individual mandate went beyond Congress's commerce power because "Congress has never

⁹ Tim Mak, *Blog Chatter: Impeach John Roberts*, Politico, June 28, 2012, <http://www.politico.com/news/stories/0612/77947.html>.

¹⁰ See, e.g., Linda Greenhouse, *A Justice in Chief*, New York Times, June 28, 2012, <http://opinionator.blogs.nytimes.com/2012/06/28/a-justice-in-chief/> (praising Roberts for navigating Court through "perilous" political landscape without appearing unduly partisan); Laurence Tribe, *Chief Justice Roberts Comes Into His Own and Saves the Court While Preventing a Constitutional Debacle*, Scotusblog, June 28, 2012, <http://www.scotusblog.com/2012/06/chief-justice-roberts-comes-into-his-own-and-saves-the-court-while-preventing-a-constitutional-debacle/> (praising Roberts for "heroic rebuke" to those who associated Court with political partisanship).

¹¹ 5 U.S. 137 (1803).

¹² Vikram David Amar and Akhil Reed Amar, *Chief Justice Roberts reaches for greatness*, Los Angeles Times, July 1, 2012, (comparing Roberts's performance to *Marbury*).

¹³ Bradley Joondeph, *A Marbury for Our Time*, Scotusblog, June 29, 2012, <http://www.scotusblog.com/2012/06/a-marbury-for-our-time/>.

attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product.” Thus, Chief Justice Roberts and the signatories to the Joint Opinion agreed that Congress could not compel individuals to engage in commerce. The near certainty that all would sometime seek commercially offered health care services did not authorize Congress to compel such activity.

Chief Justice Roberts also offered a textual argument in support of his restrictive reading, that the power “to regulate Commerce” “presupposes the existence of commercial activity to be regulated.” The Commerce Clause does not confer the power to create an activity to regulate, he argued, or to compel individuals to act to purchase a product. Chief Justice Roberts acknowledged that as an economic matter, distinctions between activity and inactivity were artificial since both had “measurable economic effects on commerce.” Yet the Framers, as practical statesmen rather than metaphysical philosophers, would have accepted the distinction. Similarly, the joint opinion of Justices Scalia, Kennedy, Thomas and Alito invoked the activity/inactivity distinction as dispositive. Congress could regulate commercial or economic activity which substantially affected commerce but not inactivity which had that impact.

In dissent, Justice Ginsburg argued that application of the Court’s usual rational basis standard in Commerce Clause litigation would easily have upheld the individual mandate since Congress clearly had reason to conclude that the class of uninsureds substantially affects interstate commerce in myriad ways.

The logic of the Roberts/Joint Opinion analysis was certainly not unassailable.¹⁴ One might argue that Congress, in ACA, was regulating commerce in health care even if its regulations reached some particular individuals who were not already engaging in it. The constitutional language empowers Congress to “regulate Commerce,” not simply to “regulate persons already engaged in commerce.” Congress arguably was regulating commerce in health care. Under this reading, the fact that some were not participating in that market, was irrelevant.

Even if one accepts Chief Justice Roberts’s characterization regarding ACA’s novelty in regulating inactivity, one might still conclude that the novelty of a type of regulation does not necessarily impeach its constitutionality. Novelty may deprive a regulation of supporting precedents but cannot be dispositive since there is a first time for every type of regulation. If originality was an impediment to constitutionality nothing would ever be held within Congress’s power. Even if the regulation was novel in compelling economic activity by those previously inactive, a characterization some reject,¹⁵ novelty does not render something unconstitutional.

Finally, the decision denying Congress power under the Commerce Clause to compel economic activity could lead to unfortunate consequences. Suppose a threatened national epidemic could be addressed only by a national order directing compulsory immunizations.

¹⁴ See, e.g., Hon. Richard Posner, *The Commerce Clause was clearly enough to uphold the Affordable Care Act*, Slate, June 28, 2012, http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/_supreme_court_year_in_review/affordable_care_act_upheld_why_the_commerce_clause_should_have_been_enough_.html.

¹⁵ Einer Elhauge, *A Response to Critics on the Founding Fathers and Health Insurance Mandates*, The Health Care Blog, April 2012, <http://thehealthcareblog.com/blog/2012/04/20/a-response-to-critics-on-the-founding-fathers-and-health-insurance-mandates/>; Einer Elhauge, *If Health Insurance Mandates Are Unconstitutional, Why Did the Founding Fathers Back Them?* The New Republic, April 13, 2012, <http://www.tnr.com/article/politics/102620/individual-mandate-history-affordable-care-act>.

Under the Roberts-Joint Opinion analysis, Congress would seem foreclosed from taking such action under the Commerce Clause (even if it allowed exemptions based on religious belief).

Although Chief Justice Roberts and the Joint Opinion gave the Commerce Clause a constricted reading, this portion of the Court's decision would seem likely to have little impact on future doctrine. Congress, as was pointed out, has not in the past sought to compel nonparticipants to spend money and would seem unlikely to do so often in the future. As such, a ruling denying Congress such a power would seem to have little actual or doctrinal significance. The two opinions seem to assume the continued existence of Commerce Clause precedents and doctrine although the signatories to the Joint Opinion clearly are not enamored with *Wickard v. Filburn*.¹⁶

3. Necessary and Proper Clause (*Chapter 3, § 3.02 end, Page 103*)

The Court's treatment of the Necessary and Proper Clause may prove more consequential. Although Chief Justice Roberts recognized that the Court had been "very deferential" to Congress's judgments regarding the necessity of a regulation, thereby implicitly adopting Chief Justice Marshall's *McCulloch v. Maryland* definition of "necessary" as convenient, useful or conducive, he argued that the Court retained power to find such a regulation not "proper" because it "undermine[s] the structure of government established by the Constitution." He suggested that Congress could only use the Necessary and Proper Clause to exercise authority "derivative of, and in service to, a granted power," not, as here, "to create the necessary predicate to the exercise of an unenumerated power."

The dissent pointed out, however, that the Necessary and Proper Clause had routinely been recognized as a vehicle for Congress to enact measures to give effect to exercises of its commerce power even when it could not have adopted such measures in isolation. Here, Congress clearly could, under the Commerce Clause, prohibit insurance companies from denying coverage, or charging higher premiums, to customers with preexisting conditions. Passing such a provision alone, however, would not work without the individual mandate, arguably making the latter an essential part of the larger economic regulation.

The Chief Justice's reliance on "proper" as an independent restraint was somewhat anomalous. The two cases he cited in which the Court had held that Congressional acts were not "proper" *Printz v. United States*¹⁷ and *New York v. United States*,¹⁸ both involved statutes which compelled states to implement federal programs. Moreover, the Chief Justice's opinion gives Congress and courts little guidance regarding the boundaries of legislative action. Former Solicitor General Walter Dellinger described this portion of Chief Justice Roberts's opinion as "almost inscrutable."¹⁹ The Joint Opinion's claim that ACA expands federal power "into a broad new field" of "mandating economic activity" seemed to play with words to manipulate

¹⁶ 317 U.S. 111 (1942).

¹⁷ 521 U.S. 898 (1997).

¹⁸ 505 U.S. 144 (1992).

¹⁹ Walter Dellinger, *Why Obama Won More Than a Battle*, Slate, June 29, 2012, http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/_supreme_court_year_in_review/supreme_court_year_in_review_the_obama_administration_won_more_than_a_battle_on_health_care.html.

doctrine. Why is “mandating economic activity” a “new field” and when did that become the test under the Necessary and Proper Clause? And the Joint Opinion’s rejection of the individual mandate because Congress had other alternatives to achieve its objectives seemed to involve second-guessing of legislative decisions, introducing a level of scrutiny contrary to normal standards of judicial deference in this area.

Some critics of the mandate seemed to view it as an intrusion into individual liberty. The Court, of course, never invoked this reasoning which would presumably draw from notions of substantive due process. Such a theory would create other difficulties. A substantive Due Process limitation based on “liberty” would presumably limit not simply the federal government under the Fifth Amendment but state government under the Fourteenth Amendment. Moreover, this sort of argument was made, and rejected, when segregationists argued that the Civil Rights Act of 1964 interfered with their “liberty” to decide what customers they would serve.

Although the Commerce Clause analysis seems to have little doctrinal significance, the decision of the Chief Justice and signatories of the Joint Opinion to reject the Necessary and Proper Clause defense appears far more important. Many thought that provision enhanced Congress’s Commerce Clause power to confer clear federal power to impose the mandate.²⁰ The decision leaves some degree of uncertainty regarding the criteria which Chief Justice Roberts and those who wrote the Joint Opinion will apply in the future regarding legislation based on the Necessary and Proper Clause.

4. **Taxing Power** (*Chapter 3, § 3.04 end, Page 107*)

Although Chief Justice Roberts thought the most plausible reading of the individual mandate was to view it as a command to purchase insurance issued pursuant to the Commerce Clause he thought it also could fairly be construed as a tax and accordingly fall within Congress’s power under the Taxing Clause.²¹ ACA’s description of the mandate as a penalty was not fatal to the classification of the mandate as a tax for constitutional purposes although that classification did signal Congress’s decision to remove it from the scope of the Anti-Injunction Act. Whether the mandate qualified as a tax for constitutional analysis turned on “its substance and application,” not the designation Congress gave it. The fact that the amount most would owe was less than the price of insurance, the absence of a scienter requirement and the collection by Internal Revenue Service of any amounts paid also were consistent with characterizing the mandate as imposing a tax.²² In essence, the provision gave Americans a choice between buying

²⁰ See, e.g., Eric Segall and Aaron E. Carroll, *Health Care and Constitutional Chaos: Why the Supreme Court Should Uphold the Affordable Care Act*, 64 STAN. L. REV. Online 139 (May 29, 2012) <http://www.stanfordlawreview.org/online/health-care-constitutional-chaos>.

²¹ U.S. Const., art. I, sec. 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, . . .; but all Duties, Imposts and Excises shall be uniform throughout the United States;”).

²² Chief Justice Roberts’s analysis overlapped with Robert D. Cooter and Neil Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, SSRN (posted January 23, 2012) 99 VA. L. REV. _ forthcoming 2012). See Neil Siegel and Robert Cooter, *A Theory of the Tax Power that Justifies—and May have Informed—the Chief Justice’s Analysis*, Scotusblog, July 9, 2012, <http://www.scotusblog.com/2012/07/online-aca-symposium-a-theory-of-the-tax-power-that-justifies-and-may-have-informed-the-chief-justices-analysis-2/>.

insurance or paying an amount to IRS. Deciding to pay (the tax) rather than to buy insurance did not make an individual a law violator.

The Joint Opinion accused the majority of rewriting, rather than interpreting, the statute. The mandate was a penalty for violating the law, not a means of financing government. The Joint Opinion thought significant the references to the mandate as a penalty as well as placement of the mandate with ACA's "operative core" rather than with its revenue provisions.

Whereas the Joint Opinion took a formalistic approach in concluding that the mandate did not impose a tax because Congress labeled it as a penalty, Chief Justice Roberts adopted a functional approach which looked at its "substance and application." The Direct Taxation Clause²³ was not implicated because the tax imposed on those who did not buy health insurance was not a capitation or other direct tax. Nor did the activity/inactivity restriction which the Chief Justice found in the Commerce Clause apply to this Article I power. The Constitution had not previously been construed to limit government to taxing only "activity" not inactivity.

Implicitly, then, under the Chief Justice's analysis, government's power to tax exceeded its power to regulate commerce since the former, but not the latter, power extended to "inactivity." That was appropriate, the Chief Justice reasoned, because Commerce Clause regulation exposed an individual to a broader range of government sanctions than did the tax power. Indeed, for political reasons Congress may be less likely to use its taxing, than its commerce, power since the former requires it to engage in politically unpopular behavior.

5. Spending Power (*Chapter 3, § 3.05 end*)

The Court's resolution of the Spending Clause issues was also significant. In essence, ACA provided for an expansion of the Medicaid program and enlarged the class of those the States must cover under it while offering more federal funds to meet most, but not all, of these additional costs. A State which refused to accept ACA's expanded coverage requirements would forfeit all federal Medicaid funding, not simply the new funds ACA provided.

The Spending Clause, of course, provides that "The Congress shall have Power ...to pay the Debts and provide for the common Defence and general Welfare of the United States; ..." ²⁴ Supreme Court precedents have made clear that Congress can attach conditions to distribution of expenditures in order to create incentives for states to comply with federal objectives. Yet some cases had suggested limits to the ability of the federal government to deploy this power. In *South Dakota v. Dole*,²⁵ the Court had, of course, suggested that a condition imposed on a state's receipt of federal funds might be so coercive as to be unconstitutional. In the quarter century following the decision, the Court had never struck down a condition on a federal expenditure for being coercive although it had held federal laws impermissibly commandeered state government.

NFIB provided the first occasion. Chief Justice Roberts, joined by Justices Breyer and Kagan, concluded that Congress exceeded permissible limits in conditioning continued receipt of

²³ U.S. Const. art. I, sec. 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.").

²⁴ U.S. Const. art. I, sec. 8, cl. 1.

²⁵ 483 U.S. 203 (1987).

all Medicaid funds on a State accepting the broader coverage criteria. They also concluded that Congress could condition the receipt of *new* Medicaid funds on compliance with new coverage requirements and, pursuant to ACA's severability clause, construed the statute accordingly. The Joint Opinion would have gone further. It concluded that the conditions accompanying the Medicaid expansion were coercive and accordingly would have deemed it unconstitutional in its entirety rather than severing the offending parts to preserve the rest. It accused Chief Justice Roberts of "rewriting" that provision of ACA. Justices Ginsburg and Sotomayor thought ACA's condition was constitutional as stated but, since a majority reached a contrary conclusion, agreed with the Chief Justice's use of the severability clause, thereby providing a five justice majority for preserving the Medicaid expansion.

The Roberts opinion suggested that Congress had gone too far because the conditions imposed constituted "threats to terminate other significant independent grants." The financial condition was not the "relatively mild encouragement" of *Dole* but a "gun to the head" since it impacted all Medicaid funding and accordingly left the State with no real option.

Chief Justice Roberts rejected the Government's and Justice Ginsburg's argument that the Medicaid expansion simply modified an existing program which States had long understood could be changed. Congress's characterization of the change as an expansion of an existing program (rather than creation of a new program) was not dispositive. Moreover, Congress had not given sufficiently clear notice that it could make this sort of change in "kind" not simply of "degree" in reserving the right to "alter or amend" Medicaid.

The Spending Clause discussion also provoked some criticism. If Medicaid had not existed, presumably Congress could, under ACA, have created it and required states, as a condition to receiving funds under it, to provide the coverage challenged in *NFIB*. Why could Congress not do in two sequential laws what it presumably could have done in a single act? Alternatively, presumably, as Justice Ginsburg argued, Congress could have abolished Medicaid and then created it anew subject to the conditions ACA imposed. If so, the Court's resolution would seem to elevate form over substance.

The Court did not fix the line at which persuasion becomes coercion. Even the Joint Opinion shied away from that challenge in acknowledging that the boundaries between "entice" and "coerce" "are often difficult to determine" and in admonishing lower courts not to deem legislation unconstitutional "unless the coercive nature of an offer is unmistakably clear." That task may inevitably need to occur on a case-by-case basis and accordingly the Court's unwillingness to state a rule may be wise. Nonetheless, the uncertainty will spawn litigation and may have some effect of deterring Congress from using conditional grants as a means of shaping policy.

6. Conclusion

The decision ended one round of litigation by preserving most of ACA slightly more than four months before Americans went to the polls for the November 2012, elections. Coming years will no doubt present further tests of ACA, in the courts as well as the legislative and political arenas, as well as further developments regarding the doctrine various opinions in *NFIB* produced.

Chapter 1

THE CONSTITUTION AND CONSTITUTIONAL ARGUMENT

§ 1.05 Constitutional Argument

[3] Ongoing Practice

Page 15: Insert at end of section

The Court made explicit and extensive use of ongoing history in interpreting the Recess Appointments Clause in one of the principal decisions of the October 2013 term. In *NLRB v. Canning*,²⁶ Justice Breyer gave “significant weight” to ongoing practice in interpreting that Clause. He cited extensive precedents to support the proposition that the Court “has treated practice as an important interpretive factor even when the nature of that practice is subject to dispute, and even when that practice began after the founding era” and concluded that the Court should be cautious about upsetting longstanding arrangements made between the political branches. Justice Scalia’s concurring opinion (joined by Chief Justice Roberts and Justices Thomas and Alito) demonstrated far less enthusiasm for ongoing history. Justice Scalia criticized Justice Breyer’s majority opinion for reaching “atextual results” based “on an adverse-possession theory of executive authority” and for “cast[ing] aside the plain, original meaning of the constitutional text in deference to late-arising historical practices that are ambiguous at best.” Justice Scalia predicted that the majority’s approach would diminish the Court’s role in resolving separation of powers disputes. The Scalia concurrence did not entirely reject ongoing practice. “Of course, where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision,” Justice Scalia wrote. But “a self-aggrandizing practice adopted by one branch well after the founding, often challenged, and never before blessed by this Court” did not “relieve” the Court of its “duty to interpret the Constitution in light of its text, structure, and original understanding.”

²⁶ 134 S. Ct. 2550, 2559 (2014).

Chapter 2

THE COURTS AND JUDICIAL REVIEW

§ 2.11 NON-ARTICLE III ADJUDICATION

Page 61: Insert at end of section

Recent decisions in the bankruptcy context have drawn a somewhat uncertain line regarding the extent to which Congress may empower non-Article III judges based on the public rights exception. In a 5-4 decision by Chief Justice Roberts, the Court held that the public rights exception was not broad enough to allow Congress to empower a non-Article III court to enter final judgment on a common law tort claim. Justice Scalia provided the crucial fifth vote but thought the majority opinion should confine the public rights exception more tightly.²⁷ More recently, a 6-3 decision held that a bankruptcy court could, with the parties' consent, decide claims within Article III jurisdiction which sought to augment the bankruptcy estate and which would exist without regard to the bankruptcy proceeding. Justice Sotomayor's majority opinion took a more pragmatic approach to the problem than the dissenters (Chief Justice Roberts and Justices Scalia and Thomas) thought appropriate.²⁸

§ 2.12 CASES AND CONTROVERSIES

Page 70: Insert before [b] at end of section

[4] Standing

[a] Constitutional Requirements

During the October, 2012 term, a closely divided Court made standing depend on whether a plaintiff could demonstrate that a threatened injury was “‘certainly impending.’” *Clapper v. Amnesty Int’l USA*²⁹ presented a constitutional challenge to 50 U.S.C. 1881a which was added to the Foreign Intelligence Surveillance Act of 1978 (FISA) in 2008 to expand the intelligence gathering power of the federal government by allowing it to seek authority from a FISA court to engage in surveillance of foreign targets without a showing of probable cause and without specifying the location of the surveillance. Respondents, various lawyers, human rights workers, journalists and others sought to challenge 1881a as unconstitutional for violating the First and Fourth Amendments to the Constitution as well as separation of powers principles and to enjoin its use. In a 5-4 decision, the Court, in an opinion by Justice Alito, held that the respondents lacked standing because they could not show that any threatened injury to them was “‘certainly impending.’” Their allegations were too speculative to satisfy the injury in fact and redressability requirements for standing. The Court concluded that respondents’ claims of injury relied on a set of speculative contingencies (e.g., the government would target foreign communications to which they were parties, that it would do so under 1881a, that the FISA court would authorize the requested surveillance, that the government would acquire communications

²⁷ *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

²⁸ *Wellness Int’l Network Ltd. V. Sharif*, 135 S. Ct. 1932 (2015).

²⁹ 133 S. Ct. 1138 (2013).

with the foreign targets, and that the respondents would be parties to those communications) and were not “certainly impending” or fairly traceable to 1881a.

Page 78: Insert before [5] Ripeness

[g] Standing on Appeal

On the final day of its 2012 Term, the Court’s decisions regarding whether a party had standing to appeal a lower court decision affected the outcome of two hotly contested cases dealing with legal restrictions involving same sex marriage. In a 5-4 decision in *United States v. Windsor*,³⁰ the Court held that the federal government had standing to appeal a lower court decision holding Section 3 of the Defense of Marriage Act (DOMA) unconstitutional. In *Hollingsworth v. Perry*,³¹ however, the Court, also in a 5-4 decision, dismissed an appeal of the lower court decision holding California’s Proposition 8 unconstitutional for lack of standing. In *Windsor*, the presence of standing allowed the Court to strike down section 3 of DOMA. By denying standing in *Hollingsworth* the Court avoided an opportunity to consider whether California’s prohibition of same sex marriage was constitutional.

By excluding same sex partners from the definition of “spouse,” section 3 of DOMA had prevented Edith Windsor, a surviving widow, from claiming the estate tax exemption for surviving spouses following the death of her wife. After the surviving spouse challenged the constitutionality of DOMA in litigation to secure the tax exemption, the executive branch declined to defend Section 3 in court but continued to enforce it in order to recognize the federal judiciary as the final arbiter of constitutional claims. The Bipartisan Legal Advisory Group (BLAG) of the House of Representatives intervened to defend the constitutionality of Section 3.

Although Windsor clearly presented a justiciable claim since she was harmed due to application of section 3 to her and her harm would have been redressed by the relief sought, the case presented the question whether either the government and/or BLAG were entitled to appeal the district court’s decision striking down section 3 or to seek certiorari from the Court. The executive branch’s position created a somewhat anomalous situation since it agreed with, but refused to enforce, Windsor’s position.

The Court, in an opinion by Justice Kennedy, held that the government had constitutional standing to pursue the appeal because an order that it refund Windsor the money value of the tax exemption was an economic harm. “That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not. The judgment orders the United States to pay money that it would not disburse but for the court’s order.”³² Any issue arose simply from flexible prudential standing considerations designed to avoid deciding abstract questions better left to other branches which the Court could choose to disregard. The Court had faced a similar situation in *INS v. Chadha*³³ where the government had refused to defend the

³⁰ 133 S. Ct. 2675 (2013).

³¹ 133 S. Ct. 2652 (2013).

³² *Windsor*, 133 S. Ct. at 2868.

³³ 462 U. S. 919 (1983).

constitutionality of a statute which allowed it to deport Chadha even while continuing to enforce it. BLAG's participation obviated any concern that a lack of the parties' "concrete adverseness" would impede fair presentation of the issues. The Court's failure to resolve Section 3's constitutionality would impact numerous individuals and proliferate litigation. Although the Court suggested that difficulties would ensue if the executive branch routinely refused to defend statutes it enforced, the "unusual and urgent circumstances" in the case counseled for the Court to decide the matter.

In an unusually sarcastic and pointed opinion, Justice Scalia, for Chief Justice Roberts and Justice Thomas, dissented regarding the Court's disposition of the standing issue. He accused the Court of aggrandizing its power in its eagerness to reach the merits. Justice Scalia argued that constitutional judicial review was neither the Court's "primary role" but simply something it did "incidentally" when necessary to resolve justiciable disputes.³⁴ The government's agreement with Windsor's claim that Section 3 was unconstitutional ended any need for the Court to adjudicate the interests of an injured party. And the government's injury—having to refund the amount of the exemption—would not be redressed by the relief it sought, i.e. declaring section 3 unconstitutional, but "carve[d]...into stone." Accordingly, no controversy existed between Windsor and the government. *Chadha* presented a different situation since the challenge to the constitutionality of the one-house veto presented a potential harm to the House and the Senate in affecting something they claimed was an institutional power. The adverseness requirement was a constitutional requirement of standing, not a prudential consideration.

Justice Alito agreed that the government lacked standing to appeal but thought that the House of Representatives had suffered an injury which would be redressed by the relief (upholding Section 3) it sought. He reasoned that a house of Congress suffered injury whenever legislation it passed was declared unconstitutional. *Raines v. Byrd*,³⁵ was distinguishable since it held that individual congressmen, not a house of Congress, lacked standing.

Hollingsworth arose after California voters, through Proposition 8, amended that state's constitution to limit marriage to unions of heterosexual couples. Two same sex couples brought suit challenging Proposition 8 in federal court and naming various state officials as defendants. After those officials declined to defend Proposition 8, although enforcing it, the district court allowed Proposition 8's proponents (Hollingsworth et al) to intervene to defend it, held that Proposition 8 violated the Constitution and directed the named officials not to enforce it. When state officials elected not to appeal, the Court of Appeals for the Ninth Circuit directed Hollingsworth et al to address whether they had standing. In response to a certified question, the California Supreme Court concluded that, under California law, in a post-election challenge to a voter-approved initiative the proponents of the initiative could appear and assert the state's interest if the state officials declined to do so. The Ninth Circuit held that Hollingsworth et al had standing and held that Proposition 8 violated the Constitution. When Hollingsworth et al appealed, the Court granted certiorari and directed the parties brief and argue the issue of standing. The Court, 5-4, held Hollingsworth et al lacked standing.

³⁴ *Windsor*, 133 S. Ct. at 2699.

³⁵ 521 U.S. 811 (1997).

Although Perry et al clearly had standing to bring the suit since Proposition 8 harmed them, once they prevailed, Hollingsworth et al had only a generalized grievance like other citizens which was insufficient to confer standing to appeal. Their special role under California law related only to the conduct of the initiative vote but once it was adopted they lacked any ongoing personal stake which distinguished them from other California citizens. Neither the depth of their commitment nor the zeal of their advocacy conferred standing. Nor could Hollingsworth et al claim standing to assert the interests of third parties since they lacked the essential predicate of individual standing. Having “never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to,” the Court decline[d] to do so for the first time here.”³⁶

In his dissent, for himself and Justices Thomas, Alito and Sotomayor, Justice Kennedy argued that the California Supreme Court’s unanimous opinion, that the proponents of an initiative had power under California law to defend a measure when state officials declined to do so, established standing and adversity to satisfy justiciability requirements of Article III. The Court should have deferred to California’s highest court in defining the powers and responsibilities of various parties to defend California law. Justice Kennedy thought it ironic that the Court insisted that standing would have existed had state officials litigated the dispute even though their preference would have been to lose the case, an approach inconsistent with “[a] prime purpose of justiciability [which] is to ensure vigorous advocacy.”³⁷

Although the two cases raised somewhat different issues, the voting configurations produced some interesting results. Whereas two justices (Kennedy and Sotomayor) thought standing existed in both cases and two (Roberts and Scalia) thought standing absent in each, the other five justices thought standing existed in either *Windsor* (Ginsburg, Breyer, Kagan) or *Hollingsworth* (Thomas, Alito) but not both.

Page 89: Insert at end of section

[7] Political Question

During the October 2011 term, Supreme Court (8-1) rejected the government’s claim that a particular decision implicating a touchy foreign policy issue presented a nonjusticiable political question. In so doing, it may have narrowed the political question doctrine from one which turned on the six factors Justice Brennan identified 40 years ago in *Baker v. Carr*.

The problem arose because Menachem Binyamin Zivotofsky, an American citizen who was born in Jerusalem, wished to have his American passport identify his birthplace as Israel. Congress had passed legislation specifically directing that, upon request, an American citizen born in Jerusalem could have Israel identified as his or her birthplace. The legislation attempted to override the Foreign Affairs Manual of the United States State Department which specifically instructed that births in Jerusalem, as with some other disputed areas, should identify the city but

³⁶ *Hollingsworth*, 133 S. Ct. at 2668.

³⁷ *Id.* at 2674.

no country. Although lower courts held that the issue raised a political question, the Court, in an opinion by Chief Justice Roberts, reversed.

In *Zivotofsky v. Clinton*,³⁸ the Court rejected the State Department's argument that its decision to disregard a federal statute which authorized Americans born in Jerusalem to list Israel as their birthplace on passports was a nonjusticiable political question. The Department argued that the Constitution textually committed to the executive branch the power to determine what nations to recognize as foreign sovereigns and that this power included the power to determine whether someone born in Jerusalem could designate Israel as his or her birth country for passport purposes. The Court concluded, however, that the issue presented involved the constitutionality of the statute in question, an issue which was within the Court's power of judicial review.

The Court identified the political question doctrine as "a narrow exception" to the rule that courts decide cases within their jurisdiction and identified the two criteria which justify abstention as being a textually demonstrable commitment of an issue to a coordinate political branch or the absence of judicially manageable and discoverable standards. Although decision might require complicated consideration of competing claims based upon constitutional powers of the executive and legislative branches, Chief Justice Roberts rejected the government's argument that the Court lacked power to decide. Since the lower courts had not addressed the substantive question, the Court remanded the case for them to do so.

Significantly, Chief Justice Roberts recognized only two of the six criteria Justice Brennan had identified in his seminal opinion in *Baker v. Carr*. That prompted a concurrence by Justice Sotomayor and a dissent by Justice Breyer, both of which endorsed and applied the continued validity of all six *Baker* criteria. In particular, Justice Sotomayor argued that the Court should consider prudential factors *Baker v. Carr* identified as well as those going to constitutional text and judicial competence. And Justice Breyer thought some of those prudential factors, including the fact that the dispute involved foreign policy and that the political branches could resolve the matter, counseled in favor of judicial abstention.

³⁸ 132 S. Ct. 1421 (2012).

Chapter 3

CONGRESSIONAL POWER

§ 3.02 IMPLIED POWERS

Page 102: Insert at bottom of page:

The Court's 2012 term provided another opportunity to explore the relationship an act of Congress predicated on the Necessary and Proper Clause must have to some enumerated power in order to be Constitutional. In *United States v. Kebodeaux*,³⁹ the Court held, 7-2, that the Sexual Offender Registration and Notification Act (SORNA), as applied to defendant Kebodeaux, was within Congress's power under the Necessary and Proper Clause.

Kebodeaux, a member of the United States Air Force, was prosecuted for failing to comply with SORNA, which Congress adopted in 2006 after he had served his sentence for committing a federal sex offense. (SORNA applied to federal sex offenders who had served their sentences). Justice Breyer's majority opinion held that SORNA could constitutionally apply to Kebodeaux. The Court held that Kebodeaux's release was not unconditional because he had remained subject to the federal Wetterling Act which mandated registration requirements which SORNA in effect modified. Since Congress had power to "make Rules for the ...Regulation of the land and Naval forces" (Art. I, sec. 8, cl. 14), the Necessary and Proper Clause empowered Congress to punish violations and to impose conditions on his release including those set forth in the Wetterling Act, and to modify them through SORNA. Chief Justice Roberts largely agreed with the majority's reasoning but wrote separately to distance himself from the majority's discussion of the benefits of the federal registration system which he viewed as irrelevant and worrisome to the extent it implied the existence of a federal police power. Justice Thomas, joined largely but not entirely by Justice Scalia, dissented, arguing that SORNA went beyond Congress's power and intruded on the states' police power.

Page 103: Insert section 3 of "Understanding The Health Care Decision" at end.

§ 3.04 TAXING POWER

Page 107: Insert section 4 of "Understanding The Health Care Decision" as [3] The Tax Power in NFIB v. Sebelius

³⁹ 133 S.Ct. 2496 (2013).

§ 3.05 SPENDING POWER

Page 109: Insert section 5 of “Understanding The Health Care Decision” at end.

§ 3.07 CITIZENSHIP

[3] Power to Regulate Immigration and Alienage

In *Arizona v. United States*,⁴⁰ the Supreme Court (5-3)⁴¹ struck down on preemption grounds much of Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070) which made it unlawful for an unauthorized alien to seek or engage in work in Arizona and gave Arizona officials various authority and duties regarding such aliens.

The majority reaffirmed the “broad, undoubted” national power over immigration and alienage which it described as “well settled” in view of the extensive and important foreign policy implications. Federal governance of immigration and alienage is “extensive and complex.” Nonetheless, the Court recognized that states retain interests which the presence and activities of illegal aliens implicate.

In striking down three of the four provisions at issue, the Court reiterated and applied familiar preemption principles related to the Supremacy Clause such as the federal government’s power to preempt specific regulatory areas expressly and to oust state regulatory authority based on implied field preemption or conflict preemption. The majority found Arizona’s requirement that aliens carry registration documents in conflict with the federal government’s intent to occupy the regulatory field which was implicit in its comprehensive regulatory regime regarding alien registration. The State’s criminal prohibition against illegal aliens seeking or engaging in work conflicted with the federal regulatory regime by penalizing employers who hired illegal employees rather than the employees themselves. An Arizona provision essentially empowering state officers to arrest and render removable some aliens conflicted with the principle that removal decisions are entrusted to the federal government. Moreover, some Arizona remedies directly conflicted with federal remedies.

The Court deemed it premature to rule preempted a fourth provision which required state officials to make a reasonable attempt to determine the immigration status of someone they stop for some other legitimate purpose if reasonable basis exists to suspect the person is an illegal alien. Viewing Arizona’s likely interpretation of the law as unclear, the Court declined to assume that the law would be applied so as to conflict with federal law. Further review of this provision would depend upon the state’s interpretation and application of the law.

In dissent, Justice Scalia argued that the Court’s decision deprived Arizona of a principal attribute of sovereignty, the power to exclude. That State power predated the Constitution and remained after it went into effect. Although the federal government had broad power over immigration, Justice Scalia would conclude that a state regulation was precluded only if

⁴⁰ 132 S.Ct. 2492 (2012).

⁴¹ Justice Kennedy wrote the majority opinion which Chief Justice Roberts and Justices Ginsburg, Breyer and Sotomayor joined. Justices Scalia, Thomas and Alito dissented. Justice Kagan did not participate.

expressly prohibited or in conflict with federal law. Field preemption should not apply regarding an area at the core of state sovereignty. The majority’s holding was inconsistent with the expectations of states when they entered the union.

§ 3.08 TREATY POWER

Page 115: Add at end of section

During the October 2013 term,⁴² the Court avoided an opportunity to reconsider *Missouri v. Holland* by narrowly construing a federal statute implementing an international convention on chemical weapons in a criminal case in which a betrayed wife allegedly tried to poison the “other woman.” Although six justices agreed with that disposition, three others concurred in the judgment but would have reached the constitutional issues raised.

The case arose under unusual circumstances—a woman in Pennsylvania, after discovering her husband’s affair with her best friend, spread toxic substances on property of the friend. She was charged in part with violating a federal statute, section 229 of the Chemical Weapons Convention Implementation Act which made it unlawful for any person knowingly to “own, possess, or use” a chemical weapon, the statute having been passed, consistent with its name, to implement an international convention regulating chemical weapons. After the federal district court denied her motion to dismiss the chemical weapons charge on the grounds that section 229 exceeded Congress’s power and violated the Tenth Amendment, entered a conditional guilty plea while reserving her right to appeal. The Court of Appeals for the Third Circuit rejected the petitioner’s constitutional challenge to her conviction on the grounds that under *Missouri v. Holland* since the treaty was valid Congress had power under the Necessary and Proper Clause to implement it.

The Supreme Court unanimously reversed. Consistent with the Court’s practice of avoiding constitutional decisions when a case can be resolved on some other basis, six justices, speaking through Chief Justice Roberts, considered whether Congress intended section 229 to apply to “purely local crimes” like those involved in the case since such an application would be inconsistent with the usual federal-state balance. The majority concluded that, absent a clear statement to that effect, it would not presume that Congress authorized “such a stark intrusion into traditional state authority.” The Court noted the “unusual” nature of the case and the “appropriately limited” nature of its analysis.

The three dissenters—Justices Scalia, Thomas and Alito—argued that the Act clearly covered the behavior in question, that the constitutional question must be met rather than avoided, and that *Missouri v. Holland* went too far in allowing the Necessary and Proper Clause to be used to implement treaty obligations.

⁴² *Bond v. United States*, 134 S. Ct. 2077 (2014).

§ 3.10 CONGRESSIONAL ENFORCEMENT

(Add at end of section)

The October 2011, term continued the Court's uncertain course in applying the congruence and proportionality test to determine whether Congress can abrogate state sovereign immunity. Although the Family and Medical Leave Act, 29 U.S.C. 2601 et seq (FMLA) clearly abrogated state sovereign immunity, the Court held the act unconstitutional in *Coleman v. Court of Appeals of Maryland*⁴³ insofar as it allowed a private suit against a state pursuant to section 2612 (a)(1)(d) which required employers, including state employers, to grant unpaid leave for self-care for serious medical conditions under specified circumstances.

Justice Kennedy's plurality opinion specifically distinguished *Coleman* since it involved a different FMLA provision from that addressed in *Nevada Department of Human Resources v. Hibbs*.⁴⁴ The self-care provision at issue in *Coleman* lacked sufficient evidence "of a pattern of state constitutional violations accompanied by a remedy drawn in narrow terms to address or prevent those violations." Congress could not abrogate state sovereign immunity, the plurality opinion concluded, unless it could "identify a pattern of constitutional violations and tailor a remedy congruent and proportional to the documented violations."⁴⁵

Justice Scalia concurred in striking down the attempted abrogation of state sovereign immunity regarding the self-care remedy, but his continued misgivings regarding the congruence and proportionality test precluded his assent to Justice Kennedy's opinion. Justice Scalia thought both the plurality and dissent had properly applied that test which confirmed his belief that the test invited "judicial arbitrariness and policy-driven decision."⁴⁶ Justice Ginsburg dissented largely on the grounds that the self-care provision satisfied the congruence and proportionality test.⁴⁷

⁴³ 132 S.Ct. 1327 (2012).

⁴⁴ 538 U.S. 721 (2003).

⁴⁵ 132 S.Ct. at 1338.

⁴⁶ *Id.*

⁴⁷ *Id.*, at 1339.

Chapter 4

COMMERCE CLAUSE

§ 4.09 SOME CONCLUDING OBSERVATIONS ABOUT THE COMMERCE CLAUSE

Page 154: Insert section 3 of “Understanding The Health Care Decision” at end.

Chapter 5

THE FEDERAL SYSTEM

§ 5.02 RESERVED POWERS

[2] The Rise and Fall and Rise of the Tenth Amendment

Page 165 Insert at end of section:

In *United States v. Windsor*,⁴⁸ Justice Kennedy, in his majority opinion striking down Section 3 of the Defense of Marriage Act (DOMA), suggested that Congress might have less leeway to legislate in areas of traditional state concern than elsewhere, a theme which resonated in his concurring opinion in *United States v. Lopez*.⁴⁹ Although Congress can legislate in ways which affect “marital rights and privileges,” Justice Kennedy observed that “[b]y history and tradition the definition and regulation of marriage ... has been treated as being within the authority and realm of the separate States.” While citing examples which “establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations” directed to a class which 12 states protected. Subject to their consistency with constitutional rights, history and tradition marked domestic relations as a “‘virtually exclusive province of the States.’” The federal government had accordingly generally deferred to state law determinations regarding domestic relations.

Although the majority sketched these federalism considerations in some detail, the Court found it “unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance” since Section 3 of DOMA violated the Constitution by affronting the dignity of same sex married couples which some states had recognized. In his dissent, for himself and Justice Thomas, Justice Scalia observed that the Court’s seven pages regarding the traditional powers of the States regarding domestic relations “initially fool[ed] many readers, I am sure, into thinking that this is a federalism opinion.” Apparently, among those fooled was Chief Justice Roberts, who, in a separate dissent, argued that it was “undeniable that [the Court’s] judgment is based on federalism.”

⁴⁸ 133 S.Ct. 2675 (2013).

⁴⁹ 514 U.S. 549 (1995).

Chapter 6

COMMERCE AND THE STATES: THE DORMANT COMMERCE CLAUSE

§ 6.04 Discriminatory Laws

Page 297 Add at end of section

During the October, 2014 term, the Court (5-4) held that Maryland violated the Dormant Commerce Clause by denying residents full credit against income taxes they paid other states on out of state income, thereby burdening interstate economic activity. Applying the internal consistency test, the Court concluded that if every state followed Maryland's approach, interstate commerce would suffer discrimination since Maryland fully taxed nonresidents' Maryland income while not allowing a credit to residents for state taxes paid to other states on their non-Maryland income.⁵⁰

⁵⁰ *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787 (2015).

Chapter 7

EXECUTIVE POWER

§ 7.02 THEORIES OF PRESIDENTIAL POWER

[6] Jackson's Categories and Inherent Power Limitations

Page 238 Insert at end of section

In 2015, the Court for the first time upheld an assertion of presidential power in a Category 3 case on the grounds that the statute Congress had passed infringed on the president's exclusive power to recognize foreign countries.⁵¹

§ 7.04 Administrative Role

[1] Appointing Power

Page 244 Add at end of section

During the October, 2013, the Supreme Court, for the first time, construed the Recess Appointments Clause⁵² and, in doing so, invalidated three of President Obama's appointments to the National Labor Relations Board (NLRB).⁵³ The unanimous result concealed a sharp, 5-4 division regarding the breadth of presidential power under the Clause and the appropriate manner of constitutional interpretation.

Noel Canning had challenged an adverse NLRB decision on the grounds that the NLRB was improperly constituted since President Obama had appointed three of its five members unconstitutionally, relying on the Recess Appointments Clause at a time when the Senate was not in recess. President Obama made the three appointments on January 4, 2012 after one of the nominations had been pending for more than a year, the others for a few weeks. The Senate had adopted a resolution authorizing a series of brief recesses from December 18, 2011 to January 23, 2012 but also providing for *pro forma* sessions every Tuesday and Friday during which no business would be transacted. The January 4th appointments occurred between the January 3 and January 6 *pro forma* sessions.

In his opinion for the Court, Justice Breyer held that the Clause applies to intra-session as well as inter-session breaks and that it allows the president to fill vacancies which exist but did not originate during, a recess. Nonetheless, the majority held that the appointments in question were made at a time the Senate was not in recess. It reasoned that the *pro forma* sessions, like those the Senate authorized from December 18, 2011 to January 23, 2012, were sessions, not part of a longer recess, since, "for purposes of the Recess Appointments Clause, the Senate is in

⁵¹ *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

⁵² U.S. CONST. art. II, sec. 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.")

⁵³ *NLRB v. Canning*, 134 S. Ct. 2550 (2014).

session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business,” a standard satisfied here. This judicial deference to the Senate found support in constitutional provisions which empowered the Senate to establish its own rules and the Court’s precedents. During the *pro forma* sessions, the Senate claimed it was in session and although it had resolved not to conduct business it could have done so by unanimous consent. The majority held that a three day break (January 3 to 6) was too short to constitute a “recess.” Although the United States government had suggested a three day limit by analogy to the Adjournments Clause (“Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days.” Art. I, section 5, cl. 4) the majority further stated that a recess of less than 10 days was also “presumptively” too short.

Whereas Justice Breyer found the Clause ambiguous and relied extensively on ongoing practice, including that decades after the founding, Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, thought the Clause was clearly limited to inter-session breaks and applied only when vacancies began during such a recess.

§ 7.06 Foreign Affairs

[2] Curtiss-Wright

Page 253 Insert in place of last sentence in section.

In *Zivotofsky v. Kerry*,⁵⁴ the Court went out of its way to reject the executive branch’s sweeping reliance on *Curtiss-Wright* to support the executive branch’s claim of exclusive power to conduct diplomatic relations and “the bulk of foreign-affairs powers.” Speaking for the majority, Justice Kennedy wrote that “[t]his Court declines to acknowledge that unbounded power” and pointed out that the Court’s broad assertions of executive power in *Curtiss-Wright* were dicta. “Indeed, *Curtiss-Wright* did not hold that the President is free from Congress’ lawmaking power in the field of international relations.” Chief Justice Roberts, speaking for himself and Justice Alito in dissent, noted the executive branch had cited *Curtiss-Wright* ten times and acknowledged the appeal its language has to executive branch lawyers but agreed that Court “precedents have never accepted such a sweeping understanding of executive power.”

[3] Power of Recognition

Page 253 Insert in place of last paragraph

In *Zivotofsky v. Kerry*,⁵⁵ the Court (6-3) held that the power to recognize a foreign country is within the exclusive province of the president and that that authority includes the power to make certain that statements the executive branch publicly issues are consistent with its decisions regarding recognition. The case arose when the family of Menachem Binyamin Zivotofsky, an American citizen born in Jerusalem, asked that his U.S. passport reflect his place of birth as “Israel” pursuant to an act of Congress which allowed American citizens born in

⁵⁴ 135 S. Ct. 2076 (2015).

⁵⁵ 135 S. Ct. 2076 (2015).

Jerusalem to designate Israel their birthplace on their passports. Department of State policy refused to follow that law since the executive branch has viewed the status of Jerusalem as a matter to be decided by negotiations. Justice Kennedy’s majority opinion nullified the Congressional statute upon which the Zivotofsky family relied. It reasoned that the president has the exclusive power to recognize foreign nations and that “[i]f the power over recognition is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also that he may maintain that determination in his and his agent’s statements.” The majority construed its holding to apply narrowly to the president’s recognition power and acknowledged that Congress has significant power to regulate relating to foreign policy. The dissenters—Chief Justice Roberts, and Justices Scalia and Alito—argued in part that the Jerusalem passport law did not involve recognition of foreign governments.

[4] Steel Seizure Case

Page 254 Insert at end of section

In *Zivotofsky v. Kerry*,⁵⁶ the Court for the first time upheld an assertion of presidential power in a Category 3 case. Although the case involved a clash between a specific Congressional statute and presidential action, the Court held that the Constitution gave the president exclusive authority which the statute infringed.

⁵⁶ 135 S. Ct. 2076 (2015).

Chapter 8

LIBERTY, PROPERTY, AND DUE PROCESS, TAKING AND CONTRACT CLAUSES

§ 8.05 REGULATION OF BUSINESS AND OTHER PROPERTY INTERESTS

[3] Government Takings of Property Requiring Just Compensation

[b] Physical versus Regulatory Takings

[ii] Takings as a Government Condition for Granting a Permit

Page 327: Insert the following before § 8.05[3][b][iii] Takings Clause in Other Contexts

In *Koontz v. St. Johns River Water Mgmt. Dist.*,⁵⁷ the Court extended the *Nollan v. California Coastal Commission*⁵⁸ and *Dolan v. City of Tigard*⁵⁹ nexus and proportionality test to a situation in which the regulation authority a) had denied the property owner's permit application rather than grant it subject to a condition and b) had demanded money, not property, as a condition of granting the permit. All nine Justices agreed that the *Nollan-Dolan* test applied regardless of whether the government approved the development application subject to a condition subsequent that the owner convey property (the conventional approach) or denied the application due to the property owner's failure to satisfy a condition precedent (that it convey property).⁶⁰ The Court split, however, over whether the *Nollan-Dolan* requirements applied when the condition involved payment of money, as it did here, as opposed to conveyance of real property as in earlier cases.

Petitioner sought to develop 3.7 acres of his property, and applied for the necessary permits. To "mitigate the environmental effects of his proposal,"⁶¹ petitioner would foreclose development on 11 acres of his land "by deeding it to the District as a conservation easement."⁶² The District, however, rejected his proposal and offered two alternatives to acquire the necessary permits. First, petitioner could limit his development to 1 acre and grant the residual 13.9 acres as a conservation easement. Alternatively, petitioner could continue to build on 3.7 acres and deed a conservation easement on the rest of his property, if he would also improve District-owned property located miles away.

⁵⁷ 133 S. Ct. 2586 (2012).

⁵⁸ 428 U.S. 825 (1987). This case is discussed *supra* § 8.05[3][b][ii].

⁵⁹ 517 U.S. 374 (1994). This case is discussed *supra* § 8.05[3][b][ii].

⁶⁰ The majority and dissent also agreed that the government could have denied the development application, without imposing any conditions on the property, and that would not have constituted a taking as no property would have been taken. While it may not have violated the Takings Clause, denial of a development permit, without imposing any conditions, might have violated other legal provisions.

⁶¹ 133 S. Ct. at 2592.

⁶² *Id.* at 2592-93.

Writing for a 5-4 majority, Justice Alito treated a condition that the property owner pay money as equivalent to one that it relinquish property. Otherwise, the government could always evade *Nollan-Dolan* by offering the property owner the option of paying a sum of money instead of surrendering property. In *Eastern Enterprises v. Apfel*,⁶³ the Court found no taking when the government had retroactively required a former mining company to pay medical benefits for retired miners because the government-imposed financial obligations did not “ ‘operate upon or alter an identified property interest.’ ”⁶⁴ In this case, however, the obligation to pay money did operate on an identified property owner. Responding to the dissent, the majority reiterated that taxes were not takings.

Justice Kagan dissented, joined by Justices Ginsburg, Breyer, and Sotomayor. The dissenters argued that the Court’s decision might subject normal permit fees to takings analysis, thereby complicating land use regulation. The decision would also confuse the boundaries between monetary exactions, which are subject to takings review, and taxes, which are not.

Page 331: Insert the following before [4] Economic Penalties

In *Horne v. Department of Agriculture*,⁶⁵ the Court invalidated a US Department of Agriculture’s California Raisin Marketing Order requiring growers to set aside, free of charge, a specific percentage of their crop that the Department could dispose of in its discretion to maintain an orderly raisin market. The Department had issued the order under the Agricultural Marketing Agreement Act of 1937, which allowed “‘marketing orders’ to help maintain stable markets for particular agricultural products.”⁶⁶ The Department ordered growers to turn over 47% of their crop in 2002-03 and 30% of their crop in 2003-04. Growers turned over their crops to raisin handlers who separated the government percentage. Horne was both a grower and a handler. The government used the proceeds to subsidize raisin exports; Horne was not a raisin exporter. One year the proceeds were less than the cost of producing the raisins; another year, there were no proceeds at all. When Horne refused to turn over the raisins to the government, it fined Horne the value of the raisins (\$480,000) and assessed an additional penalty of over \$200,000.

Chief Justice Roberts delivered the opinion of the Court, in which Justices Scalia, Kennedy, Thomas, and Alito joined, and in which Justices Ginsburg, Breyer, and Kagan, joined as to Parts I and II. The protections of the Takings Clause go back at least as far as Magna Carta. *Lucas v. South Carolina Coastal Council*⁶⁷ suggests that certain protections of the Clause – specifically the prohibition against regulatory takings – might only extend to real property, but the protection against “government acquisition of property”⁶⁸ extended to both real and personal property.

⁶³ 524 U.S. 498 (1998).

⁶⁴ 133 S. Ct. at 2599 (quoting *Eastern Enterprises*, 524 U.S. at 540).

⁶⁵ 192 L. Ed. 2d 388 (2015).

⁶⁶ *Id.* at 394.

⁶⁷ 505 U.S. 1003 (1992). This case is discussed *supra* § 8.05 [3][b][i].

⁶⁸ 192 L. Ed. 2d at 393.

“The reserve requirement imposed by the Raisin Committee is a clear physical taking.”⁶⁹ Both title and control of the property passed to the government, and the raisin growers lost their entire “bundle”⁷⁰ of property rights. While the government could have prohibited growing raisins altogether, this was not equivalent to simply taking them. The distinction between “appropriation and regulation”⁷¹ was important. While the impact on the grower may have been the same, the Constitution was concerned with both means and ends.

Second, even though the growers receive the net proceeds realized from government selling the raisins, there is still a taking. For physical takings, the Takings Clause also compensates for partial takings. Retaining “a contingent interest of indeterminate value does not mean there has been no physical taking, particularly since the value of the interest depends on the discretion of the taker, and may be worthless, as it was for one of the two years at issue here.”⁷² The Chief Justice also distinguished *Andrus v. Allard*,⁷³ as a regulatory taking case rather than a physical taking.

Third, the government's action was a *per se* taking. The Court rejected the government's contention “that the reserve requirement is not a taking because raisin growers voluntarily choose to participate in the raisin market.”⁷⁴ The Government contends that growers who dislike the program, “can ‘plant different crops,’”⁷⁵ or sell the grapes “as table grapes or for use in juice or wine.”⁷⁶ This argument “is wrong as a matter of law.”⁷⁷ The Court distinguished *Ruckelshaus v. Monsanto Co.*,⁷⁸ on the ground that the manufacturer in that case received the “valuable Government benefit”⁷⁹ of being licensed to sell dangerous chemicals in exchange for revealing trade secrets about these chemicals. While selling produce may be regulated, the growers do not receive a similar “special governmental benefit.”⁸⁰

The Chief Justice also distinguished *Leonard & Leonard v. Earle*,⁸¹ in which the government required oyster harvesters to remit 10% of their detached marketable shells. As the oysters were government property, harvesting oysters was a privilege.

The Chief Justice also rejected the argument that the property owner first had to pay the government imposed fine, and then seek reimbursement. As plaintiffs were both growers and handlers, they could bring suit alleging that the fine levied against them as handlers was a taking as the raisins they refused to set aside for government use were their raisins.

The Court also rejected the Government's position that the amount of the taking be

⁶⁹ *Id.*

⁷⁰ *Id.* at 399 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)).

⁷¹ 192 L. Ed. 2d at 399.

⁷² *Id.* at 400.

⁷³ 444 U.S. 51 (1979). (This case is discussed *supra* § 8.05 [3][b][iii]).

⁷⁴ 192 L. Ed. 2d at 401.

⁷⁵ *Id.* at 401.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ 467 U.S. 986 (1984). (This case is discussed *supra* § 8.05 [3][b][iii]).

⁷⁹ 192 L. Ed. 2d at 401 (quoting *Ruckelshaus*, *supra* n. 14 at 1007).

⁸⁰ *Id.* at 402.

⁸¹ 279 U.S. 392 (1929).

reduced by what the raisins would have been worth without the reserve program, and other benefits of the reserve program. “The Court has repeatedly held that just compensation normally is to be measured by “the market value of the property at the time of the taking.””⁸²

The Government had already calculated the fair market value of the raisins as \$483,843.53. Consequently there was no reason for remand to determine the value. In rejecting the Government's argument, the Chief Justice left open questions of how the exercise of eminent domain could increase the value of real property by adding access to waterways or highways. The Court only rejected “a generally applicable exception to the usual compensation rule, based on asserted regulatory benefits of the sort at issue here.”⁸³ In rejecting a remand, the Chief Justice noted that litigation had gone on for 10 years, and that was long enough.

Concurring, Justice Thomas questioned the public use if government “takes the raisins of citizens and, among other things, gives them away or sells them to exporters, foreign importers, and foreign governments.”⁸⁴

Justice Breyer dissented in part, joined by Justices Ginsburg and Kagan. Justice Breyer agreed that a taking had occurred, but would remand the case for a determination of just compensation as the petition for certiorari did not present the question of just compensation and the briefs “barely touched”⁸⁵ the question. As the reserve requirement enhanced the price of raisins, the government may be right that no compensable taking had occurred. In calculating just compensation, the Court “sets off from the value of the portion that was taken the value of any benefits conferred upon the remaining portion of the property.”⁸⁶ Justice Breyer did not think the majority provided any meaningful way to distinguish this case from the *Bauman v. Ross*⁸⁷ line of cases. For over a century, this rule has applied whether all in the neighborhood benefit or the benefit is specific to only one property. Indeed, there may not be a taking at all if the government program increased the value of the raisins sold more than the value of the raisins taken. If no taking has occurred, plaintiffs conceded that they had to pay the fine.

Justice Sotomayor dissented. She did not think that the government's action met the “high bar”⁸⁸ for a *per se* taking articulated in *Loretto v. Teleprompter Manhattan CATV Corp.*⁸⁹ For *Loretto* to apply, government must completely destroy the owner’s entire bundle of property rights. The entire bundle of property rights was not eliminated. Plaintiffs just can’t sell the reserve raisins. For example, they could still consume them or feed them to farm animals. Moreover, surrendering certain property rights in order to enter a regulated market, does not effectuate a taking.

Ultimately, the majority opinion rests on two errors. First, it relaxed the *Loretto* rule.

⁸² 192 L. Ed. 2d at 403 (quoting *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984), which is quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)).

⁸³ 192 L. Ed. 2d at 403.

⁸⁴ *Id.* at 404.

⁸⁵ *Id.* at 405.

⁸⁶ *Id.* at 406.

⁸⁷ 167 U.S. 548 (1897).

⁸⁸ 192 L. Ed. 2d at 408.

⁸⁹ 458 U.S. 419 (1982) This case is discussed supra § 8.05 [3] [b].

Second, the Court rejected treating this program as a regulatory taking because of the physical intrusion. Justice Sotomayor sharply disagreed that “the slightest physical movement of property”⁹⁰ necessarily entailed “a *per se* taking rather than as a regulatory taking.”⁹¹

⁹⁰ 192 L. Ed. 2d at 415.

⁹¹ *Id.*

Chapter 9

RACIAL EQUALITY

§ 9.02 OTHER FORMS OF RACIAL DISCRIMINATION

[4] Voting

Page 418: Insert the following before § 9.02[5] The Criminal Justice System
[*Shelby* could also usefully be read at the beginning of § 9.02[4]]

In *Shelby County v. Holder*,⁹² the Court (5-4) invalidated Section 4(b) of the Voting Rights Act of 1965. Writing for a majority of five, Chief Justice Roberts stated: “Section 5 of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And §4 of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty.”⁹³ Congress thought this approach necessary to combat “entrenched racial discrimination in voting.”⁹⁴ Due to the severe nature of these requirements, the original Act lasted 5 years; however, through a series of reauthorizations the Act remains in effect today. Specifically, in 2006, Congress reauthorized the Act for 25 more years and broadened the reach of Section 5 to prohibit more conduct than before. Congress passed the Voting Rights Act under its power to enforce the Fifteenth Amendment, which forbids federal and state governments from denying citizens the right to vote based on race. Section 4(b) applied the Act to states “that had maintained a test or device as a prerequisite to voting as of November 1, 1964 and had less than 50 percent voter registration or turnout in the 1964 Presidential election.”⁹⁵ Examples of such tests or devices were “literacy and knowledge tests”⁹⁶ and “good moral character requirements.”⁹⁷ In 1965, the Act applied to Alabama, Georgia, Louisiana, Mississippi, South Carolina and Virginia.⁹⁸ Section 4(a) barred covered jurisdictions from implementing such tests and devices. Section 5 required covered jurisdictions to obtain approval from the Attorney General or a three-judge court before any change in voting procedures could be effected. To obtain approval, the covered jurisdiction had to demonstrate that the proposed change “had neither ‘the purpose [nor] the effect’ ”⁹⁹ of being based on race.

*South Carolina v. Katzenbach*¹⁰⁰ upheld the Act as necessary “to address ‘voting discrimination where it persists on a pervasive scale.’ ”¹⁰¹ *Northwest Austin v. Holder*,¹⁰² however, “explained that §5 ‘imposes substantial federalism costs’ and ‘differentiates between

⁹² 133 S. Ct. 2612 (2013).

⁹³ *Id.* at 2618.

⁹⁴ *Id.*

⁹⁵ *Id.* at 2619.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Thirty-nine counties in North Carolina and one in Arizona were also covered by the Act.

⁹⁹ 133 S. Ct. at 2620.

¹⁰⁰ 383 U.S. 301 (1966).

¹⁰¹ 133 S. Ct. at 2620 (quoting *Katzenbach*, 383 U.S. at 308).

¹⁰² 557 U.S. 193 (2009).

the States, despite our historic tradition that all the States enjoy equal sovereignty.’ ”¹⁰³ The Court “also noted that ‘[t]hings have changed in the South. Voter turnout and registration rates now approach parity.’ ”¹⁰⁴ Flagrant discriminatory acts that defy federal law are uncommon. Eight Justices adhered to these views in *Northwest Austin*, the constitutional issues were left to be decided in the future.

The Federal Government has no “general right to review and veto state enactments before they go into effect.”¹⁰⁵ The Constitutional Convention debated and subsequently rejected the federal “authority to ‘negative’ state laws.”¹⁰⁶ The Constitution reserves to the states or the people all powers not explicitly allocated to the Federal Government. Through the Tenth Amendment, the Framers intended that the states would have the power to regulate elections. In contrast, the Voting Rights Act prevented “ ‘all changes to state election law’ ”¹⁰⁷ until they were precleared. The Attorney General can object to a preclearance request within 60 days, longer if he seeks additional information. Obtaining preclearance from a three-judge court often took years.

Violating “the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties).”¹⁰⁸ Neighboring states not held to the Act can pass the same law immediately, without having to get through preclearance. When a covered jurisdiction is sued, “the preclearance proceeding ‘not only switches the burden of proof to the supplicant jurisdiction, but also applies substantive standards quite different from those governing the rest of the nation.’ ”¹⁰⁹

Katzenbach had justified these different procedures: “Case-by-case litigation had proved inadequate to prevent such racial discrimination in voting.”¹¹⁰ Moreover, before the Act, “only 19.4 percent of African-Americans of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi.”¹¹¹ These registration rates were approximately fifty percent lower than those for whites.

“The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years.”¹¹² Congress came to these same conclusions when it reauthorized the Act in 2006. In fact, Census Bureau data from the latest election demonstrated that in five of the six States covered by Section 5, African-American turnout was higher than white voter turnout. The disparity in the sixth State was less than one half of one percent.¹¹³ Moreover, for the initial 10

¹⁰³ 133 S. Ct. at 2621 (quoting *Northwest Austin*, 557 U.S. at 202, 203).

¹⁰⁴ *Id.* (quoting *Northwest Austin*, 557 U.S. at 202).

¹⁰⁵ *Id.* at 2623.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 2624.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 2625.

¹¹³

	1965			2004		
	White	Black	Gap	White	Black	Gap
Alabama	69.2	19.3	49.9	73.8	72.9	0.9
Georgia	62.16	27.4	35.2	63.5	64.2	-0.7

years of Section 5’s existence, “the Attorney General objected to 14.2 percent of the proposed changes.”¹¹⁴ However, in the decade before the 2006 reauthorization, “the Attorney General objected to a mere 0.16 percent.”¹¹⁵

Relying on *Northwest Austin*, the Chief Justice stated that “a statute’s ‘current burdens’ must be justified by ‘current needs,’ and any ‘disparate geographic coverage’ must be ‘sufficiently related to the problem that it targets.’”¹¹⁶ In 1965, the coverage formula met these requirements. “Coverage today is based on decades-old data and eradicated practices.”¹¹⁷

The Government argued that the formula was “‘reverse-engineered.’”¹¹⁸ Specifically, the offending jurisdictions were identified prior to Congress’ devising a system to describe them. “Under that reasoning, . . . all that is necessary is that the formula happen to capture the jurisdictions Congress wanted to single out.”¹¹⁹ The Government next argued that since the formula dates back to 1965, its continued use is permitted if any discrimination continues within the original jurisdictions identified by Congress. Chief Justice Roberts rejected this argument because it did not refer to “‘current political conditions’”¹²⁰ as required by *Northwest Austin*.

The Fifteenth Amendment “is not designed to punish for the past; its purpose is to ensure a better future.”¹²¹ In contrast to *Katzenbach*, the Government failed to provide data that showed the same “‘pervasive,’ ‘flagrant,’ ‘widespread’ and ‘rampant’ discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time.” *Katzenbach*.¹²² Congress’ failure to create a coverage formula based on current data was the most significant problem in the Act’s reenactment. Congress had reauthorized the coverage formula using “40-year-old facts having no logical relation to the present day.”¹²³ The dissent relied on “‘second-generation barriers,’ which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes.”¹²⁴ This underscored the impracticality of continued dependence on the original Section 4 formula, which was “based on voting tests and access to the ballot, not vote dilution.”¹²⁵ The Court’s holding was restricted to the coverage formula in Section 4. It issued no holding on Section 5. The Court also afforded Congress the opportunity to create a new formula grounded on present day conditions.

Louisiana	80.5	31.6	48.9	75.1	71.1	4.0
Mississippi	69.9	6.7	63.2	72.3	76.1	-3.8
South Carolina	75.7	37.3	38.4	74.4	71.1	3.3
Virginia	61.1	38.3	22.8	68.2	57.4	10.8

¹¹⁴ 133 S. Ct. at 2626.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 2627. (quoting *Northwest Austin*, 557 U.S. at 203).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 2628.

¹¹⁹ *Id.*

¹²⁰ *Id.* (quoting *Northwest Austin*, 557 U.S. at 203).

¹²¹ *Id.* at 2629.

¹²² *Id.* (quoting *Katzenbach*, 383 U.S. at 308, 315, 331).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

Justice Thomas concurred. Although “the Court claims to ‘issue no holding on §5 itself,’ its own opinion compellingly demonstrates that Congress has failed to justify ‘“current burdens” with a record demonstrating “‘current needs.”’”¹²⁶ Consequently, Justice Thomas would have also held Section 5 unconstitutional.

Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor and Kagan. Justice Ginsburg observed that according to the majority, “the very success of §5 of the Voting Rights Act demands its dormancy.”¹²⁷ She believed that “Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated.”¹²⁸ Covered jurisdictions still propose many “changes to voting laws that the Attorney General declined to approve.”¹²⁹ Moreover, Congress discovered other measures that “‘dilute increasing minority voting strength.’”¹³⁰ These “[s]econd-generation barriers come in various forms.”¹³¹ Examples, included racial gerrymandering, and employing at-large voting rather than district-by-district voting in jurisdictions with sizeable black minorities.¹³²

The 2006 reauthorization of the Act passed the House by a vote of 390-33 and the Senate by a vote of 98-0. President Bush signed it into law. Traditionally, Congress’ authority to enforce the Fourteenth and Fifteenth Amendments merits considerable deference. “When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress’ power to act is at its height.”¹³³ *Katzenbach* permits Congress to “use any rational means”¹³⁴ to prevent racial discrimination in voting. First, Congress may consider the preexisting record and the record before it when voting on reauthorization. Second, Congress promised to review, after 15 years and then 25, whether current data suggested a need to continue the Act. Third, one ought to expect the data validating reauthorization to be less blatant than the data originally supporting the Act. “If the statute was working, there would be less evidence of discrimination.”¹³⁵

Regarding the evidence, there were 626 DOJ objections from 1982-2004, as compared with 490 between 1965 and the 1982 reauthorization. Additionally, from 1982-2004, “DOJ and private plaintiffs succeeded in more than 100 actions to enforce the §5 preclearance requirements.”¹³⁶ Since 1982, covered jurisdictions were responsible for 56% of all successful Section 2 litigation, despite comprising only 25% of the country’s population. Adjusting for population, “there were nearly *four* times as many successful §2 cases in covered jurisdictions as there were in noncovered jurisdictions.”¹³⁷

¹²⁶ *Id.* at 2632 (Thomas, J., concurring).

¹²⁷ *Id.* (Ginsburg, J., dissenting).

¹²⁸ *Id.*

¹²⁹ *Id.* at 2634.

¹³⁰ *Id.*

¹³¹ *Id.* at 2635.

¹³² A change to at-large voting could allow the overall majority to elect all city council members, thus eliminating all minority voting power. Cities can also reduce the power of minority votes by incorporating areas where the majority of the population is white.

¹³³ 133 S. Ct. at 2636 (Ginsburg, J., dissenting).

¹³⁴ *Id.* at 2638.

¹³⁵ *Id.*

¹³⁶ *Id.* at 2639.

¹³⁷ *Id.* at 2642.

The Voting Rights Act allows a jurisdiction to be relieved of preclearance if it demonstrates conformance with the Act for ten years. Moreover, it must have “engaged in efforts to eliminate intimidation and harassment of voters.”¹³⁸

Shelby County advanced a facial challenge. However, “‘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.’”¹³⁹ Thus, “as applied to Shelby County, the VRA’s preclearance requirement is hardly contestable.”¹⁴⁰ Amongst covered jurisdictions, Alabama was second only to Mississippi in the number of successful Section 2 suits from 1982-2005. Moreover, the Act’s expansive severability provision undercut a facial challenge of Section 4(b) and Section 5. Even assuming that the VRA was unconstitutional as applied to specific jurisdictions, “§1973p calls for those unconstitutional applications to be severed, leaving the Act in place for jurisdictions as to which its application does not transgress constitutional limits.”¹⁴¹

Finally, the majority relied heavily on “‘the fundamental principle of equal sovereignty’”¹⁴² to hold Section 4(b)’s coverage formula unconstitutional. *Katzenbach*, however, determined that principle “‘applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.’”¹⁴³ Many federal statutes treat states differently.¹⁴⁴

In *Alabama Legislative Black Caucus v. Alabama*,¹⁴⁵ Justice Breyer reversed and remanded the judgment of a three-judge District Court upholding Alabama’s redistricting under the Equal Protection Clause. In its 2012 redistricting, required under the Alabama Constitution, Alabama endeavored to meet many “traditional districting objectives, *e.g.*, compactness, not splitting counties or precincts, minimizing change, and protecting incumbents.”¹⁴⁶ However, two goals were overarching. First, the State tried to limit population deviations between electoral districts to 1%. Second, it sought to avoid retrogression in the ability of racial minorities to elect candidates of their choice. Alabama believed this entailed maintaining “roughly the same black population percentage in existing majority-minority districts.”¹⁴⁷ These goals proved to be in tension with each other. Plaintiffs, the Alabama Black Legislative Caucus and the Alabama Democratic Conference, alleged that the state went too far in preserving majority-minority districts to the detriment of minorities.

The Court held the District Court committed several errors of law. First, the District

¹³⁸ *Id.* at 2644.

¹³⁹ *Id.* at 2645.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 2648.

¹⁴² *Id.*

¹⁴³ *Id.* (quoting *Katzenbach*, 383 U.S. at 328-329).

¹⁴⁴ For example, the Environmental Protection Agency is mandated to establish a green building project in a State that conforms to certain population requirements. Another statute allocates rural drug enforcement assistance based largely on a state’s population density.

¹⁴⁵ 135 S. Ct. 1257 (2015).

¹⁴⁶ *Id.* at p. 1263.

¹⁴⁷ *Id.*

Court considered the racial gerrymandering of the state taken as a whole. The Court held that it had to assess racial gerrymandering in “one or more *specific electoral districts*.”¹⁴⁸ Racial gerrymandering claims involve both voters “being personally... subjected to [a] racial classification”¹⁴⁹ and voters “being represented by a legislator who believes his ‘primary obligation is to represent only the members’ of a particular racial group.”¹⁵⁰ By their nature, these claims apply personally to voters in that district, not in other districts. Statewide evidence can help to support a claim of racial gerrymandering in a particular district. However, the District Court erred in evaluating gerrymandering on a statewide basis to exonerate the state rather than focusing on individual districts. *Miller v. Johnson*,¹⁵¹ stated that “plaintiff’s burden in a racial gerrymandering case is ‘to show, either through circumstantial evidence of a district’s shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.’”¹⁵²

Plaintiffs had not waived the claim that districting had to be considered on an individual district basis. While this claim did not appear clearly in the complaint, plaintiffs revised their theory of the case during discovery and presented evidence to this effect thereby negating any waiver concerns. Examining the transcript of the oral argument on appeal, Justice Breyer also rejected the argument that plaintiffs had waived individual districting claims on appeal.

Second, Justice Breyer found erroneous the District Court’s holding that the Alabama Democratic Conference lacked standing as there was no proof that any plaintiffs resided in each of the four majority-minority districts at issue. While the District Court had an obligation to confirm its jurisdiction *sua sponte*, it should have afforded the Alabama Democratic Conference the opportunity to present its membership list before it dismissed the Conference. On remand, the District Court will give the Conference the opportunity to present its membership list and for the State to respond before making a determination on standing.

Third, the District Court erred in finding that “[r]ace was not the predominant motivating factor”¹⁵³ in districting. Factors used to make this determination included: “compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency protection, and political affiliation.”¹⁵⁴ Instead, it found that equal population, or “one person, one vote,”¹⁵⁵ was the predominant motivating factor. The majority held that equipopulation should not be weighed against racial motivation. “Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator’s determination as to *how* equal population objectives will be met.”¹⁵⁶

If equal population is used as a background principle, then overwhelming evidence

¹⁴⁸ *Id.* at p. 1260.

¹⁴⁹ *Id.* at p. 1265 (quoting *Bush v. Vera*, 517 U.S. 952, 957 (1996)).

¹⁵⁰ *Id.* at p. 1265 (quoting *Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 648 (1993)).

¹⁵¹ 515 U.S. 900 (1995).

¹⁵² 135 S. Ct. at 1267 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).

¹⁵³ 135 S. Ct. at 1265 (quoting 989 F.Supp. 2d, 1227, 1287 (MD Ala. 2013)).

¹⁵⁴ 135 S. Ct. at 1270 (quoting *Vera*, 517 U.S., at 964, 968).

¹⁵⁵ 135 S. Ct. at 1270 (quoting 989 F.Supp. 2d, 1227, 1297 (MD Ala 2013)).

¹⁵⁶ 135 S. Ct. at 1270.

suggests that racial motivations did predominate in the districting. The state's expert believed that preserving majority-minority districts was the primary task. The Court did not express a view on “whether the intentional use of race in redistricting, even in the absence of proof that traditional districting principles were subordinated to race, triggers strict scrutiny.”¹⁵⁷

Fourth, the District Court erred in holding that §5 of the Voting Rights Act required that the redistricting plan maintain the proportion of minorities and nonminorities in majority-minority districts. Instead, “§5 is satisfied if minority voters retain the ability to elect their preferred candidates.”¹⁵⁸ The Court did “not insist that a legislature guess precisely what percentage reduction a court or the Justice Department (DOJ) might eventually find to be retrogressive. The law cannot insist that a state legislature, when redistricting, determine *precisely* what percent minority population §5 demands.”¹⁵⁹ Section 5 is complex and the evidence may be unclear. “The law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under §5 should the legislature place a few too few.”¹⁶⁰ The legislature's determination need only have “a strong basis in evidence.”¹⁶¹ This is a “purpose-oriented view”¹⁶² rather than the District Court's “mechanically numerical”¹⁶³ one. The correct question for a court to ask is: “To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?”¹⁶⁴

Narrow tailoring is satisfied “when the race-based action taken was *reasonably necessary* to achieve a compelling interest.”¹⁶⁵ In light of *Shelby County v. Holder*,¹⁶⁶ the Court did not decide whether compliance with Section 5 of the Voting Rights Act constituted a compelling state interest.

Justice Scalia dissented, joined by the Chief Justice, and Justices Thomas and Alito. The Alabama Democratic Conference lacked standing as it presented no “evidence that it had members who voted in the challenged districts, and because the individual Conference plaintiffs did not claim to vote in them.”¹⁶⁷ The majority gave “the Democratic Conference the opportunity to prove on appeal what it neglected to prove at trial.”¹⁶⁸ Even if the Alabama Democratic Congress had standing, the complaint failed to allege which districts were racially gerrymandered. Nor, as the majority insists, did the Conference rectify this problem during discovery or at trial. From its opening brief, the Conference unequivocally stated: “Appellants challenge Alabama's race-based statewide redistricting policy, *not* the design of any one

¹⁵⁷ *Id.* at 1272.

¹⁵⁸ *Id.* at 1273.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1273-74.

¹⁶¹ *Id.* at 1274 (quoting Brief for United States as Amicus Curiae 29 (citing *Ricci v. DeStafano* 557 U.S. 557, 585 (2009))).

¹⁶² 135 S. Ct. at 1273.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1274.

¹⁶⁵ *Id.* at 1274 (quoting 989 F. Supp. 2d, 1227, 1307 (MD Ala. 2013)).

¹⁶⁶ 133 S. Ct. 2612 (2013).

¹⁶⁷ 135 S. Ct. at 1275.

¹⁶⁸ *Id.* at 1276.

particular election district.”¹⁶⁹

While the majority did not treat the claims of the Alabama Black Legislative Caucus separately, it focused even less on individual electoral districts. The Black Caucus “was presenting illustrative evidence in particular districts—majority-minority, minority-influence, and majority-white—in an effort to make out a claim of statewide racial gerrymandering. The fact that the Court now concludes that this is not a valid legal theory does not justify its repackaging the claims for a second round of litigation.”¹⁷⁰ Unfortunately, the Court's approach both “discourages careful litigation and punishes defendants who are denied both notice and repose.”¹⁷¹

In his separate dissent, Justice Thomas said that race conscious districting exacerbated racial tension by trying to fine tune districts “to achieve some ‘optimal’ result with respect to black voting power; the only disagreement is about what *percentage* of blacks should be placed in those optimized districts. This is nothing more than a fight over the ‘best’ racial quota.”¹⁷²

Plaintiffs claimed that voter districts were too heavily packed with black voters thereby diluting the overall voting power of blacks in the State. However, these heavily packed black districts were a product of §5 of the Voting Rights Act, in particular the “‘max-black’ policy that the DOJ itself applied to §5 throughout the 1990’s and early 2000’s.”¹⁷³ So rather than Alabama, the real culprits were the Court’s “jurisprudence requiring segregated districts,”¹⁷⁴ DOJ's max black policy, and the 2006 amendments to the Voting Rights Act prohibiting retrogression which effectively locked in place districts created under the max-black policy. The underlying premise of race-based districting is that racial groups think alike and have such distinct interests that they require separate representatives. While the Court rejected DOJ's max-black policy in *Miller v. Johnson*, the damage had already been done.

The majority's approach involved an even more exhaustive analysis of race “by accounting for black voter registration and turnout statistics.”¹⁷⁵ This approach did “nothing to ease the conflict between our color-blind Constitution and the ‘consciously segregated districting system’ the Court has required in the name of equality.”¹⁷⁶ While he dissented on procedural grounds, Justice Thomas remained critical of the Court’s jurisprudence in this area.

¹⁶⁹ *Id.* at 1278.

¹⁷⁰ *Id.* at 1280.

¹⁷¹ *Id.* at 1281.

¹⁷² *Id.*

¹⁷³ 135 S. Ct. at 1282.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1288.

¹⁷⁶ *Id.* (quoting *Holder v. Hall* 512 U.S. 874, 907 (1994)).

Chapter 11

AFFIRMATIVE ACTION

§ 11.01 EDUCATION

Page 458: Insert the following before § 11.02 EMPLOYMENT

In *Fisher v. University of Texas at Austin et al.*,¹⁷⁷ the Court (7-1)¹⁷⁸ invalidated the Fifth Circuit's decision which had held that "petitioner could challenge only 'whether [the University's] decision to reintroduce race as a factor in admissions was made in good faith' "¹⁷⁹ because it "did not hold the University to the demanding burden of strict scrutiny articulated in *Grutter v. Bollinger*¹⁸⁰ and *Regents of Univ. of Cal. v. Bakke*¹⁸¹." ¹⁸² Plaintiff, who is Caucasian, was denied admission to the University of Texas at Austin.¹⁸³ Following *Grutter* and *Gratz v. Bollinger*,¹⁸⁴ the University instituted a new admissions program for that portion of the class not admitted under the top 10% program.¹⁸⁵ Specifically, the University began including a student's race as a component of the "Personal Achievement Index" (PAI).¹⁸⁶ Race is not given an explicit numerical value, but it is a significant factor.

Justice Kennedy wrote for the Court. In *Bakke*, Justice Powell's principal point was that "this interest in securing diversity's benefits"¹⁸⁷ is not one " 'in simple ethnic diversity.' "¹⁸⁸ The *Grutter* Court affirmed that " 'student body diversity is a compelling state interest.' "¹⁸⁹ *Gratz* and *Grutter*, however, require an admissions process that uses race to survive strict scrutiny. To do so, the university must "demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary

¹⁷⁷ 133 S. Ct. 2411.

¹⁷⁸ Justice Kagan took no part.

¹⁷⁹ 133 S. Ct. at 2420.

¹⁸⁰ 539 U.S. 306 (2003). This case is discussed *supra* § 11.01.

¹⁸¹ 438 U.S. 265 (1978). This case is discussed *supra* § 11.01.

¹⁸² 133 S. Ct. at 2415.

¹⁸³ When petitioner sought entrance, "she was 1 of 29,501 applicants. From this group 12,843 were admitted, and 6,715 accepted and enrolled." *Id.*

¹⁸⁴ 539 U.S. 244 (2003). This case is discussed *supra* § 11.01.

¹⁸⁵ Much of the class was admitted under the top 10% program in which the Texas Legislature mandated that students graduating in the top 10% of Texas high school classes receive automatic admissions to the University of Texas. Furthermore, prior to the admissions program under consideration in this case, the University had employed two different programs. Under the first program which *did* consider race, "the entering freshman class was 4.1% African-American and 14.5% Hispanic." 133 S. Ct. at 2416. Under the second program which *did not* consider race, the "entering class was 4.5% African-American and 16.9% Hispanic." *Id.*

¹⁸⁶ " 'Personal Achievement Index' (PAI) measures a student's leadership and work experience, awards, extracurricular activities, community service, and other special circumstances that give insight into a student's background." *Id.* at 2415. Such circumstances include growing up in a "single-parent home" and "speaking a language other than English at home." *Id.* at 2416.

¹⁸⁷ *Id.* at 2418.

¹⁸⁸ *Id.* (quoting *Bakke*, 438 U.S. at 315).

¹⁸⁹ *Id.* (quoting *Grutter*, 539 U.S. at 325).

. . . to the accomplishment of its purpose.’ *Bakke*.”¹⁹⁰ Under *Richmond v. J.A. Croson Co.*,¹⁹¹ the government bears the burden of proving “ ‘that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate.’ ”¹⁹²

Under *Grutter*, the decision to pursue “ ‘the educational benefits that flow from student body diversity,’ that the University deems integral to its mission”¹⁹³ is largely academic receiving “some, but not complete, judicial deference.”¹⁹⁴ Courts should require “a reasoned, principled explanation for the academic decision.”¹⁹⁵ There is argument about whether equal protection allows “this compelling interest in diversity.”¹⁹⁶ However, “the parties here do not ask the Court to revisit that aspect of *Grutter*’s holding.”¹⁹⁷

Establishing the goal of academic diversity does not end the inquiry, however. The University bears the burden of proving, without the benefit of any deference, that its means of achieving “are narrowly tailored to that goal.”¹⁹⁸ *Grutter* always requires the University to demonstrate, and the Judiciary to adjudicate “that admissions processes ‘ensure that each application is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.’ ”¹⁹⁹ A court must also determine that the use of race is “ ‘necessary’ ” to attain “the educational benefits of diversity.”²⁰⁰ Although narrow tailoring does not require the elimination of “ ‘every conceivable race-neutral alternative’ ”²⁰¹ the university must still establish the inadequacy of “available, workable race-neutral alternatives.”²⁰²

Grutter approved the plan in question because “it was not a quota, was sufficiently flexible, was limited in time, and followed ‘serious, good faith consideration of workable race-neutral alternatives.’ ”²⁰³ In the present case, “the parties do not challenge, and the Court therefore does not consider, the correctness of that determination.”²⁰⁴ On remand, the University must prove that its use of race is “narrowly tailored”²⁰⁵ to realize “student body diversity.”²⁰⁶ Under *Bakke*, diversity entails a “ ‘broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.’ ”²⁰⁷

Concurring, Justice Scalia reiterated his position in *Grutter* that the Constitution prohibits

¹⁹⁰ *Id.* (quoting *Bakke*, 438 U.S. at 305).

¹⁹¹ 588 U.S. 469 (1989).

¹⁹² 133 S. Ct. at 2419 (quoting *Croson*, 588 U.S. at 505).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 2420.

¹⁹⁹ *Id.* (quoting *Grutter*, 539 U.S. at 337).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 2421 (quoting *Grutter*, 539 U.S. at 339).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* (quoting *Bakke*, 438 U.S. at 315).

government from engaging in racial discrimination.

Concurring, Justice Thomas “would overrule *Grutter*”²⁰⁸ as “a radical departure from our strict-scrutiny precedents.”²⁰⁹ Recalling the history of legally mandated school segregation, he maintained that “just as the alleged educational benefits of segregation were insufficient to justify racial discrimination then, see *Brown v. Board of Education*,²¹⁰ the alleged educational benefits of diversity cannot justify racial discrimination today.”²¹¹ The desegregation cases rejected racial discrimination even if it “is necessary to the schools’ survival.”²¹² For example, following the desegregation order in *Davis v. School Bd. Of Prince Edward Cty.*,²¹³ “Prince Edward County closed its public schools from the summer of 1959 until the fall of 1964.”²¹⁴

The University of Texas claims “that the diversity obtained through its discriminatory admissions program prepares its students to become leaders in a diverse society.”²¹⁵ Similarly, in 1950, the University of Texas “defended segregation on the ground that it provided more leadership opportunities for blacks.”²¹⁶ However “[i]t is irrelevant under the Fourteenth Amendment whether segregated or mixed schools produce better leaders.”²¹⁷ The University’s argument “that student body diversity improves interracial relations”²¹⁸ was also used to support segregation. One difference, however, “is that the segregationist argued that it was *segregation* that was necessary to obtain the alleged benefits, whereas the University argued that *diversity* is the key.”²¹⁹ Nevertheless, educational benefits are not close to “the truly compelling state interests that we previously required to justify use of racial classifications.”²²⁰

Justice Thomas agreed with the plaintiffs in *Brown*. Equal protection does not allow a state to use race in allocating educational opportunities. This principle “was lost on the Court in *Plessy* and *Grutter*.”²²¹ The “insidious consequences”²²² of these policies are that Black and Hispanic youths “are, on average, far less prepared than their white and Asian classmates.”²²³ Placed at such a disadvantage, “‘the majority of [black] students end up in the lower quarter of their class.’”²²⁴ In addition to the damage to these students’ self-confidence “there is no evidence that they learn more at the University than they would have learned at other schools for

²⁰⁸ *Id.* (Thomas, J., concurring).

²⁰⁹ *Id.* at 2423.

²¹⁰ 347 U.S. 483 (1954). This case is discussed *supra* § 9.01[1].

²¹¹ 133 S. Ct. at 2425 (Thomas, J., concurring).

²¹² *Id.*

²¹³ 347 U.S. 483 (1954).

²¹⁴ 133 S. Ct. at 2426 (Thomas, J., concurring).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 2427.

²¹⁹ *Id.* at 2428 n.3.

²²⁰ *Id.*

²²¹ *Id.* at 2429.

²²² *Id.* at 2431.

²²³ Justice Thomas cited the University of Texas’ entering class of 2009: “Blacks had a mean GPA of 2.57 and a mean SAT score of 1524; Hispanics had a mean GPA of 2.83 and a mean SAT score of 1794; whites had a mean GPA of 3.04 and a mean SAT score of 1914; and Asians had a mean GPA of 3.07 and a mean SAT score of 1991.”

Id.

²²⁴ *Id.*

which they were better prepared.”²²⁵

Justice Ginsburg dissented. For her, “only an ostrich could regard the supposedly neutral alternatives as race unconscious.”²²⁶ As she had previously noted, “government actors, including state universities, need not be blind to the lingering effects of ‘an overtly discriminatory past,’ the legacy of ‘centuries of law-sanctioned inequality.’”²²⁷

In *Schuette v. Coalition to Defend Affirmative Action*,²²⁸ the Court rejected an equal protection challenge to a Michigan constitutional amendment passed by the voters that abrogated affirmative action in higher education. Writing for a plurality, Justice Kennedy was joined by Chief Justice Roberts and Justice Alito. After the Court’s decisions in *Gratz v. Bollinger*²²⁹ and *Grutter v. Bollinger*²³⁰ Michigan passed a constitutional amendment, known as “Proposal 2,” broadly prohibiting preferences in State institutions based on race and certain other criteria, including gender and ethnicity, across a wide range of governmental decisions and venues, including universities and government employment. Initially, Justice Kennedy stated that the case did not involve the constitutionality of race-based admissions affirmative action policies in universities upheld in *Fisher v. University of Texas*.²³¹ Recognizing the “ ‘innovation and experimentation’ ”²³² in our federal system, the *Grutter* Court acknowledged that California, Florida, and Texas had already banned affirmative action in admissions by state law. Justice Kennedy distinguished *Reitman v. Mulkey*,²³³ because the constitutional amendment invalidated in that case was designed to permit private racial discrimination. Similarly, in *Hunter v. Erickson*,²³⁴ the Court’s primary holding was that the referendum at issue singled out ordinances banning discrimination in a context of widespread racial discrimination in housing, which resulted in substandard housing conditions for minorities. Both *Reitman* and *Hunter* involved demonstrated racial injury aggravated by the referenda at issue.

In *Washington v. Seattle School Dist. No. 1*,²³⁵ a school board initiated mandatory busing. This remedy was adopted prior to the Court’s 2007 decision in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*,²³⁶ which required a finding of *de jure* discrimination before undertaking such remedial action. Justice Kennedy said that *Seattle* can only be understood as prohibiting voter initiatives that interfere with a state’s remedying racial discrimination in which it was complicit. The Sixth Circuit, in adopting an extremely broad interpretation of *Seattle*, determined that “any state action with a ‘racial focus’ that makes it ‘more difficult for certain racial minorities than for other groups’ to ‘achieve legislation that is in their interest’ is subject to strict scrutiny.”²³⁷ Justice Kennedy, however, found such a broad reading of *Seattle*

²²⁵ *Id.*

²²⁶ *Id.* at 2433 (Ginsburg, J., dissenting).

²²⁷ *Id.*

²²⁸ 134 S. Ct. 1623 (2014).

²²⁹ 539 U.S. 244 (2003). This case is discussed *supra* § 11.01.

²³⁰ 539 U.S. 306 (2003). This case is discussed *supra* § 11.01.

²³¹ 133 S. Ct. 2411 (2013). This case is discussed *supra* § 11.01.

²³² *Schuette*, 134 S. Ct. at 1630.

²³³ 387 U.S. 369 (1967). This case is discussed *supra* § 9.02[3].

²³⁴ 393 U.S. 385 (1969). This case is discussed *supra* § 9.02[3].

²³⁵ 458 U.S. 457 (1982).

²³⁶ 551 U.S. 701 (2007). This case is discussed *supra* § 9.01[3].

²³⁷ *Schuette*, 134 S. Ct. at 1634.

incompatible with the Court's equal protection jurisprudence. *Shaw v. Reno*²³⁸ rejected racial stereotyping based on assumptions that members of the same racial group " 'think alike.' "

Racial lines are increasingly blurring. Government action whereby individuals are classified solely on the basis of race is considered inherently suspect by the Court, and can lead to the very racial divisions that the polity seeks to eliminate. If anything, racial resentments and conflict would increase if courts were to announce what specific issues of public policy should be advantageous to certain groups according to their race. Justice Kennedy noted that issues such as taxation, "housing subsidies, wage regulations, and even the naming of public schools, highways, and monuments" are a few of the issues that could be placed beyond the reach of voters. "The holding in the instant case is simply that the courts may not disempower the voters from choosing which path to follow."²³⁹ Debate of whether to continue or end racial preferences has been going on in the political arena for over 15 years. The plurality's language was not limited to university admissions; it permitted the political processes to determine racial preferences across a broad range of areas including public contracting.

In addition to the serious First Amendment problems of taking electoral questions away from voters, that approach "is inconsistent with the underlying premises of a responsible, functioning democracy."²⁴⁰ Moreover, Justice Kennedy stated that the idea that voters are incapable of rationally deciding an issue of such sensitivity demeans the democratic process.

In *Mulkey*, *Hunter*, and *Seattle* "the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race. What is at stake here is not whether the injury will be inflicted but whether government can be instructed not to follow a course that entails, first, the definition of racial categories and, second, the grant of favored status to persons in some racial categories and not others."²⁴¹ Race-based preferences, the voters decided, have the latent potential to become a source of resentments and hostilities concerning race that this Nation strives to put behind it. Likewise, voters might consider, following debate and reflection, that programs designed to increase diversity, allowable under the Constitution, are essential to overcome the stigma of earlier racism. The plurality concluded: "This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it."²⁴²

Concurring, Chief Justice Roberts focused on the dissent: "People can disagree in good faith on this issue, but it similarly does more harm than good to question the openness and candor of those on either side of the debate."²⁴³

Justice Scalia concurred in the judgment, joined by Justice Thomas. "Does the Equal Protection Clause of the Fourteenth Amendment *forbid* what its text plainly *requires*?"²⁴⁴ Michigan voters merely adopted the correct understanding of the Fourteenth Amendment by

²³⁸ 509 U.S. 630 (1993). This case is discussed *supra* § 9.02[4].

²³⁹ *Schuetz*, 134 S. Ct. at 1635.

²⁴⁰ *Id.* at 1637.

²⁴¹ *Id.* at 1638.

²⁴² *Id.*

²⁴³ *Id.* at 1639 (Roberts, C.J., concurring).

²⁴⁴ *Id.* (Scalia, J., concurring).

prescribing all racial discrimination by government. The case does not involve the constitutionality of race-based preferences, but instead the political-process doctrine of *Seattle* and *Hunter*. While the plurality repudiated this doctrine, its reinterpretation of *Seattle* and *Hunter* made them stand for the cloudy and doctrinally faulty proposition that whenever state action poses “ ‘the serious risk . . . of causing specific injuries on account of race,’ it denies equal protection.”²⁴⁵ Justice Scalia would simply have reaffirmed that plaintiffs alleging equal protection violations based on facially neutral acts must “ ‘prove intent and causation not just racial disparity.’ ”²⁴⁶ A law that commands state actors to provide equal protection is, at the very least, facially neutral, and incapable of violating the Constitution.

Justice Scalia would simply overrule *Seattle* and *Hunter*. The triggering prong of the political-process doctrine is problematical. The first problem lay in defining “a ‘racial issue.’ ”²⁴⁷ At one point, *Seattle* appeared to suggest that this would include any issue in which taking one side would benefit minorities. The plurality recognized two problems with this exercise. First, it requires judges to divide the nation into race-based blocs. Second, it assumes that members of minority groups share common views and interests. Such racial stereotyping was inconsistent with the Equal Protection Clause, which applied to all races. In this connection, Justice Scalia criticized the concept of “ ‘discrete and insular minorities’ ”²⁴⁸ articulated in the *United States v. Carolene Products*²⁴⁹ footnote. For Justice Scalia, “a group’s ‘discreteness’ and ‘insularity’ ”²⁵⁰ could be a political advantage rather than a liability.

Another problem with the process theory was that it required a court to assess whether the challenged act “ ‘place[s] effective decisionmaking authority over [the] racial issue at a different level of government.’ ”²⁵¹ This is at odds with Supreme Court precedents establishing the “rule of structural state sovereignty.”²⁵² This allows each state to vest state government authority at whatever level it wishes within the state.

Finally, the plurality’s apparent suggestion that a facially neutral law may violate equal protection solely based on disparate impact conflicts with all equal protection precedent. In any event, as the District Court in this case already had found, the constitutional amendment at issue could not possibly have had a disparate impact. Hence the decision should not be remanded. “As Justice Harlan observed over a century ago, ‘[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.’ ”²⁵³

Justice Breyer concurred in the judgment. First, the Court did not address the Michigan constitutional amendment “insofar as it forbids the use of race-conscious admissions programs designed to remedy past exclusionary racial discrimination or the direct effects of that discrimination.”²⁵⁴ That question may demand a different answer. The Court only addressed the

²⁴⁵ *Id.* at 1640.

²⁴⁶ *Id.* (quoting *Freeman v. Pitts*, 503 U.S. 467, 506 (1992)).

²⁴⁷ *Id.* at 1643.

²⁴⁸ *Id.* at 1644.

²⁴⁹ 304 U.S. 144, 152-53 n.4 (1938).

²⁵⁰ *Schuetz*, 134 S. Ct. at 1645 (Scalia, J., concurring).

²⁵¹ *Id.* (quoting *Seattle*, 458 U.S. at 474).

²⁵² *Id.* at 1646.

²⁵³ *Id.* at 1648.

²⁵⁴ *Id.* at 1649 (Breyer, J., concurring).

kind of program at issue in *Grutter*. Second, in his dissent in *Seattle*, Justice Breyer approved the constitutionality of programs of this kind “whether implemented by law schools, universities, high school, or elementary schools.”²⁵⁵ He concurred because “the Constitution does not ‘authorize judges’ either to forbid or to require the adoption of diversity-seeking race-conscious ‘solutions’ (of the kind at issue here).”²⁵⁶ He recounted studies chronicling the serious problems facing the American educational system and other studies correlating income and race with poor educational achievement. The U.S. Constitution permits “narrowly tailored race-conscious programs designed to bring about greater inclusion and diversity. But the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates about the merits of these programs.”²⁵⁷

Third, the measures at issue in *Hunter* and *Seattle* restricted the political process to change “the political level at which policies were enacted.”²⁵⁸ In this case, effective decision-making authority was moved from unelected faculty members and administrative staff to the voters deciding on a constitutional amendment. Specifically, the boards of trustees delegated decision-making authority over admissions to faculty and administrators. The principle underlying *Hunter* and *Seattle* goes against the competing ideal that decision-making should occur through the democratic process.

Justice Sotomayor, dissented, joined by Justice Ginsburg. While we live in a democratic society, “to know the history of our Nation is to understand its long and lamentable record of stymieing the right of racial minorities to participate in the political process.”²⁵⁹ For many years, the majority openly and invidiously prevented minorities from voting. While the political restructurings at issue may not have had a discriminatory purpose,²⁶⁰ minorities have the right “to participate meaningfully and equally in the political process.”²⁶¹ Justice Sotomayor termed these programs “ ‘race-sensitive admissions policies,’ ”²⁶² in contrast to affirmative action. She also noted: “To comport with *Grutter*, colleges and universities must use race flexibly.”²⁶³

Justice Sotomayor then argued that the voters of Michigan had alternatives to Proposal 2 to influence those race-sensitive policies. For instance, they could have voted “uncooperative board members out of office.”²⁶⁴ Instead, the referendum “changed the rules in the middle of the game, reconfiguring the existing political process in Michigan in a manner that burdened racial minorities.”²⁶⁵ This resulted in “two very different processes through which a Michigan citizen is permitted to influence the admissions policies of the State’s universities: one for persons interested in race-sensitive admissions policies and one for everyone else.”²⁶⁶ Those who wish to influence the board to adopt admissions policies based on legacy, athleticism, geography, etc.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 1650.

²⁵⁹ *Id.* at 1651 (Sotomayor, J., dissenting).

²⁶⁰ *Id.* at 1652.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 1652, n.2.

²⁶⁴ *Id.* at 1653.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

could do so. The only exception to this was race; changing that policy required amending the Michigan Constitution.

Consequently, the Court effectively overruled *Seattle* and *Hunter*. “While our Constitution does not guarantee minority groups victory in the political process, it does guarantee them meaningful and equal access to that process.”²⁶⁷ Judges must scrutinize the method of self-government. *Seattle* reaffirmed *Hunter*. Those cases require a different analysis when the State explicitly “allocates governmental power nonneutrally,”²⁶⁸ according to *race*. The Court struck down the measure in *Seattle* because only the Legislature or statewide electorate could eliminate de facto school segregation. “ ‘Yet authority over all other student assignment decisions, as well as over most other areas of education policy, remains vested in the local school board.’ ”²⁶⁹ In summary, under the *Hunter* and *Seattle* doctrine, “governmental action deprives minority groups of equal protection when it (1) has a racial focus, targeting a policy or program that ‘inures primarily to the benefit of the minority,’ and (2) alters the political process in a manner that uniquely burdens racial minorities’ ability to achieve their goals through that process.”²⁷⁰ Correctly applying this calculus would invalidate the Michigan amendment. Enacting race-sensitive policies now required a constitutional amendment, which required at least 320,000 signatures in Michigan. The cost of “state-level initiative and referendum campaigns in 2008 eclipsed the \$740.6 million spend by President Obama in his 2008 presidential campaign.”²⁷¹

The Michigan amendment should be subjected to strict scrutiny and invalidated, as Michigan asserted no compelling state interest. The plurality tried to avoid this result by maintaining that the political process doctrine requires discriminatory intent. Justice Sotomayor, however, stated that it does not; it only protects a process. The plurality’s rewriting the political process doctrine leaves little left of it.

Disagreeing with Justice Breyer’s concurrence, Justice Sotomayor noted that “race-sensitive admissions policies often dominated board elections,”²⁷² and boards “remain actively involved in setting admissions policies and procedures.”²⁷³ She emphasized that “the minority does have a right to play by the same rules as the majority.”²⁷⁴ In this way, the political process doctrine has its roots in the *Carolene Products* case.

Justice Sotomayor rejected the view expressed by Justice Scalia’s concurrence that race should be left out of the decision-making process altogether. “Race matters. Race matters in part because of the long history of racial minorities’ being denied access to the political process.”²⁷⁵ Race also matters “because of persistent racial inequality in society”²⁷⁶ which “has produced stark socioeconomic disparities.”²⁷⁷ Moreover, it “matters because of the slights, the

²⁶⁷ *Id.* at 1654.

²⁶⁸ *Id.* at 1658.

²⁶⁹ *Id.* (quoting *Seattle*, 458 U.S. at 474).

²⁷⁰ *Id.* at 1659 (quoting *Seattle*, 458 U.S. at 474).

²⁷¹ *Id.* at 1662.

²⁷² *Id.* at 1665.

²⁷³ *Id.*

²⁷⁴ *Id.* at 1668.

²⁷⁵ *Id.* at 1676.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

snickers, the silent judgments that reinforce that most crippling of thoughts: ‘I do not belong here.’ ”²⁷⁸

For over a century, racial minorities in Michigan fought to bring diversity to their State’s public colleges and universities. The Michigan amendment turned back the clock. Since 2006 (before § 26 took effect), underrepresented minorities in the University of Michigan’s entering freshman class declined from 12.15% to 9.54% in 2012.²⁷⁹ Moreover, from 2006 to 2011, black freshmen at the University declined from 7% to 5%, while “black college aged persons in Michigan increased” from 16% to 19%.²⁸⁰ Justice Kagan took no part in the consideration of this case.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 1678.

²⁸⁰ *Id.*

Chapter 12

EQUAL PROTECTION FOR OTHER GROUPS AND INTERESTS

§ 12.01 DISCRETE AND INSULAR MINORITIES

Page 473: Insert the following after the sentence that ends with footnote 17 in § 12.01[1][a] Resident Aliens

In *Arizona, et al. v. The Inter Tribal Council of Arizona, Inc., et al.*,²⁸¹ an Arizona law requiring proof of citizenship for eligibility to vote in federal elections was preempted by the federal voting form developed under the National Voter Registration Act.

[2] Illegitimate Children

Page 475: Insert the following after Lalli v. Lalli.

In *Astrue v. Capato ex rel. B.N.C.*,²⁸² the Court upheld the Social Security Administration's denial of survivors benefits for Karen Capato's twin children who had been conceived through *in vitro* fertilization after the death of their father. The Court had applied an intermediate level of scrutiny to laws that burden illegitimate children as a way of punishing their parents for illicit sexual relations. However, this case involved no showing that the burden on posthumously conceived children was intended to penalize their parents. Therefore, the Court applied a rational basis test and upheld the denial of benefits.

[5] Sexual Orientation

Page 481: Insert the following before § 12.02 EQUAL PROTECTION FOR THE POOR

In *United States v. Windsor*,²⁸³ a 5-4 majority struck down Section 3 of the federal Defense of Marriage Act (DOMA). Two women, Edith Windsor and Thea Spyer, were lawfully married at a ceremony in Ontario, Canada and subsequently returned to their home in New York City. Spyer died, leaving her entire estate to Windsor who claimed the federal estate tax exemption for surviving spouses. However, Section 3 defines “ ‘marriage’ ” to mean “ ‘only a legal union between one man and one woman as husband and wife.’ ”²⁸⁴ Furthermore, it requires that this definition be used when “ ‘determining the meaning of any Act of Congress, or of any ruling, [or] regulation.’ ”²⁸⁵ Windsor challenged the constitutionality of Section 3. Windsor did not challenge Section 2, which “ ‘allows States to refuse to recognize same-sex

²⁸¹ 133 S. Ct. 2247 (2013)

²⁸² 132 S. Ct. 2021 (2012).

²⁸³ 133 S. Ct. 2675 (2013).

²⁸⁴ *Id.* at 2683.

²⁸⁵ *Id.*

marriages performed under the laws of other States.’ ”²⁸⁶ Both the District Court and the Court of Appeals held Section 3 unconstitutional.

Justice Kennedy’s majority opinion began by holding that the plaintiff had standing to bring this action. While the President had ordered the Department of Justice not to defend Section 3, he still continued to enforce it. Upon receiving notice of the Executive’s position from the Attorney General, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives agreed to defend Section 3. The Court held that “the United States retains a stake sufficient to support Article III jurisdiction on appeal.”²⁸⁷

A court ordering the Treasury to award a tax deduction, and consequently pay money, comprised “a real and immediate economic injury.”²⁸⁸ That the President approved of the court-ordered refund, along with the constitutional ruling it sought, did not alleviate the injury to the national Treasury. In contrast, standing would not have existed had the Executive actually paid Windsor the refund pursuant to the District Court’s ruling. Similarly, in *INS v. Chadha*,²⁸⁹ the INS had continued to enforce a statute that the Executive had refused to defend on constitutional grounds.

Under *Deposit Guar. Nat’l Bank v. Roper*,²⁹⁰ “ ‘[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it.’ ”²⁹¹ However, this rule does not derive from the constitutional requirements of Article III but rather from prudential considerations. Specifically, “ ‘concrete adverseness’ ”²⁹² of the parties focuses the issues presented to the Court. This prudential concern was fulfilled by BLAG’s demonstration of the issues. Although the extent of DOMA’s mandate meant that a case may one day have come into existence without the prudential concerns of the current case, “ ‘the costs, uncertainties, and alleged harm and injuries’ ”²⁹³ would probably have continued for years before the issue was settled. Under these “unusual and urgent circumstances”²⁹⁴ prudential considerations required that the Court resolve these issues immediately. If Executive agreement with an opposing party that a law is unconstitutional resulted in precluding judicial review, then the Supreme Court would surrender its principal role in deciding the constitutionality of a law to the President. The arguments for dismissing the case on prudential grounds do have substance. Rather than challenge statutes it disagrees with in court, the Executive should try to persuade Congress to amend or repeal them.

Turning to the merits, the Court noted that “marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization.”²⁹⁵ But then for some “came the

²⁸⁶ *Id.* at 2682.

²⁸⁷ *Id.* at 2686.

²⁸⁸ *Id.*

²⁸⁹ 462 U.S. 919 (1983). This case is discussed *supra* § 7.03[3].

²⁹⁰ 445 U.S. 326 (1980).

²⁹¹ 133 S. Ct. at 2687.

²⁹² *Id.*

²⁹³ *Id.* at 2688.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 2689.

beginnings of a new perspective, a new insight.”²⁹⁶ New York, 11 other states, and the District of Columbia have extended to same-sex couples “the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons.”²⁹⁷ Justice Kennedy stated that the definition of marriage has commonly been considered the prerogative of the states. Congress has utilized various statutes to make determinations that affect “marital rights and privileges.”²⁹⁸ For example, Congress will not afford admission to the United States to foreigners who have married for that reason, even if the noncitizen’s marriage was legal under state law. In calculating income for Social Security benefits, Congress recognizes common-law marriage regardless of state recognition. DOMA is much more expansive, affecting more than 1,000 federal statutes.

The definition of marriage is the foundation for a state’s regulation of domestic relations including the enforcement of property rights, marital responsibilities, and children’s rights.²⁹⁹ In fact, “ ‘when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.’ ”³⁰⁰ DOMA, however, rejected the time-honored rule that the “incidents, benefits, and obligations of marriage . . . may vary, subject to constitutional guarantees, from one State to the next.”³⁰¹ Nevertheless, the Court did not decide whether DOMA was unconstitutional on federalism grounds, as the state’s traditional power to define marital relations afforded it greater deference in its decision to protect those within its community.

The Court then highlighted its findings in that “ ‘discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.’ ”*Romer v. Evans*.³⁰² The Court addressed whether the ensuing injury abridged liberty secured by the Fifth Amendment. “What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect.”³⁰³

“Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form ‘but one element in a personal bond that is more enduring.’ ”*Lawrence v. Texas*.³⁰⁴ Recognition “reflects both the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.”

DOMA injured the class that New York protected. This violated “basic due process and equal protection principles applicable to the Federal Government.”³⁰⁵ Equal Protection “ ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 2690.

²⁹⁹ Generally, federal courts do not adjudicate marital status even when there may be a basis for federal jurisdiction.

³⁰⁰ 133 S. Ct. at 2691.

³⁰¹ *Id.* at 2692.

³⁰² 517 U.S. 620 (1996). This case is discussed *supra* § 12.01[5].

³⁰³ 133 S. Ct. at 2692.

³⁰⁴ 539 U.S. 558 (2003). This case is discussed *supra* § 8.06[3].

³⁰⁵ 133 S. Ct. at 2693.

cannot' justify disparate treatment of that group. *Department of Agriculture v. Moreno*³⁰⁶ In ascertaining an improper purpose, "[d]iscriminations of an unusual character' "³⁰⁷ attract scrutiny. "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages."³⁰⁸ This demonstrated that the law had "the purpose and effect"³⁰⁹ of stigmatizing same-sex couples.

DOMA's own text and legislative history evidence "interference with the equal dignity of same-sex marriages,"³¹⁰ bestowed by the states. The House Report determined that DOMA voiced " 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.' "³¹¹ Furthermore, the name "The Defense of Marriage" reinforces this purpose. "DOMA writes inequality into the entire United States Code"³¹² including laws involving "Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits."³¹³ DOMA relegated same-sex couples into a "second-tier marriage."³¹⁴ It demeans same-sex couples "whose moral and sexual choices the Constitution protects, see *Lawrence*."³¹⁵ The Law also "humiliates tens of thousands of children now being raised by same-sex couples,"³¹⁶ making "it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."³¹⁷ Moreover, it disadvantaged same-sex couples in health-care benefits, Bankruptcy's Code protections for domestic-support obligations, state and federal taxation, and burial arrangements in veterans' cemeteries.

"The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. See *Bolling; Adarand Constructors, Inc. v. Peña*."³¹⁸ Justice Kennedy continued: "While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved."³¹⁹ Accordingly, Section 3 of DOMA violated the Fifth Amendment by singling out "a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty."³²⁰ Justice Kennedy concluded: "This opinion and its holding are confined to those lawful

³⁰⁶ *Id.* (quoting *Moreno*, 413 U.S. at 534-535).

³⁰⁷ *Id.* (quoting *Romer*, 517 U.S. at 633).

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.* at 2694.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ See *Lawrence*, 539 U.S. at 558.

³¹⁶ 133 S. Ct. at 2694.

³¹⁷ *Id.*

³¹⁸ See *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954) and *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 217-18 (1995).

³¹⁹ 133 S. Ct. at 2695.

³²⁰ *Id.*

marriages.”³²¹

Chief Justice Roberts’ dissent began with the issue of standing; the Chief Justice agreed with Justice Scalia’s dissent that the Court lacked appellate jurisdiction here. On the merits, he also agreed with Justice Scalia that DOMA was constitutional. “Interests in uniformity and stability amply justified Congress’s decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world.”³²²

The majority emphasized the Federal Government’s past deference to state definitions of marriage. However, “none of those prior state-by-state variations had involved differences over something—as the majority puts it—‘thought of by most people as essential to the very definition of [marriage] and to its role and function throughout the history of civilization.’”³²³ Chief Justice Roberts would have required “more convincing evidence”³²⁴ that DOMA codified malice. “I would not tar the political branches with the brush of bigotry.”³²⁵

The Chief Justice stressed that the Court did not decide the question of whether the states, in “ ‘their historic and essential authority to define the marital relation,’ may continue to utilize the traditional definition of marriage.”³²⁶ The Court itself states: “ ‘[t]his opinion and its holding are confined to those lawful marriages.’”³²⁷ He concluded: “ ‘[t]he State’s power in defining the marital relation is of central relevance’ to the majority’s decision to strike down DOMA here, that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions. So too will the concerns for state diversity and sovereignty.”³²⁸

In his dissent, joined by Justice Thomas, and in part by Chief Justice Roberts, Justice Scalia maintained that the Court had no jurisdiction as petitioner lacked standing. Had standing existed the Constitution did not empower the court to invalidate DOMA. The majority opinion sprang from “an exalted conception of the role of this institution in America.”³²⁹ On standing, Windsor had cured her injury through acquiring relief in the lower courts, and the President was happy with the result. “What, then, are we *doing* here?”³³⁰ By choosing to decide this case, the Court had placed itself “at the apex of government.”³³¹ As demonstrated by *Federalist No. 49*, the Framers’ fear of such a power was a major reason for “ ‘perfectly coordinate’ ”³³² branches of government. “One could spend many fruitless afternoons ransacking our library for any other petitioner’s brief seeking an affirmance of the judgment against it.”³³³ Equally unrewarding would be searching for a “Motion to Dismiss” similar to the one that the United States filed in

³²¹ *Id.* at 2696.

³²² *Id.* (Roberts, C.J., dissenting).

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.* at 2697.

³²⁹ *Id.* at 2698. (Scalia, J., dissenting).

³³⁰ *Id.*

³³¹ *Id.*

³³² THE FEDERALIST No. 49 (James Madison).

³³³ 133 S. Ct. at 2699 (Scalia, J., dissenting).

agreeing with opposing counsel that the District Court should not dismiss the complaint. Then, after having received the judgment it requested, the United States appealed. Before the Supreme Court, petitioner, the United States, aligned with Windsor in endorsing the judgment below. Justice Scalia concluded that the subsequent proceedings had been a contrivance fashioned to promote the District Court's judgment to one that would have "precedential effect throughout the United States."³³⁴ In contrast to this case, the two parties in *Chadha* disagreed with the United States position and with the lower court. Further unlike the present case, the Justice Department's decision not to defend the legislation at issue comported with its long standing refusal to defend legislation that impaired Presidential powers.

Adverseness was not a prudential aspect of standing. Article III mandates the existence of a plaintiff who has standing to complain and an opposing party. But, the majority's entertaining between friendly parties, so long as *amici curiae* present the other side, starkly breaks with the Court's Article III jurisprudence.

The current suit went forward only because the President enforced DOMA, even though he thought it unconstitutional. This action provided Windsor with standing to sue. The President could have more appropriately chosen not to enforce a statute, which he was unprepared to defend. Then, the issue would have been resolved by "a tug of war between the President and the Congress, which has innumerable means (up to and including impeachment) of compelling the President to enforce the laws it has written."³³⁵ In sum, Justice Scalia sought to insulate the Court from Executive contrivance.

*Marbury v. Madison*³³⁶ does state "that '[i]t is emphatically the province and duty of the judicial department to say what the law is.' "³³⁷ However, the majority ignores Chief Justice Marshall's next sentence: " '*Those who apply the rule to particular cases, must of necessity expound and interpret that rule.* ' "³³⁸

As the majority discussed the merits, Justice Scalia reluctantly did as well. The Chief Justice did not join the remainder of Justice Scalia's opinion. The majority seemed to utilize a rational-basis approach taken from cases like *Moreno* rather than strict scrutiny. However, the majority's approach did not resemble the deference inherent to that framework. Nor did the majority mention the "dread words 'substantive due process.' "³³⁹ Instead, it states that DOMA "violates 'basic due process.' "³⁴⁰ Yet, the majority did not contend that same-sex marriage was " 'deeply rooted in this Nation's history and tradition.' "³⁴¹ This led Justice Scalia to conclude that the result "of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role)."³⁴²

³³⁴ *Id.* at 2700.

³³⁵ *Id.* at 2702.

³³⁶ 5 U.S. 137 (1803). This case is discussed *supra* § 2.01.

³³⁷ *Id.* at 177.

³³⁸ *Id.* (emphasis added).

³³⁹ 133 S. Ct. at 2706 (Scalia, J., dissenting).

³⁴⁰ *Id.*

³⁴¹ *Id.* at 2707.

³⁴² *Id.*

*United States v. O'Brien*³⁴³ refused to strike down a law based on an “ ‘illicit legislative motive.’ ”³⁴⁴ By contradicting this principle, the majority will attract constitutional challenges to any law that can be “characterized as mean-spirited.”³⁴⁵ Moreover, invalidating DOMA’s standard definition of marriage will prompt difficult choice-of-law issues that DOMA, as a standard definitional statute, endeavored to avoid. At bottom, “to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements.”³⁴⁶

Justice Scalia doubted the majority’s opinion which restricted its holding “to those couples ‘joined in same-sex marriages made lawful by the State.’ ”³⁴⁷ *Lawrence* acknowledged a constitutional right to homosexual sodomy, but “assured that the case had nothing, nothing at all to do with ‘whether the government must give formal recognition to any relationship that homosexual persons seek to enter.’ Now we are told that DOMA is invalid because it ‘demeans the couple, whose moral and sexual choices the Constitution protects.’ with an accompanying citation of *Lawrence*.”³⁴⁸ The Court should have “let the People decide.”³⁴⁹

Justice Alito also dissented, joined by Justice Thomas in Parts II and III. The United States was not a proper petitioner because it did not seek to overturn the lower court judgment against it. He found it astonishing that the Court concurrently decided that the United States, which attained all it pursued in the courts below, was a proper petitioner in this case, yet considered the intervenors in *Hollingsworth v. Perry*,³⁵⁰ who represented the party that lost in the lower court, as improper. In his view, “both the *Hollingsworth* intervenors and BLAG have standing.”³⁵¹ The House of Representatives suffered “grievous injury”³⁵² to its core function of legislating, and it had authorized BLAG to represent it. *Chadha* held that Congress was the appropriate party to defend a statute when the President refuses on constitutional grounds.

Turning to the merits, same-sex marriage is not a difficult issue of constitutional law because no article in the Constitution addresses it. The substantive component of the Due Process Clause only protects rights that are “ ‘deeply rooted in this Nation’s history and tradition,’ ”³⁵³ which same-sex marriage is not. Until 2003, when the Massachusetts Supreme Judicial Court invalidated the definition of marriage to opposite-sex couples under the State Constitution, no state had permitted same-sex marriage. Additionally, no country recognized same-sex couples before the Netherlands elected to in 2000. BLAG submitted that nearly every culture, even groups not shaped by Abrahamic religions, had restricted marriage to people of the opposite sex. BLAG stipulated that this was done in order to channel “heterosexual intercourse

³⁴³ 391 U.S. 367 (1968). This case is discussed *infra* § 16.01.

³⁴⁴ *Id.* at 383.

³⁴⁵ 133 S. Ct. at 2707 (Scalia, J., dissenting).

³⁴⁶ *Id.* at 2708.

³⁴⁷ *Id.* at 2709.

³⁴⁸ *Id.* (quoting *Lawrence*, 539 U.S. at 578).

³⁴⁹ *Id.* at 2711.

³⁵⁰ 133 S. Ct. 2652 (2013). The standing aspects of this case are discussed *supra* § 2.12[4][a]. The merits of this case are discussed *infra* § 16.01.

³⁵¹ 133 S. Ct. at 2712 (Alito, J., dissenting).

³⁵² *Id.* at 2713.

³⁵³ *Id.* at 2714.

into a structure that supports child rearing.”³⁵⁴ Justice Alito agreed with the majority that same-sex marriage was an issue primarily for the states.

Page 481: Insert the following after the Windsor case and just before § 12.02 EQUAL PROTECTION FOR THE POOR

In *Hollingsworth v. Perry*,³⁵⁵ the Court (5-4) held that the proponents of California’s Proposition 8 ballot initiative lacked standing to defend the law. Proposition 8 was a voter ballot initiative which amended the California Constitution to define marriage as a union between a man and a woman. This prevented same-sex couples from marrying. Under California law, “same-sex couples have a right to enter into relationships recognized by the State as ‘domestic partnerships,’ which carry ‘the same rights, protections, and benefits,’ ”³⁵⁶ as heterosexual married couples had.³⁵⁷

State officials refused to defend Proposition 8. The District Court allowed the official proponents of Proposition 8 to intervene to defend it. Responding to a certified question from the Ninth Circuit Federal Court of Appeals, the California Supreme Court stated that California law permitted the proponents of a ballot initiative to appear in court and represent the state if elected officials declined to do so. Chief Justice Roberts, however, denied standing to the initiative proponents. Standing to proceed in a federal court was a question of federal law. Once the initiative measure passed, the initiative proponents had only a generalized grievance, which was insufficient to establish standing to appeal. The Court has never afforded standing to private litigants to defend the constitutionality of a state statute when state officials have declined to do so.

Justice Kennedy dissented, joined by Justices Thomas, Alito, and Sotomayor. The decision of the California Supreme Court specifying the powers of an official initiative proponent was binding on the United States Supreme Court for purposes of establishing standing. As ballot initiatives (which are utilized by 27 states) are designed “to control and to bypass public officials,”³⁵⁸ their official proponents are better suited to defend them in court than are the elected officials whom the ballot initiative is designed to bypass. *Hollingsworth* is further discussed at § 2.12[4][a].

In *Obergefell v. Hodges*,³⁵⁹ the Court established the liberty of persons of the same sex to marry “on the same terms and conditions as persons of the opposite sex.”³⁶⁰ Challenging the law were “14 same-sex couples and two men whose same-sex partners are deceased.”³⁶¹ The two questions presented were: 1) “whether the Fourteenth Amendment requires a State to license a

³⁵⁴ *Id.* at 2718.

³⁵⁵ 133 S. Ct. 2652 (2013).

³⁵⁶ *Id.* at 2659 (quoting Cal. Fam. Code Ann. § 297.5(a) (West 2004)).

³⁵⁷ *Id.* (quoting Cal. Fam. Code Ann. § 297.5(a) (West 2004)).

³⁵⁸ *Id.* at 2668 (Kennedy, J., dissenting).

³⁵⁹ 192 L.Ed. 2d 609 (2015).

³⁶⁰ *Id.* at 618.

³⁶¹ *Id.* at 619.

marriage between two people of the same sex”;³⁶² and 2) whether it requires states which outlaw such marriages to recognize same-sex marriages performed in states that legally permit them.

Justice Kennedy began his analysis by talking about “the transcendent importance of marriage”³⁶³ promising “nobility and dignity to all persons”³⁶⁴ extending across time and spanning cultures around the world. Different people predicated the importance of marriage on religious or secular reasons. Confucius saw marriage as the “foundation of government;”³⁶⁵ Cicero, as the foundation of society. These references assumed “that marriage is a union between two persons of the opposite sex.”³⁶⁶ Same-sex couples seek marriage “because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.”³⁶⁷

The institution of marriage has evolved over time. For example, legal and political transformations have eliminated the “doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity.”³⁶⁸ Such changes characterize America “where new dimensions of freedom become apparent to new generations,”³⁶⁹ with change often beginning in the political realm and carrying through to the judicial process.

Such change characterized homosexual relationships, which for much of the 20th century, had been criminalized. Moreover, homosexuals “were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.”³⁷⁰ Homosexuality was considered an illness.

Justice Kennedy recounted the shift in Supreme Court decisions from *Bowers v. Hardwick*³⁷¹ to *Romer v. Evans*³⁷² to *Lawrence v. Texas*³⁷³. Then in *Baehr v. Lewin*,³⁷⁴ the Supreme Court of Hawaii invalidated that state’s same-sex marriage prohibition because the law classified people based on gender. In reaction, many states reaffirmed opposite sex marriage laws and Congress passed the Defense of Marriage Act (DOMA) which the Supreme Court invalidated in *United States v. Windsor*.³⁷⁵

All federal court of appeals cases have invalidated same-sex marriage laws except the current Court of Appeal; so have most federal district court decisions. “After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ 192 L.Ed. 2d at 619.

³⁶⁶ *Id.* at 619.

³⁶⁷ *Id.* at 620.

³⁶⁸ *Id.* at 621.

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 622.

³⁷¹ 478 U.S. 186 (1986). This case is discussed *supra* § 8.06[3].

³⁷² 517 U.S. 620 (1996). This case is discussed *supra* § 12.01[5].

³⁷³ 539 U.S. 558 (2003). This case is discussed *supra* § 8.06[3].

³⁷⁴ 74 Haw. 530, 852 P 2d 44 (1993).

³⁷⁵ 133 S. Ct. 2247 (2013). This case is discussed *supra* §12.01[5].

divided on the issue of same-sex marriage.”³⁷⁶

Due process under the 14th Amendment extends “to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”³⁷⁷ Identifying fundamental rights is part of “the judicial duty”³⁷⁸ which has no fixed formula. “Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries.”³⁷⁹ However, the Court will not allow “the past alone to rule the present.”³⁸⁰ The framers of the Constitution did not pretend to comprehend the full scope of liberty but entrusted future generations to gain new insights “to enjoy liberty as we learn its meaning.”³⁸¹

For example, in the area of marriage, *Loving v. Virginia*,³⁸² invalidated a ban on interracial marriage; *Zablocki v. Redhail*,³⁸³ invalidated a marriage prohibition on fathers behind in child support payments; and *Turner v. Safley*,³⁸⁴ invalidated a ban on prison inmates marrying. However, in its 1972 one-line decision in *Baker v. Nelson*,³⁸⁵ the Court held that excluding “same-sex couples from marriage did not present a substantial federal question.”³⁸⁶

Four reasons entail extending the fundamental right of marriage to same-sex couples. First, “personal choice regarding marriage is inherent in the concept of individual autonomy”³⁸⁷ analogous to “choices concerning contraception, family relationships, procreation, and childrearing,”³⁸⁸ which are constitutionally protected. “There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.”³⁸⁹ Second, “the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”³⁹⁰ It “responds to the universal fear that a lonely person might call out only to find no one there.”³⁹¹

Third, marriage protects “children and families and thus draws meaning from related rights of childrearing, procreation, and education.”³⁹² Some of its benefits are material. Others

³⁷⁶ 192 L.Ed. 2d at 623.

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.* at 623-624.

³⁸⁰ *Id.* at 624.

³⁸¹ *Id.*

³⁸² 388 U.S. 1 (1967). This case is discussed *supra* §9.02[1].

³⁸³ 434 U.S. 374 (1978). This case is discussed *supra* § 8.06[2].

³⁸⁴ 482 U.S. 78 (1987). This case is discussed *supra* § 8.06[2].

³⁸⁵ 409 U.S. 810 (1972).

³⁸⁶ 192 L.Ed. 2d at 624.

³⁸⁷ *Id.* at 625.

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ *Id.* at 626.

³⁹² 192 L.Ed. 2d at 626.

are “more profound,”³⁹³ allowing “recognition and legal structure to their parents’ relationship,”³⁹⁴ which fosters permanent and stable home environments for the hundreds of thousands of children raised by same-sex couples. Most states permit adoption either individually or as a couple. “Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.”³⁹⁵ Thus, laws prohibiting same-sex marriages “harm and humiliate the children of same-sex couples.”³⁹⁶ Of course, neither the constitutional protection nor the meaningfulness of marriage hinges on procreation.

Fourth, government has nurtured the marital relationship for a variety of state-provided material benefits including: “taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules,”³⁹⁷ marriage is also relevant in “over a thousand provisions of federal law,”³⁹⁸ and states have placed it symbolically placed at the center of their legal orders.

“Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.”³⁹⁹ Excluding them from marriage imposes unconstitutional “stigma and injury.”⁴⁰⁰

Justice Kennedy also rejected the approach to due process in *Washington v. Glucksberg*,⁴⁰¹ defining liberty in “a most circumscribed manner, with central reference to specific historical practices,”⁴⁰² as being inapplicable in cases of many “fundamental rights, including marriage and intimacy.”⁴⁰³ If past definition circumscribed rights, “new groups could not invoke rights once denied.”⁴⁰⁴ In addition to “ancient sources,”⁴⁰⁵ rights can arise “from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.”⁴⁰⁶ While some people believe that same-sex marriage is wrong for religious or philosophical reasons, the state placing its imprimatur on these beliefs demeans same-sex relationships.

Justice Kennedy also founded the right of same-sex couples to marry on the Equal Protection Clause which, though independent, is profoundly connected to the Due Process

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.* at 627.

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 627-28.

³⁹⁸ 192 L.Ed. 2d at 628.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ 521 U.S. 702 (1997). This case is discussed *supra* §8.06[4].

⁴⁰² 192 L.Ed. 2d at 628.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* at 629.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

Clause. In this connection, a number of precedents rely on both clauses including: *Loving; Zablocki; Lawrence; Skinner v. Oklahoma*,⁴⁰⁷ *Eisenstadt v. Baird*,⁴⁰⁸ and *M. L. B. v. S. L. J.*⁴⁰⁹ Disapproving same-sex marriages imposes a “disability”⁴¹⁰ on gays and lesbians and “serve[s] to disrespect and subordinate them.”⁴¹¹ Moreover, “the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.”⁴¹² The Court held “that same-sex couples may exercise the fundamental right to marry”⁴¹³ based “on the same terms and conditions as opposite-sex couples.”⁴¹⁴ It also overruled *Baker v. Nelson*.

The Court found the workings of the democratic process regarding same-sex marriage unimportant as fundamental rights were being breached. Staying the Court’s hand would harm gays and lesbians as *Bowers v. Hardwick* did. Faced with a conflict among the federal courts of appeal, the Court had to resolve this question.

Justice Kennedy also rejected the argument that this decision would harm the institution of marriage: “these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.”⁴¹⁵

“The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate.”⁴¹⁶

Turning to the full faith and credit issue, as the Court “holds that same-sex couples may exercise the fundamental right to marry”⁴¹⁷ in all States it logically follows that a State must “recognize a lawful same-sex marriage performed in another State.”⁴¹⁸

The Constitution granted same-sex couples “equal dignity in the eyes of the law.”⁴¹⁹

Chief Justice Roberts dissented, joined by Justices Scalia and Thomas. “The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State’s decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not

⁴⁰⁷ 316 U.S. 535 (1942). This case is discussed *supra* §8.06[1].

⁴⁰⁸ 405 U.S. 438 (1972). This case is discussed *supra* §8.06[1].

⁴⁰⁹ 519 U.S. 102 (1996). This case is discussed *supra* §12.02[2].

⁴¹⁰ 192 L.Ed. 2d at 631.

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* at 634.

⁴¹⁶ 192 L.Ed. 2d at 634.

⁴¹⁷ *Id.* at 631.

⁴¹⁸ *Id.* at 634.

⁴¹⁹ *Id.* at 635.

enact any one theory of marriage.”⁴²⁰ States can stick to the historical definition or enact a new one.

“The majority’s decision is an act of will, not legal judgment.”⁴²¹ The majority seeks to “remake society according to its own ‘new insight’ into the ‘nature of injustice.’”⁴²² Through history and across civilizations, marriage involved a man and a woman. This universal definition derives from the human race’s necessity to procreate to survive. Indeed, “every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way.”⁴²³

While cases like *Loving* demonstrate that marriage has involved change, “the core meaning of marriage has endured.”⁴²⁴ While over the past six years, 11 states and the District of Columbia have adopted same-sex marriage and the highest state courts have required it in five others, the remaining states have all retained the traditional definition.

Rejecting the argument of the U.S. Solicitor General that the Due Process Clause does not support such a right, the majority’s decision cuts against both principal and tradition and as such resembles *Lochner v. New York*.⁴²⁵

The Court has embraced the doctrine of substantive due process for rights “so rooted in the traditions and conscience of our people as to be ranked as fundamental,”⁴²⁶ that-- regardless of what process the government uses-- they can be abridged with compelling justification.

The Court first invoked substantive due process analysis in *Dred Scott v. Sandford*⁴²⁷ which invalidated legislation as violating the rights of slaveowners. After the Civil War and a constitutional amendment overruled *Dred Scott*, substantive due process was not used again until *Lochner*. *Lochner* and its progeny struck down 200 laws as violating personal liberty and freedom of contract.

While the Court did reject the *Lochner* line of cases and it’s sitting as a “super-legislature,”⁴²⁸ this rejection did not necessitate “disavowing the doctrine of implied fundamental rights”⁴²⁹ which the Court has not done. However, to cabin in the unrestrained predilections of unelected judges modern substantive due process theory requires that fundamental rights be “‘objectively, deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.’”⁴³⁰ The majority jettisons these restrictions effectively overruling *Glucksberg*

⁴²⁰ *Id.* at 639.

⁴²¹ *Id.*

⁴²² 192 L.Ed. 2d at 639.

⁴²³ *Id.* at 641.

⁴²⁴ *Id.* at 642.

⁴²⁵ 198 U.S. 45 (1905). This case is discussed *supra* §8.05[1].

⁴²⁶ 192 L.Ed. 2d at 644.

⁴²⁷ 60 U.S. 393 (1857).

⁴²⁸ 192 L.Ed. 2d at 645. (quoting *Williamson v. Lee Optical of Okla., Inc.* 348 U.S. 483, 488 (1955)).

⁴²⁹ 192 L.Ed. 2d at 645.

⁴³⁰ *Id.* at 646. (quoting *Glucksberg*, 521 U.S. at 720-21).

to return “to the unprincipled approach of *Lochner*.”⁴³¹

The precedents that majority cites strike down barriers to marriage. None of the laws at issue in those cases challenged “the core definition of marriage as the union of a man and a woman.”⁴³² Nor do the privacy cases, including *Lawrence*, help “because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive”⁴³³ government entitlements.

The majority offers no reason to retain the limitation that marriage involves two people. The Court “offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not.”⁴³⁴ Indeed, polygamy finds deeper roots in tradition and history than same-sex marriage. One commentator estimates that the United States has 500,000 polygamous families and there is currently an appeal to the 10th Circuit on this issue. While legal differences may exist, petitioners have not pointed to any.

While the Court also cites the Equal Protection Clause, its main equal protection argument was “synergy”⁴³⁵ with the Due Process Clause. The Court's analysis does not resemble typical equal protection analysis. At bottom, differentiating between same-sex and opposite sex marriages “is rationally related to the States’ ‘legitimate state interest’ in ‘preserving the traditional institution of marriage.’”⁴³⁶

The majority violates the core right of the people to govern themselves. Moreover, “Federal courts are blunt instruments when it comes to creating rights.”⁴³⁷ The decision may threaten religious liberty, which is “actually spelled out in the Constitution.”⁴³⁸ While voters in every state adopting same-sex marriage have enacted “accommodations for religious practice,”⁴³⁹ courts cannot do that. While the majority “suggests that religious believers may continue to ‘advocate’ and ‘teach’ their views of marriage,”⁴⁴⁰ it says nothing about the free exercise of religion.

“Perhaps the most discouraging aspect of today’s decision is the extent to which the majority feels compelled to sully those on the other side of the debate,”⁴⁴¹ repeatedly stating that they are guilty of stigmatizing or demeaning same-sex couples.

While people supporting same-sex marriage may celebrate this decision, they should not

⁴³¹ 192 L.Ed. 2d at 647.

⁴³² *Id.*

⁴³³ *Id.* at 648-49.

⁴³⁴ *Id.* at 650.

⁴³⁵ *Id.* at 651.

⁴³⁶ *Id.* at 652. (quoting *Lawrence*, 539 U. S., at 585 (O’Connor, J., concurring in judgment)).

⁴³⁷ 192 L.Ed. 2d at 654.

⁴³⁸ *Id.* at 654.

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* at 654-55.

“celebrate the Constitution. It had nothing to do with it.”⁴⁴²

Justice Scalia dissented, joined by Justice Thomas. The decision is a “threat to American democracy.”⁴⁴³ The majority decision “is the furthest extension in fact—and the furthest extension one can even imagine—of the Court’s claimed power to create ‘liberties’ that the Constitution and its Amendments neglect to mention.”⁴⁴⁴ Before the Court’s decision, many states allowed same-sex marriage. While many more did not, the democratic process was working its way out.

When the 14th Amendment was ratified, every state limited marriage to opposite sex couples. “We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment’s text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment’s ratification.”⁴⁴⁵

The Court is operating legislatively. Federal judges were not selected to represent specific constituencies and do not represent a cross-section of the country. For example, four of the nine justices of the Supreme Court come from New York City; all studied law at Harvard or Yale; and none are Protestant.

At bottom, substantive due process stands for “freedoms and entitlements that this Court *really* likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court *really* dislikes.”⁴⁴⁶

Justice Thomas dissented, joined by Justice Scalia. “Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits.”⁴⁴⁷ The roots of liberty go back to Magna Carta, Blackstone, and John Locke. It meant “freedom from physical restraint.”⁴⁴⁸

Even assuming it meant more than this, the American understanding of liberty centers on “individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement.”⁴⁴⁹ In this connection, those challenging the law “do not ask this Court to order the States to stop restricting their ability to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children. The States have imposed no such restrictions. Nor have the States prevented petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney. Instead, the States have refused to grant them governmental entitlements,”⁴⁵⁰ such as, its

⁴⁴² *Id.* at 655.

⁴⁴³ 192 L.Ed. 2d at 655.

⁴⁴⁴ *Id.* at 656.

⁴⁴⁵ *Id.* at 657.

⁴⁴⁶ *Id.* at 660.

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.* at 663.

⁴⁴⁹ 192 L.Ed. 2d at 663.

⁴⁵⁰ *Id.* at 665.

symbolic “*imprimatur* on their marriages,”⁴⁵¹ and monetary benefits accruing from that imprimatur.

Had the Framers “recognized a natural right to marriage that fell within the broader definition of liberty, it would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have been left free to engage in—making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one’s spouse—without governmental interference.”⁴⁵² They understood marriage to predate government, not derived from it.

The precedents cited by the majority all involve negative liberty in that states were attempting to forbid marriage – in *Loving* and *Zablocki* under criminal penalty and in *Turner* by inmates. None of those cases solely denied “governmental recognition and benefits associated with marriage.”⁴⁵³

The majority also disregards the political process: 32 of the 35 states that have put this question to the people have retained the traditional definition of marriage.

Marriage is a religious not just a political institution. The decision also is on a collision course with religious liberty, “particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.”⁴⁵⁴

While the majority emphasizes “‘dignity,’”⁴⁵⁵ the Constitution has “no ‘dignity’ Clause.”⁴⁵⁶ Dignity is innate. Government can neither grant it or take it away.

Justice Alito dissented joined by Justices Scalia and Thomas. The Constitution leaves this question to the States. The majority overlooks “that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition.”⁴⁵⁷ The tradition links “to the one thing that only an opposite-sex couple can do: procreate.”⁴⁵⁸ The states “formalize and promote marriage, unlike other fulfilling human relationships,”⁴⁵⁹ to foster procreation and child-rearing.

Justice Alito also expressed concern about the impact of this decision on religious liberty. “I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.”⁴⁶⁰ Finally, he thought that the decision would adversely affect the rule of law. If the Court can invent new rights, the only real limit is

⁴⁵¹ *Id.*

⁴⁵² *Id.*

⁴⁵³ *Id.* at 666.

⁴⁵⁴ *Id.* at 668.

⁴⁵⁵ 192 L.Ed. 2d at 668.

⁴⁵⁶ *Id.* at 669.

⁴⁵⁷ *Id.* at 670.

⁴⁵⁸ *Id.* at 671.

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.* at 672-673.

the Justices’ “sense of what those with political power and cultural influence”⁴⁶¹ will tolerate.

§ 12.03 EQUALITY IN THE POLITICAL PROCESS

[2] Other Barriers to Political Participation: Apportionment, Ballot Access for Minority Parties, Gerrymandering

Page 502: Insert the following after League of United Latin Am. Citizens v. Perry.

In *Perry v. Perez*,⁴⁶² the Court rejected an interim redistricting plan from a three-judge Federal District Court sitting in Texas. Following the 2010 census, Texas received four additional congressional seats which required Texas to redraw its voting districts. Section 5 of the Voting Rights Act of 1965 requires a preclearance process in which either the Federal District Court for the District of Columbia or the Attorney General must approve all voter redistricting. Although this preclearance proceeding was still before the D.C. District Court, it became increasingly apparent that the state’s new plans would not be precleared before the 2012 primary elections. Consequently, the Federal District Court in Texas created an interim voter district plan. Texas disputed the interim plan fashioned by Texas’ District Court as being inconsistent with the plan submitted by the Texas legislature.

To avoid displacing legitimate state policy, a district court should be focused only on modifying the map submitted by a state to the extent necessary to comply with the United States Constitution and the Voting Rights Act. When a plan is challenged “under the Constitution or § 2 of the Voting Rights Act, a district court should still be guided by that plan, except to the extent those legal challenges are shown to have a likelihood of success on the merits.”⁴⁶³

The Court rejected the appellees’ argument that a federal court can ignore any state plan that has not received preclearance under § 5 of the Voting Rights Act. Instead, a federal court should “defer to the unobjectionable aspects of a State’s plan even though that plan had already been *denied* preclearance.”⁴⁶⁴ The District Court in Texas redrew a voter district in response to alleged constitutional violations, but did not say that those allegations were likely to succeed. As it was unclear if the District Court followed the appropriate standards in creating the interim plan, the orders implementing these maps were vacated, and the case was remanded. Justice Thomas concurred in the judgment.

⁴⁶¹ 192 L.Ed. 2d at 673.

⁴⁶² 132 S. Ct. 934 (2012) (per curiam).

⁴⁶³ *Id.* at 942.

⁴⁶⁴ *Id.*

CHAPTER 13

POLITICAL SPEECH AND ASSOCIATION

§13.05 ASSOCIATION, POLITICAL PARTIES, AND THE ELECTORAL PROCESS

[2] Judicial Elections

Page 543: Insert the following note after Republican Party of Minnesota v. White

*Williams-Yulee v. Fla. Bar*⁴⁶⁵ upheld a Florida ethical canon banning judicial candidates from personally soliciting campaign funds. Chief Justice Roberts delivered the opinion of the Court (except as to Part II), joined in full by Justices Breyer, Sotomayor and Kagan. Justice Ginsburg joined except as to Part II.

In 39 states, trial judges or appellate judges are elected. Many of those states prohibit judicial candidates from personally soliciting campaign funds. Even elected judges “are not politicians.”⁴⁶⁶ Consequently, electing the judiciary does not necessitate treating “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.”⁴⁶⁷ Under Florida’s “merit selection,”⁴⁶⁸ the governor selects appellate judges from a group proposed by a nominating committee; they then must run for retention in office every six years. Trial judges are elected every six years unless the local jurisdiction chooses merit selection. Following the American Bar Association’s model code of judicial conduct, Canon 7C(1) of the Florida Code of Judicial Ethics prohibits judicial candidates from personally soliciting funds. In addition Florida statutes limit contributions to trial judge candidates to \$1000 per election and \$3000 for Supreme Court candidates.

Plaintiff Yulee was a candidate for trial court, who signed a letter to prospective donors asking for contributions. After she lost the election, the Florida Bar disciplined Yulee for soliciting funds. The Florida Supreme Court adopted the recommendations of its referee that Yulee be publicly reprimanded and assessed the cost of the proceeding (\$1860).

Yulee asserted that the restriction violated the First Amendment. The Court adopted the rule that *Republican Party v. White*⁴⁶⁹ had assumed: government restrictions on the speech of judicial candidates must be “narrowly tailored to serve a compelling interest.”⁴⁷⁰ This was a rare case that passed this level of scrutiny. Canon 7C(1) serves the state interests of “protecting the integrity of the judiciary” and “maintaining the public’s confidence in an impartial judiciary.”⁴⁷¹ In “exercising strict neutrality and independence,”⁴⁷² judges “cannot supplicate

⁴⁶⁵ 135 S. Ct. 1656 (2015).

⁴⁶⁶ *Id.* at 1662.

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ 536 U.S. 765 (2002). This case is discussed *supra* § 13.05 [2].

⁴⁷⁰ 135 S. Ct. at 1664. While Justice Ginsburg did not join this part of the opinion and would not apply strict scrutiny, the four dissenters would. Thus, a clear majority of the Court applied strict scrutiny.

⁴⁷¹ 135 S. Ct. at 1666.

⁴⁷² *Id.*

campaign donors without diminishing public confidence in judicial integrity.”⁴⁷³ This principle dates back at least eight centuries to Magna Carta.

*Caperton v. A. T. Massey Coal Co.*⁴⁷⁴ emphasizes the “‘vital state interest’ in safeguarding ‘public confidence in the fairness and integrity of the nation’s elected judges.’”⁴⁷⁵ As Alexander Hamilton noted in Federalist No. 78, the judiciary lacks the power of “‘the sword or the purse.’”⁴⁷⁶ Hence it must rely on public confidence and “‘the appearance of justice.’”⁴⁷⁷ While restrictions on judicial candidates soliciting contributions lack deep historical roots, this inquiry is relevant in determining whether the speech is protected. The speech here is clearly protected. Nevertheless, Florida may restrict such personal solicitations to preserve the integrity and independence of the judiciary.

Unlike candidates for political office, judges should not be responsive to the interests of those who elected them. Instead, they must be fair, neutral, and independent. A state may also preserve the appearance of independence. The “risk”⁴⁷⁸ is placed in particular jeopardy when “most donors are lawyers and litigants who may appear before the judge they are supporting.”⁴⁷⁹ And, if they refuse a personal solicitations by a judicial candidate, “[p]otential litigants then fear that “‘the integrity of the judicial system has been compromised, forcing them to search for an attorney in part based upon””⁴⁸⁰ whether the attorney has contributed.

Yulee argues that the law is not narrowly tailored to serve that interest: first, it permits campaign committees to solicit such contributions. Second, it permits judicial candidates to write thank you notes to contributors ensuring knowledge about who contributed.

“It is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech.”⁴⁸¹ While “underinclusivity raises a red flag, the First Amendment imposes no freestanding ‘underinclusiveness limitation.’ 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.”⁴⁸²

Canon 7C(1) “aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary.”⁴⁸³ It pertains equitably to all solicitation by judicial candidates regardless of their viewpoint or solicitation method. Moreover, it contains no exceptions.

While campaign committees can still solicit funds, the stakes are higher when the judicial candidate does so personally. “[T]he same person who signed the fundraising letter might one

⁴⁷³ *Id.*

⁴⁷⁴ 556 U.S. 868 (2009). This case is discussed *supra* § 8.02.

⁴⁷⁵ 135 S. Ct. at 1666 (quoting *Caperton*, 556 U.S. 868, 889 (2009)).

⁴⁷⁶ 135 S. Ct. at 1659 (quoting The Federalist No. 78, p.465 (C. Rossiter ed. 1961)).

⁴⁷⁷ 135 S. Ct. at 1666 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

⁴⁷⁸ 135 S. Ct. at 1667.

⁴⁷⁹ *Id.* at 1667.

⁴⁸⁰ *Id.* at 1668 (quoting *Simes v. Arkansas Judicial Discipline & Disability Comm’n*, 368 Ark., 577, 585, 247 S.W. 3d 876, 882 (2007)).

⁴⁸¹ 135 S. Ct. at 1668.

⁴⁸² *Id.* (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 387 (1992)).

⁴⁸³ 135 S. Ct. at 1668.

day sign the judgment.”⁴⁸⁴ Permitting candidates to sign thank you notes is less central to the state's interest in the actual solicitation. It represents an accommodation between preserving judicial integrity and the realities of electoral politics.

While Florida permits judicial candidates to solicit personal loans or gifts, it will not permit such solicitation if the donor's intention is to influence the election. “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*.”⁴⁸⁵

At bottom, the principal dissent would allow a complete ban on the solicitations at issue, but not a partial one. “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,”⁴⁸⁶ particularly when “the selective restriction of speech”⁴⁸⁷ is not pretextual.

Canon 7C(1) only restricts a “narrow slice of speech.”⁴⁸⁸ It “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.”⁴⁸⁹

Yulee and the principal dissent concede the constitutionality of Canon 7C(1) across a broad swath of applications. The Chief Justice rejected their proposed more narrowly tailored exceptions.

These underplay “the breadth”⁴⁹⁰ of Florida's compelling state interest. They are also unworkable. For example, while plaintiff would accept a ban on in person solicitation, would that extend to a telephone call or text message? “We decline to wade into this swamp.”⁴⁹¹ The First Amendment requires narrow tailoring, not perfect tailoring. This is particularly true when the state is seeking to preserve an interest as intangible as public confidence in judicial integrity. Most states have drawn a line between personal solicitation and solicitation by committees.

The Chief Justice also rejected the proffered “less restrictive means of recusal rules and campaign contribution limits.”⁴⁹² Even with lower limits on campaign contribution, judges personally soliciting them would still give off the appearance of impropriety.

“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

⁴⁸⁴ *Id.* at 1669.

⁴⁸⁵ *Id.* at 1670.

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.* at 1670.

⁴⁸⁹ 135 S. Ct. at 1670.

⁴⁹⁰ *Id.* at 1671.

⁴⁹¹ *Id.*

⁴⁹² *Id.*

postelection recusal motions could ‘erode public confidence in judicial impartiality’ and thereby exacerbate the very appearance problem the State is trying to solve.”⁴⁹³ Moreover, such an expansion of recusal motions “could create a perverse incentive for litigants to make campaign contributions to judges solely as a means to trigger their later recusal”⁴⁹⁴ amounting to a kind of “preemptory strike”⁴⁹⁵ which would facilitate “forum shopping.”⁴⁹⁶

The Court was not here to solve the debate about the efficacy of judicial elections – in which Jefferson and Hamilton took opposing sides – but only to answer the narrow question before it.

Justice Breyer concurred. As he had stated before, Justice Breyer viewed “tiers of scrutiny as guidelines informing our approach to the case at hand, not tests to be mechanically applied.”⁴⁹⁷

Justice Ginsburg wrote an opinion, joined by Justice Breyer. She concurred in the Court's opinion except as to Part II. Justice Ginsburg would not have applied exacting scrutiny to the State's sensible rules differentiating between judicial and political elections. The states possess “substantial latitude”⁴⁹⁸ to fashion campaign finance rules to regulate such elections. As judges “are not politicians,”⁴⁹⁹ the Court’s campaign financing cases have little bearing here.

While she dissented from *Citizens United v. Federal Election Comm’n*,⁵⁰⁰ and *McCutcheon v. Federal Election Comm’n*,⁵⁰¹ those cases have little bearing to judicial elections. “‘Favoritism,’ i.e., partiality, if inevitable in the political arena, is disqualifying in the judiciary’s domain.”⁵⁰² Judges should be indifferent to constituent concerns and to popularity. “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.”⁵⁰³ She cited as examples campaign spending to oppose judges who have supported same-sex marriage and the rights of criminal defendants. “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.’”⁵⁰⁴ On appearance, one survey found that “87% of voters stated that advertisements purchased by interest groups”⁵⁰⁵ could exert “either ‘some’ or ‘a great deal of influence’ on an elected ‘judge’s later decisions.’”⁵⁰⁶

⁴⁹³ *Id.*

⁴⁹⁴ *Id.* at 1672.

⁴⁹⁵ 135 S. Ct. at 1672.

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.* at 1673.

⁴⁹⁸ *Id.*

⁴⁹⁹ *Id.* at 1673.

⁵⁰⁰ 558 U.S. 310 (2010). This case is discussed *infra* § 16.02.

⁵⁰¹ 134 S. Ct. 1434 (2014). This case is discussed *infra* § 16.02.

⁵⁰² 135 S. Ct. at 1674.

⁵⁰³ *Id.*

⁵⁰⁴ *Id.* at 1675.

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.* (quoting Justice at Stake/Brennan Center National Poll 3, Question 9 (October 22-24, 2013)).

The Constitution does not put states to the choice of treating judicial and popular elections the same or abandoning judicial elections. “Instead, States should have leeway to ‘balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary.’”⁵⁰⁷

Justice Scalia dissented joined by Justice Thomas. Speech is fully protected “unless a widespread and longstanding tradition ratifies its regulation. No such tradition looms here.”⁵⁰⁸ While judicial electioneering has taken place in the United States since 1812, the American Bar Association “first proposed a canon advising against it in 1972, and a canon prohibiting it only in 1990.”⁵⁰⁹ Today, 9 of the 39 states that have judicial elections permit judicial candidates to solicit contributions. “When a candidate asks someone for a campaign contribution, he tends (as the principal opinion acknowledges) also to talk about his qualifications for office and his views on public issues.”⁵¹⁰ This is speech at the heart of the First Amendment. Also, the ban favors incumbents, well-to-do candidates, and well-connected candidates who can readily secure fundraising committees. “This danger of legislated (or judicially imposed) favoritism is the very reason the First Amendment exists.”⁵¹¹

Even if the state has a compelling interest in the perception of impartiality and even assuming that a judicial candidate’s request to a litigant or attorney risks coercion, “Canon 7C(1) does not narrowly target concerns about impartiality or its appearance.”⁵¹²

The majority does not actually apply strict scrutiny. The majority does not identify any “evidence that banning requests for contributions will substantially improve public trust in judges.”⁵¹³ For most of our history, judicial elections existed without bans on personal solicitations for campaign contributions.

Florida fails to “show that the ban restricts no more speech than necessary to achieve the objective.”⁵¹⁴ The ban extends to soliciting contributions from “someone who (because of recusal rules) cannot possibly appear before the candidate as lawyer or litigant. Yulee thus may not call up an old friend, a cousin, or even her parents to ask for a donation to her campaign.”⁵¹⁵ Many “workable rules”⁵¹⁶ existed. The Court “could have held that States may regulate no more than solicitation of participants in pending cases, or solicitation of people who are likely to appear in the candidate’s court, or even solicitation of any lawyer or litigant. And it could have ruled that candidates have the right to make fundraising appeals that are not directed to any particular listener (like requests in mass-mailed letters), or at least fundraising appeals plainly

⁵⁰⁷ 135 S. Ct. at 1675 (quoting *Republican Party of Minnesota v. White*, 536 U.S. 765, 821 (2002) (Ginsburg, J., dissenting)).

⁵⁰⁸ 135 S. Ct. at 1676.

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.*

⁵¹¹ *Id.*

⁵¹² *Id.* at 1677.

⁵¹³ *Id.* at 1678.

⁵¹⁴ 135 S. Ct. at 1679.

⁵¹⁵ *Id.*

⁵¹⁶ *Id.*

directed to the general public (like requests placed online).”⁵¹⁷ For example, the Supreme Court of Florida “allows sitting judges to solicit memberships in civic organizations if (among other things) the solicitee is not ‘likely ever to appear before the court on which the judge serves.’”⁵¹⁸

Moreover, the majority left open many important questions. “Does the First Amendment permit restricting a candidate’s appearing at an event where somebody *else* asks for campaign funds on his behalf? Does it permit prohibiting the candidate’s *family* from making personal solicitations? Does it allow prohibiting the candidate from participating in the creation of a Web site that solicits funds, even if the candidate’s name does not appear next to the request? More broadly, could Florida ban thank-you notes to donors? Cap a candidate’s campaign spending? Restrict independent spending by people other than the candidate? Ban independent spending by corporations? And how, by the way, are judges supposed to decide whether these measures promote public confidence in judicial integrity, when the Court does not even have a consistent theory about what it means by ‘judicial integrity’?”⁵¹⁹

Finally, the ban discriminates between different types of speech based on its content. For example, while the ban “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.”⁵²⁰ The ban on content discrimination forbids targeting “a problem only in certain messages.”⁵²¹

While the Court professes no bias for or against judicial elections, its opinion suggests otherwise. “One cannot have judicial elections without judicial campaigns, and judicial campaigns without funds for campaigning, and funds for campaigning without asking for them.”⁵²²

Judicial elections are the public’s reaction to exerting control over a judiciary that could rule them. “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.”⁵²³ This decision sharply contrasts recent decisions protecting “depictions of animal torture, sale of violent video games to children, and lies about having won military medals.” One cannot allow speech abridgments “for the benefit of the Brotherhood of the Robe.”⁵²⁴

Justice Kennedy dissented. He largely agreed with Justice Scalia that the Court’s analysis contradicts settled First Amendment doctrine. Ironically, the majority lessens free speech protection for judicial candidates who must ultimately enforce those very protections. In the contexts of political speech and fair elections, the Court permits “unprecedented content-based

⁵¹⁷ *Id.*

⁵¹⁸ *Id.* (quoting Code of Judicial Conduct for the State of Florida 23 (2014) (Judicial Conduct Code)).

⁵¹⁹ 135 S. Ct. at 1680.

⁵²⁰ *Id.*

⁵²¹ *Id.* at 1681.

⁵²² *Id.*

⁵²³ *Id.* at 1682.

⁵²⁴ *Id.*

restrictions on speech.”⁵²⁵

The Court's decision turns on two premises. One is that in judicial elections, “the public lacks the necessary judgment to make an informed choice.”⁵²⁶ Two “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.”⁵²⁷

To the extent that the context of judicial electioneering presents legitimate concerns, disclosure laws about campaign solicitations, contributions, and financing can address those concerns. Finally, the law is nowhere close to being narrowly tailored. For precedential purposes, it eviscerates strict scrutiny.

Justice Alito dissented. “Florida has a compelling interest”⁵²⁸ in its courts deciding cases “impartially and in accordance with the law,”⁵²⁹ and in preserving citizen confidence in the courts. However, Florida's rule applies to solicitations made by the candidate in mass mailings or newspaper ads – even to a person who has no prospect of ever appearing before the candidate. If this rule is “narrowly tailored, then narrow tailoring has no meaning, and strict scrutiny, which is essential to the protection of free speech, is seriously impaired.”⁵³⁰

§ 13.07 FREE SPEECH PROBLEMS OF GOVERNMENT EMPLOYEES

[3] Employee’s Rights to Criticize Government

[a] Free Speech

Page 561: Insert the following on p. 561 after Garcetti v. Ceballos

*Lane v. Franks*⁵³¹ protected a public employee's First Amendment right to provide “truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities.”⁵³² A government employee alleged that he was fired in retaliation for testifying in a criminal proceeding about another employee at a public college where he had worked. Writing for the majority, Justice Sotomayor concluded that the First Amendment protected the employee’s right to testify on a matter of public concern, even though the employee learned the information in the course of performing his official duties as a public employee. Not only does the employee have an interest in conveying information, but also the public has an interest in receiving information about government workplaces. Countervailing these considerations is the government’s interest in maintaining the efficient operation of its workplace.

⁵²⁵ 135 S. Ct. at 1683.

⁵²⁶ *Id.*

⁵²⁷ *Id.*

⁵²⁸ *Id.* at 1685.

⁵²⁹ *Id.*

⁵³⁰ *Id.*

⁵³¹ 134 S. Ct. 2369 (2014).

⁵³² *Id.* at 2374.

*Garcetti v. Ceballos*⁵³³ used a two-part test to determine whether a public employee has a First Amendment retaliation claim for speech that resulted in an adverse employment action. The first part of the test inquires “ ‘whether the employee spoke as a citizen on a matter of public concern.’ ”⁵³⁴ On this issue, the Court determined that truthful testimony under oath supplied by an employee outside the scope of his employment is speech as a citizen, which is protected by the First Amendment, even if the testimony entails discussing his public employment or information gained during that employment.

It was undisputed that testifying in court was not part of the public employee’s official responsibilities. Justice Sotomayor reserved the question of “whether truthful sworn testimony would constitute speech under *Garcetti* when given as part of a public employer’s ordinary job duties.”⁵³⁵ Whether the speech concerns information that was acquired in the public employee’s workplace does not render the speech employee speech rather than citizen speech. The key 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.”⁵³⁶

In this case, the employee’s speech about corruption and misuse of funds involved a matter of public concern, which includes any community concern, such as political or social issues, or any matter of legitimate news interest, specifically a subject of general interest, value and concern to the public. The inquiry turns on the “ ‘content, form and context’ of the speech.”⁵³⁷ In this case, the content of the speech clearly involved a matter of public concern. The form of the speech—sworn testimony in a judicial proceeding—reinforced this conclusion.

The second question under *Garcetti* is a balancing test that asks whether “the government had ‘an adequate justification for treating the employee differently from any other member of the public’ ”⁵³⁸ based on the government’s needs as an employer to maintain an efficient workplace. The need for information about corruption is obvious. On the opposite side of the balance, government asserted no legitimate interests. The testimony was neither false nor erroneous. Nor did it involve unnecessary disclosure of “sensitive, confidential, or privileged information.”⁵³⁹ The Court, however, left open the question of whether the employee could be disciplined if his testimony had admitted wrongdoing.

Justice Thomas filed a concurring opinion joined by Justice Scalia. The Court left open the question whether when testifying in the course of his job responsibilities, a public employee speaks as a citizen. For instance, laboratory analysts, police officers, crime scene technicians, and others commonly testify as part of their employment. Other government employees may testify in a particular case as representatives of their employer under Federal Rule of Civil Procedure 30(b)(6).

⁵³³ 547 U.S. 410 (1991). This case is discussed *supra* § 13.07[3][a].

⁵³⁴ *Lane*, 134 S. Ct. at 2378 (quoting *Garcetti*, 547 U.S. at 418).

⁵³⁵ *Id.* at 2378 n. 4.

⁵³⁶ *Id.* at 2379.

⁵³⁷ *Id.* at 2380 (quoting *Connick v. Myers*, 461 U.S. 138, 147 (1983)).

⁵³⁸ *Id.* (quoting *Garcetti*, 547 U.S. at 418).

⁵³⁹ *Id.* at 2381.

CHAPTER 14

GOVERNMENT AND THE MEDIA: PRINT AND ELECTRONIC

§ 14.08 DEFAMATION AND PRIVACY

[1] Public Figures versus Private Individuals

Page 599: Insert the following after New York Times v. Sullivan

In *Air Wisconsin Airlines Corp. v. Hooper*,⁵⁴⁰ the Court interpreted the *New York Times v. Sullivan*⁵⁴¹ standard as requiring that a defamatory statement be materially false. The Aviation and Transportation Security Act (ATSA) granted immunity against civil liability to airlines and their employees for reporting suspicious activity. To receive immunity, the report had to comply with the *New York Times* standard.

Writing for the majority, Justice Sotomayor interpreted *New York Times* only to allow defamation suits for statements that are “materially false.”⁵⁴² Minor inaccuracies do not meet the test if the gist or the substance of the statement is correct. Moreover, the statement must “‘have a different effect on the mind of the reader from that which the pleaded truth would have produced.’”⁵⁴³ The Court made clear that while the standard for ATSA immunity is the same as the *New York Times* standard, a person making a false statement could be immunized under the ATSA, but not immunized from a defamation suit. For example, if a spouse reported that her adulterous husband was carrying a handgun on a plane, and he was carrying a gun but was not adulterous, the spouse was immunized from liability under ATSA but not from liability for defamation.

To supply guidance to the lower courts, the Court applied the materially false standard to itself. A statement could not be material “absent a substantial likelihood that a reasonable security officer would consider it important in determining a response to the supposed threat.”⁵⁴⁴ The Court did not decide whether the immunity determination was a legal question for the judge or a factual question for the jury. The majority concluded that the facts of this case were so clear-cut that *Air Wisconsin* was entitled to immunity as a matter of law.

The airline reported the employee could have a gun, was angry and was fired. While the employee was not yet fired when the airline issued this report to TSA, he was fired later that day. Moreover, the fact that the airline said it was worried about the employee’s mental status did not necessitate their finding mental illness; it was appropriate under the circumstances in which the employee had erupted in anger after he failed the flight simulator test for the fourth time. By mutual agreement, the employee would be fired if he failed to pass that test this time. When he could not perform a particular task, the employee tossed his headphones off, muttered

⁵⁴⁰ 134 S. Ct. 852 (2014).

⁵⁴¹ 376 U.S. 254 (1964). This case is discussed *supra* § 14.08.

⁵⁴² *Hooper*, 134 S. Ct. at 858.

⁵⁴³ *Id.* at 861 (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991)).

⁵⁴⁴ *Id.* at 864.

an expletive, and said he was being railroaded. Congress intended to encourage reporting threats to safety without worry of civil liability. Justice Scalia dissented in part and concurred in part, joined by Justices Thomas and Kagan. Justice Scalia concurred that immunity under the ATSA could be lost only for false statements. He also agreed with the majority's definition of materiality. However, Justice Scalia would remand the case to have the lower courts apply the facts to the standard. As a “ ‘ “mixed question of law and fact” ’ ”,⁵⁴⁵ materiality should be decided by the jury, and the reviewing court should only decide whether a reasonable jury could have found materiality existed. Similarly, the jury should decide qualified immunity.

The Court could only find a complete absence of false statements as a matter of law; viewing the facts in a light most favorable to the plaintiff, the jury was compelled to reach this conclusion. Such was not the case here. The record presented many factual questions. Rather than pose a threat owing to mental instability, the jury could review plaintiff's anger as being quite rational in light of his allegations that the test was unfairly administered, thus placing him in imminent danger of being fired. Indeed the instructor against whom plaintiff directed his anger did not view plaintiff as being dangerous, as the instructor authorized plaintiff to fly even after his display of anger. Under this record, a reasonable jury could have found that Air Wisconsin's allegation of dangerous mental instability was materially false.

⁵⁴⁵ *Id.* at 868 (Scalia, J., dissenting in part) (quoting *United States v. Gaudin*, 515 U.S. 506, 512 (1995)).

Chapter 15

SPEECH IN PUBLIC PLACES

§ 15.01 OFFENSIVE SPEECH IN PUBLIC PLACES

[1] General Principles

Page 611: Insert the following after Cohen v. California.

In *United States v. Alvarez*,⁵⁴⁶ the Court invalidated the Stolen Valor Act. Writing for the plurality, Justice Kennedy, joined by Chief Justice Roberts, Justice Ginsburg and Justice Sotomayor, stated that the statute restricted free speech. Alvarez admitted to violating the Act by falsely claiming to have won the Congressional Medal of Honor, America's highest military honor. The plurality subjected the Act to "exacting scrutiny"⁵⁴⁷ as it regulated the content of speech. Specifically, any person who falsely claimed a military decoration or medal could be fined or imprisoned. If the false claim involved the Congressional Medal of Honor, then the punishment was more severe. The plurality noted that the Court has permitted content-based restrictions in only a few categories of speech. These categories included incitement, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats and speech presenting an imminent threat the Government had the power to prevent. Moreover, the First Amendment had no general exception allowing the government to prohibit false statements.

The plurality rejected the government's argument that false statements had no value and therefore lacked First Amendment protection. Prior cases allowing the prohibition of false speech all found a legally cognizable harm associated with the false statement, and also held that the falsity of the speech alone was not outcome determinative. "The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection."⁵⁴⁸ The constitutionality of perjury statutes does not entail a broad lack of protection for false speech. Sometimes the falsity may determine whether the speech was protected, but this did not entail false speech never receiving protection.

The statute "applies to a false statement made at any time, in any place, to any person." It equally restricts lies made in public or during a personal conversation at home, and "does so without regard to whether the lie was made for the purpose of material gain."⁵⁴⁹ False statements made to commit fraud, or to secure money or other valuable considerations like employment, could be regulated.

While Government had an unquestionable interest in protecting the integrity of the Medal of Honor, the Government failed to show that false claims had diminished the public perception of the military honors the law was trying to protect. Moreover, the government had not demonstrated that counterspeech would have been insufficient to protect the integrity of the

⁵⁴⁶ 132 S. Ct. 2537 (2012).

⁵⁴⁷ *Id.* at 2543.

⁵⁴⁸ *Id.* at 2545.

⁵⁴⁹ *Id.* at 2547.

medal. Any restriction on protected speech must be the “least restrictive means among available, effective alternatives.” For example, the government could have created a database of Congressional Medal of Honor recipients on the internet to help expose false claims.

Justice Breyer, joined by Justice Kagan, concurred in the judgment, but disagreed with the plurality’s “strict categorical analysis.”⁵⁵⁰ Justice Breyer believed that the government could have achieved its goals using less restrictive means. Penalizing purportedly false speech presented the danger that the government could restrict truthful speech in areas such as philosophy, religion and the arts, which frequently required strict scrutiny. Consequently, Justice Breyer applied “intermediate scrutiny.”⁵⁵¹

That the statute only restricted lies diminished, but did not eliminate, its threat to free speech. Sometimes, false statements could serve useful objectives, such as protecting privacy, shielding a person from prejudice, or preserving calm in the face of danger. Thus, while the statute had substantial justification, the Court had to consider if the government could have achieved its objective in a less burdensome way. For example, the statute might have required a showing of actual harm, or focused on lies most likely to be harmful. Justice Breyer also agreed with the plurality, that more true information would typically counteract false statements and endorsed the alternative of creating a publicly available register of military awards. However, “the statute as presently drafted works disproportionate constitutional harm.”⁵⁵²

Justice Alito, joined by Justice Scalia and Justice Thomas, dissented. Congress reasonably concluded that the lies prohibited by the statute undermined the military honors and inflicted real harm on the actual medal recipients. Justice Alito said that “the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest.”⁵⁵³ False statements, such as fraud, defamation, and perjury, had been prohibited before the First Amendment was adopted. The First Amendment also allowed recovery for the torts of intentional infliction of emotional distress and false-light invasion of privacy. Moreover, it was a crime knowingly to make any fraudulent statement on any matter within the jurisdiction of the federal Government, or falsely to represent that one was speaking on its behalf. Ultimately, because the false statements proscribed in the Stolen Valor Act had no intrinsic value, they did not merit First Amendment protection.

[3] Sexually Offensive Speech

Page 622: Insert the following before § 15.02 SPEECH IN TRADITIONAL PUBLIC FORUMS: STREETS, SIDEWALKS, PARKS

In *FCC v. Fox*,⁵⁵⁴ the court voided FCC sanctions imposed on Fox and ABC for airing two isolated obscenities and one instance of brief nudity. The FCC had ruled that these events violated its new 2004 *Golden Globes* Order, even though all three broadcasts had aired before

⁵⁵⁰ *Id.* at 2551.

⁵⁵¹ *Id.*

⁵⁵² *Id.* at 2556.

⁵⁵³ *Id.* at 2557.

⁵⁵⁴ 132 S. Ct. 2307 (2012).

the order had been issued. Justice Kennedy explained that while any regulation could be void for vagueness, “rigorous adherence” to due process was particularly necessary when speech regulations were involved because of the danger of a chilling effect.⁵⁵⁵ The FCC had ruled for the first time in the *Golden Globes* Order that even “fleeting expletives and a brief moment of indecency were actionably indecent.”⁵⁵⁶ Since the three broadcasts at issue had occurred before the new order had been issued, the networks had no notice that the content was actionable.⁵⁵⁷ The resultant damage to Fox’s reputation and ABC’s fine of \$1.24 million entitled the networks to relief.⁵⁵⁸ The court rejected the networks’ argument that *FCC v. Pacifica Foundation*⁵⁵⁹ should be overruled entirely in light of technological advances that now provide viewers with more choices.⁵⁶⁰ Having held the FCC’s rulings void for lack of proper notice under the Due Process Clause, the Court found it unnecessary to address the constitutionality of the *Golden Globes* Order itself.⁵⁶¹ Justice Ginsburg concurred in the judgment, arguing that *Pacifica* had been incorrectly decided.⁵⁶²

§ 15.04 THE MODERN APPROACH: LIMITING SPEECH ACCORDING TO THE CHARACTER OF THE PROPERTY

[1] Classifying Public Property into Various Types of Public Forums

Page 638: Insert the following at the end of City of Ladue v. Gilleo

In *Reed v. Town of Gilbert*,⁵⁶³ the Town of Gilbert imposed more stringent restrictions on signs that directed people to meetings of nonprofit organizations, than it placed on other signs. The ordinance specifically described such signs as “Temporary Directional Sign Relating to a Qualifying Event.”⁵⁶⁴ Generally, the city prohibited signs without a permit; however, it exempted 23 categories of signs. Of the signs particularly relevant in this case, the city treated “Ideological Signs”⁵⁶⁵ best, allowing them to be up to 20 square feet. “Political Signs”⁵⁶⁶ for campaigns could be between 16 and 32 square feet and posted up to 60 days before an election and up to 15 days following an election. In contrast, “Temporary Directional Signs”⁵⁶⁷ could only be up to 6 square feet and displayed no more than 12 hours before an event and one hour following an event. Moreover, no more than four temporary event signs could be placed on a single property at any given time.

Before the present litigation, the city called the signs “Religious Assembly Temporary

⁵⁵⁵ *Id.* at 2317.

⁵⁵⁶ *Id.* at 2318.

⁵⁵⁷ *Id.* at 2320.

⁵⁵⁸ *Id.*

⁵⁵⁹ 438 U.S. 726 (1978).

⁵⁶⁰ 132 S. Ct. at 2320.

⁵⁶¹ *Id.*

⁵⁶² *Id.* at 2321.

⁵⁶³ 135 S. Ct. 2218 (2015).

⁵⁶⁴ *Id.* at 2224. (Gilbert, Ariz., Land Development Code (Sign Code or Code), Ch. 1 § 4.402 (P) (2005)).

⁵⁶⁵ *Id.*

⁵⁶⁶ *Id.*

⁵⁶⁷ *Id.*

Direction Signs.”⁵⁶⁸ It amended this title during the pendency of the litigation. Moreover, before the litigation, the code only allowed displaying the signs two hours prior to the event and did not allow their display in public right of ways, in contrast to political and ideological signs.⁵⁶⁹

Writing for the Court, Justice Thomas delineated a broad concept of content neutrality. Laws could facially violate content neutrality if they regulated based on “the topic discussed or the idea or message expressed.”⁵⁷⁰ A law could more subtly violate content neutrality if it regulated speech based on “its function or purpose.”⁵⁷¹ Even facially neutral laws could be unconstitutional if they could not be “justified without reference to the content,”⁵⁷² or were adopted by the government “because of disagreement with the message [the speech] conveys.”⁵⁷³

Here, the signage restrictions were facially content-based, as the type of regulations depended on the sign’s message. Strict scrutiny applied whether the statute was facially content-based or its motive was content-based. “Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute.”⁵⁷⁴

Viewpoint neutrality did not save the statute as “hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.”⁵⁷⁵ The distinction between ideological, political, and directional signs was a “paradigmatic example of content-based discrimination.”⁵⁷⁶ While the law was not speaker-based as it applied to both a business and a church advertising a church event, that is not enough to render it content neutral. The ordinance focused on “signs bearing a particular message: the time and location of a specific event.”⁵⁷⁷ Or, for example, during election time the law required officials to make a content distinction based on whether the message was ideological or supported a specific candidate.

As it was content-based, the law had to be narrowly tailored to advance a compelling state interest. Neither its rationale of aesthetics nor safety satisfied this test. Directional signs imposed no greater burden on aesthetics or safety than political or ideological signs.

Content neutral restrictions would have been permissible; for example, restrictions on the sign’s “size, building materials, lighting, moving parts, and portability.”⁵⁷⁸ Justice Thomas cited *Members of City Council of Los Angeles v. Taxpayers for Vincent*,⁵⁷⁹ as permitting government to broadly ban signs on public property. Moreover, “[a] sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning

⁵⁶⁸ *Id.* at 2225.

⁵⁶⁹ These restrictions were redefined twice during the pendency of the litigation.

⁵⁷⁰ 135 S. Ct. at 2222.

⁵⁷¹ *Id.*

⁵⁷² *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

⁵⁷³ *Id.*

⁵⁷⁴ 135 S. Ct. at 2229.

⁵⁷⁵ *Id.* at 2230. (quoting *Consolidated Edison Co. v. Public Service Comm’n*, 447 U.S. 530, 537 (1980).

⁵⁷⁶ 135 S. Ct. at 2230.

⁵⁷⁷ *Id.* at 2231.

⁵⁷⁸ *Id.* at 2232.

⁵⁷⁹ 466 U.S. 789 (1984). This case is discussed *supra* § 15.04.

signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny.”⁵⁸⁰

Justice Alito wrote a concurring opinion joined by Justices Kennedy and Sotomayor. Justice Alito gave a list of content neutral restrictions on signs:

“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.”⁵⁸¹

If these restrictions were akin to time, place, and manner restrictions, they had to be content neutral and narrowly tailored to advance a legitimate governmental interest.

Justice Breyer concurred in the judgment joined by Justice Kagan. While a viewpoint neutral law automatically triggered strict scrutiny, a content-based law did not. For him, “virtually all government activities involve speech.”⁵⁸² Moreover, regulations “almost always require content discrimination.”⁵⁸³ Examples which would not trigger strict scrutiny included content-based regulations: “of securities (requirements for content that must be included in a registration statement); of energy conservation labeling-practices, (requirements for content that must be included on labels of certain consumer electronics); of prescription drugs (requiring a prescription drug label to bear the symbol ‘Rx only’); of doctor-patient confidentiality (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 (requiring taxpayers

⁵⁸⁰ 135 S. Ct. at 2232.

⁵⁸¹ *Id.* at 2233.

⁵⁸² *Id.* at 2234.

⁵⁸³ *Id.*

to furnish information about foreign gifts received if the aggregate amount exceeds \$10,000); of commercial airplane briefings (requiring pilots to ensure that each passenger has been briefed on flight procedures, such as seatbelt fastening); of signs at petting zoos,”⁵⁸⁴ recommending people wash their hands.

Content discrimination which was viewpoint-based or restricted speech in a traditional public forum should weigh heavily against the law. Other content-based regulations should be evaluated according to whether they are “disproportionate in light of the relevant regulatory objectives.”⁵⁸⁵

In this case, regulation of signage along the roadside neither involved a traditional public forum nor was viewpoint-based. Consequently, Justice Breyer concurred in the judgment and would have invalidated the law for reasons set forth in Justice Kagan’s opinion.

Justice Kagan concurred in the judgment joined by Justices Ginsburg and Breyer. Justice Kagan was concerned that the Court’s broad-ranging opinion would jeopardize many laws – for example, laws marking historical landmarks, hidden driveways, or blind pedestrian crossings. The First Amendment is concerned with protecting the marketplace of ideas and protecting against viewpoint discrimination. The “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.’”⁵⁸⁶

The law at issue offers no basis for many of the distinctions that it makes. Consequently, it is unconstitutional without strict scrutiny. Justice Kagan would not have issued a broad-ranging restriction which jeopardized every sign ordinance containing a content-based exception.

Page 640: Insert the following at the end of Pleasant Grove City, Utah v. Summum

Walker v. Tex. Division, Sons of Confederate Veterans,⁵⁸⁷ allowed the state to reject messages with which it disagreed on specialty license plates, as license plates were government speech rather than public forums. Texas law allowed automobile owners to choose ordinary or specialty license plates. The specialty plates could be created in three ways. First, the legislature could create a design. Second, a state approved private vendor could create a design at the request of an individual or organization. Examples included: “Keller Indians”⁵⁸⁸ and “Get it Sold with RE/MAX.”⁵⁸⁹ Third, a nonprofit organization could offer a design for approval by the Texas Motor Vehicles Board. Among other grounds, the Board may refuse approval on grounds that the design was offensive to any member of the public.

At issue was a design with the words “SONS OF CONFEDERATE VETERANS”⁵⁹⁰ on

⁵⁸⁴ *Id.* at 2235.

⁵⁸⁵ *Id.* at 2235-36.

⁵⁸⁶ 135 S. Ct. at 2238. (quoting *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177,188 (2007)).

⁵⁸⁷ 135 S. Ct. 2239 (2015).

⁵⁸⁸ *Id.* at 2244.

⁵⁸⁹ *Id.* at 2244.

⁵⁹⁰ *Id.* at 2245.

the license plate. “At the side was the organization’s logo, a square Confederate battle flag framed by the words ‘Sons of Confederate Veterans 1896.’”⁵⁹¹ A faint Confederate battle flag was the background for the lower portion of the plate. As with all plates, the name of the state and its map also appeared.

Justice Breyer stated that the Speech Clause permitted government to determine the content of its own speech. Through elections, the public could check government speech that it disliked and normally First Amendment protections did not apply. This is necessary for government to work. Otherwise, for example, if it wishes to institute a recycling program, government would have to include a contrary view articulated by a local trash business. The Free Speech Clause may prohibit government from forcing a private individual to convey government speech. Government speech is also subject to other constitutional restrictions.

The Court relied on *Pleasant Grove City, Utah v. Summum*⁵⁹², which allowed the government to refuse displaying in a city park a monument offered by a religious organization. The city had allowed other monuments in the park including one relating to September 11 and another to the 10 Commandments— all donated by private individuals. The Court considered displays of monuments government speech. As the city retained control over which private monuments to display in the park, the city had not created a public forum to display monuments donated by private entities.

First, analogous to city parks, governments, including Texas, had long used license plates to convey its messages. Second, as with monuments in city parks, the public frequently treated license plate messages as having government endorsement. If people did not think this, they would not have sought to put their messages on license plates, but simply use bumper stickers. Third, as with the park in *Summum*, “Texas maintains direct control over the messages conveyed on its specialty plates.”⁵⁹³

There are some distinctions. Unlike messages on license plates, parks could only accommodate a limited number of monuments. The park in *Summum* was 2.5 acres. More importantly, license plates presented a more compelling case to allow government to limit messages: parks were traditional public forums whereas license plates were not.

The parties agreed that license plates were not traditional public forums. They were not public forums by designation; nor were they limited public forums as the government had not intentionally opened them up for public discourse. The Court made this determination by examining the government’s “policy and practice”⁵⁹⁴ and “the nature of the property and its compatibility with expressive activity.”⁵⁹⁵ First, Texas controlled license plate design; second, it owned the design; third, it used license plates for government speech for identification and the State’s name.

⁵⁹¹ *Id.* at 2245.

⁵⁹² 555 U.S. 460 (2009). This case is discussed *supra* § 15.04.

⁵⁹³ *Walker*, 135 S. Ct., at 2249.

⁵⁹⁴ *Id.* at 2250. (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985)).

⁵⁹⁵ *Id.*

Nor were license plates nonpublic forums, where government merely managed the property: again analogizing to *Summum*, Texas’s specialty license plate designs “‘are meant to convey and have the effect of conveying a government message.’”⁵⁹⁶ Hence, license plates were government speech. The number of messages Texas allows on license plates did not alter this conclusion. Nor did the fact that specialty license plate holders paid a fee.

*Wooley v. Maynard*⁵⁹⁷ recognized that license plate messages “also implicate the free speech rights of private persons.”⁵⁹⁸ But under *Wooley*, “just as Texas cannot require SCV to convey ‘the State’s ideological message,’ SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.”⁵⁹⁹

Justice Alito dissented, joined by the Chief Justice, Justice Scalia, and Justice Kennedy. By re-characterizing “private speech as government speech,”⁶⁰⁰ the Court “threatens private speech that government finds displeasing.”⁶⁰¹ Someone who views the license plates as cars pass by would not assume that any of those messages were attributable to the State. For example, does a license plate stating “‘Rather Be Golfing’”⁶⁰² prompt an observer to think that is an official government message? Texas profits from specialty license plates allowing motorists to select among 350 messages. The State has converted license plates into “‘little billboards,’”⁶⁰³ rejecting a message that it finds offensive. This is “‘viewpoint discrimination.’”⁶⁰⁴ Could the State do the same thing on actual highway billboards that it owns?

Originally, the Board voted 4-4 on the SCV plate with one member absent. At a subsequent meeting, the Board unanimously rejected the license plate at issue because many people testified that they would find it offensive. The Board also thought that such offensiveness could cause public disturbances and safety issues. At that same meeting, the Board approved a “Buffalo Soldiers”⁶⁰⁵ license plate by a vote of 5-3; the name was used to refer to a black Civil War Regiment and later applied to other black soldiers. However, as the name “Buffalo Soldiers”⁶⁰⁶ originally applied to those who fought in the Indian wars, this plate was opposed by some Native Americans who said it offended them in the same way that the SCV plate offended African-Americans.

The majority relied almost exclusively on *Summum*, which Justice Alito distinguished on three bases. First, governments have long expressed messages through monuments. For most of the history of license plates, private messages were not permitted, thus impairing their treatment as government speech. Second, there is no history of public parks being thrown open to whatever monuments people wanted to put there. In contrast to *Summum*, the license plate

⁵⁹⁶ *Id.* at 2251. (quoting *Summum*, 555 U.S., at 472).

⁵⁹⁷ 430 U.S. 705 (1977). This case is discussed *infra* § 17.05.

⁵⁹⁸ *Walker*, 135 S. Ct., at 2252. (quoting *Wooley*, 430 U.S., at 705).

⁵⁹⁹ *Id.* at 2253. (quoting *Wooley*, 430 U.S., at 715).

⁶⁰⁰ *Walker*, 135 S. Ct., at 2254.

⁶⁰¹ *Id.*

⁶⁰² *Id.* at 2255.

⁶⁰³ *Id.* at 2256.

⁶⁰⁴ *Id.*

⁶⁰⁵ *Id.* at 2258.

⁶⁰⁶ *Walker*, 135 S. Ct., at 2258.

program “is *not* selective by design”⁶⁰⁷ as its main purpose is generating revenues. That people desire their messages placed on license plates rather than bumper stickers does not transform these messages into government speech: “There is a big difference between government speech (that is, speech by the government in furtherance of its programs) and governmental blessing (or condemnation) of private speech.”⁶⁰⁸ Third, spatial limitations capped the number of monuments. “Texas has space available on millions of little mobile billboards.”⁶⁰⁹ It “sells that space to those who”⁶¹⁰ wish to express a message that the State finds acceptable. “That is not government speech; it is the regulation of private speech.”⁶¹¹

The plates constituted a limited public forum. Texas’s rationale of averting a disturbance did not satisfy strict scrutiny necessary to overcome viewpoint discrimination.

[2] Reasonable Time Place and Manner Restrictions

Page 649: Insert the following after Hill v. Colorado

In *McCullen v. Coakley*,⁶¹² the Court unanimously invalidated a Massachusetts law that dramatically limited the activities of sidewalk counselors around abortion clinics. The law excluded individuals from entering a 35-foot zone except: (1) those entering or leaving the clinic; (2) the clinic’s employees; (3) municipal officers such as police, firefighters, etc.; and (4) others using the sidewalks to reach a destination. A first violation of the statute resulted in a fine of up to \$500, up to three months in prison, or both. A subsequent offense was punishable by a fine from \$500 to \$5,000, up to two and a half years in prison, or both. Application of the law varied depending upon the geography of the relevant clinic. For instance, at one clinic, the law resulted in an exclusion zone that encompassed a 56-foot-wide portion of the public sidewalk in front of the clinic. Another clinic’s geography resulted in protestors being excluded from a 70-foot expanse. A third clinic’s posting and counseling free zone was 100-feet wide. Government may regulate traditional public forums by imposing content-neutral reasonable time, place or manner restrictions, if “ ‘they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication.’ ”⁶¹³

Chief Justice Roberts found the law content neutral. Violating the Massachusetts law hinged not on what a person says, but on where the speaker says it. The key question was “whether the law is ‘ ‘justified without reference to the content of the regulated speech.’ ”⁶¹⁴ The law sought to ensure “ ‘public safety, patient access to healthcare,’ ”⁶¹⁵ and unobstructed sidewalks and roadways. Had the law sought to avoid offense to listeners, it would not have been content neutral. Although the law did single out abortion clinics, the state had compiled “a

⁶⁰⁷ *Id.* at 2260.

⁶⁰⁸ *Id.* at 2261.

⁶⁰⁹ *Id.* at 2262.

⁶¹⁰ *Id.*

⁶¹¹ *Id.*

⁶¹² 134 S. Ct. 2518 (2014).

⁶¹³ *Id.* at 2529 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

⁶¹⁴ *Id.* (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)).

⁶¹⁵ *Id.* at 2531.

record of crowding, obstruction, and even violence”⁶¹⁶ that was unique to such clinics.

The plaintiffs complained about discrimination in the act of allowing clinic escorts to speak about abortion within the buffer zone while disallowing others to do so. The Chief Justice rejected this argument. If these activities occurred within the buffer zones and were beyond the scope of their employment, they would not go to a facial challenge but rather to selective enforcement in official viewpoint discrimination, which petitioners failed to allege. If clinics permitted escorts to speak about abortion within the buffer zones, however, the employee exemption would then clearly be facilitating viewpoint discrimination.

The Court refused to analyze the law under strict scrutiny, as it was neither content nor viewpoint based. Nevertheless, the Court invalidated the law as it was not “ ‘narrowly tailored to serve a significant governmental interest.’ ”⁶¹⁷ By forcing protestors far back from abortion clinic entrances and driveways, the Act compromised plaintiffs’ ability to engage in close, intimate conversations, which they viewed as crucial to their counseling efforts. Plaintiffs reported precipitous declines in their abilities to convince women not to have an abortion. One reported having convinced 100 women not to have an abortion before the passage of the Act in 2007, and not one since. Another plaintiff testified that only one in 100 women will cross the street to speak with her outside the buffer zones. Similar testimony also suggested a dramatically adverse effect on distributing handbills.

The Act burdened significantly more speech than necessary to achieve Massachusetts’ proffered objectives. As about a dozen other states have, Massachusetts could have adopted a measure like the federal Freedom of Access to Clinic Entrances Act, “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.’ ”⁶¹⁸

The Court discussed other alternatives, though it did not specifically approve any of them. For example, Massachusetts could have adopted a New York City ordinance “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.’ ”⁶¹⁹ Other alternatives include statutes prohibiting solicitation, obstruction of the streets and sidewalks, and general criminal statutes that prohibit assault, breach of the peace, and trespass. Many of these statutes can be enforced through civil action for injunctions. In *Madsen v. Women’s Health Ctr.*,⁶²⁰ the Court discussed the virtues of injunctions as alternatives to expansive, prophylactic actions. Moreover, as injunctions are equitable remedies, courts can tailor them to restrict the minimal amount of speech necessary to remedy a specific problem. Although Massachusetts argued that the other alternatives simply did not work, they failed to identify any prosecutions

⁶¹⁶ *Id.* at 2532.

⁶¹⁷ *Id.* (quoting *Ward*, 491 U.S. at 791).

⁶¹⁸ *Id.* at 2537 (quoting 18 U.S.C. § 248(a)(1)).

⁶¹⁹ *Id.* at 2538 (quoting N. Y. C. Admin. Code § 8-803(a)(3) (2014)).

⁶²⁰ 512 U.S. 753 (1992). This case is discussed *supra* § 15.04[1].

brought under pre-existing laws for 17 years and no injunctions since the 1990s.

Rejecting Massachusetts' assertion that the Act was easier to enforce, the Court stated that the First Amendment was not primarily concerned with efficiency. The Court also distinguished *Burson v. Freeman*,⁶²¹ which upheld a 100-foot prophylactic buffer zone around polling places, to counteract the subtlety of " '[v]oter intimidation and election fraud.' "⁶²² The Court's action obviated the need to consider plaintiff's overbreadth challenge or whether the Act left open sufficient "alternative channels of communication."⁶²³

Justice Scalia concurred in the judgment, joined by Justices Kennedy and Thomas. The majority opinion continued the "Court's practice of giving abortion-rights advocates a pass."⁶²⁴ The Act's entire purpose was to inhibit anti-abortion speech. The fact that the Court only addresses problems that occurred outside one abortion clinic suggests that the law was not concerned with the problems at all but instead was suppressing anti-abortion speech. That the Act is only directed at speech on a specific subject further evidences its' being content based. "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.' "⁶²⁵ Similar to *Hill v. Colorado*,⁶²⁶ the Act strove to protect citizens' alleged right to avoid speech that they desire to not hear. The First Amendment does not allow this in public streets and sidewalks.

Justice Scalia disputed the Court's assumption that abortion-clinic employees and agents—who are exempt from the Act's buffer zones—would refrain from speaking in favor of abortion. The Court also failed to establish that clinic employees refrained from nonspeech activities to suppress antiabortion speech by hampering counselors from speaking to prospective clients. Open viewpoint discrimination is not mitigated "simply because the favored side chooses voluntarily to abstain from activity that the statute permits."⁶²⁷ The Act's true purpose was to shield clients of abortion clinics from anti-abortion speech on public streets and sidewalks.

Justice Alito concurred in the judgment. He thought that the law discriminated based on the speaker's viewpoint. Suppose that there was a recent report of a botched abortion at the clinic. A nonemployee would be forbidden from entering the buffer zone to warn about the clinic's health record. An abortion clinic employee, however, would be allowed to enter the zone and inform clients that the clinic was safe. The majority treated the Act as forbidding all speech within buffer zones. Even assuming the law did ban all speech, there are circumstances when it would be content neutral on its face, but not content neutral in fact. Suppose, for example, that a facially content-neutral law is enacted for the purpose of suppressing speech on a

⁶²¹ 504 U.S. 191 (1992). This case is discussed *supra* §§ 15.04[2], 15.02, 14.01.

⁶²² *McCullen*, 134 S. Ct. at 2540 (quoting *Burson v. Freeman*, 504 U.S. 191, 208 (1992)).

⁶²³ *Id.* at 2540, n.9.

⁶²⁴ *Id.* at 2543 (Scalia, J., concurring).

⁶²⁵ *Id.* at 2545.

⁶²⁶ 530 U.S. 703 (2000). This case is discussed *supra* § 15.04[2].

⁶²⁷ *McCullen*, 134 S. Ct. at 2547 (Scalia, J., concurring).

particular topic. Such a law, according to Justice Alito, would fail to be content neutral.

Because of the law's flagrant viewpoint discrimination, and the overbreadth that the majority identified, Justice Alito resolved that the law could not be considered content neutral even if the exemption for clinic employees and agents were expunged. If the law truly was content neutral, it would still be unconstitutional, as the Court notes, in burdening more speech than is required to serve Massachusetts's proffered interests.

In *United States v. Apel*,⁶²⁸ a protester was arrested and fined after being excluded from a military base by the base commander. Chief Justice Roberts held that 18 U.S.C.S. § 1382 defines the boundaries of a military base as the area of the base commander's responsibility. Opening part of the base to the public by allowing them to use the road for establishing a school, a bus stop, or the protest area does not alter the boundaries of the base. Opinions in the U.S. Attorney's Manual and by the Air Force Judge Advocate General defining a military base by exclusive possession did not alter the Court's construction of the statutory language.

Concurring, Justice Ginsburg, joined by Justice Sotomayor, agreed that the Court should not reach the First Amendment issues below. However, by opening up part of the base for protest, the government had created a limited public forum requiring the restrictions on protesting be narrowly tailored to serve a significant government interest. The Air Force's stated interest in base security might be impaired by the Air Force's permitting the public to traverse the road through the base and allowing access to the middle school, bus stop, and visitor center. All were located very near the designated protest area. Justice Alito also concurred. The Court's failure to address First Amendment issues demonstrated that the Court neither agreed nor disagreed with Justice Ginsburg's concurrence.

In *Wood v. Moss*,⁶²⁹ a unanimous Supreme Court sustained a motion to dismiss a *Bivens* action brought against Secret Service agents. Plaintiffs allege that the Secret Service had engaged in unconstitutional viewpoint discrimination by moving protesters out of earshot and sight of President George W. Bush while not moving supporters of President Bush.

As in prior decisions, the Court assumed without deciding that implied constitutional actions under *Bivens v. Six Unknown Fed. Narcotics Agents*⁶³⁰ applied to First Amendment violations. Nevertheless, the Court held that no *Bivens* action existed on the facts of this case. The agents had qualified immunity as their activities did not violate any statutory or constitutional right that “ ‘was “clearly established” at the time of the challenged conduct.’ ”⁶³¹

Courts have provided qualified immunity for Secret Service agents in view of the extremely important interest in protecting the President. No precedent suggested that during an unanticipated security situation, Secret Service agents had to keep protestors and supporters equivalent distances from reaching the President. Nor did any precedent suggest that the First Amendment requires Secret Service agents engaged in crowd control “ ‘to ensure that groups

⁶²⁸ 134 S. Ct. 1144 (2014).

⁶²⁹ 134 S. Ct. 2056 (2014).

⁶³⁰ 403 U.S. 388 (1971).

⁶³¹ *Wood*, 134 S. Ct. at 2067.

with different viewpoints are at comparable locations at all times.’ ”⁶³² The protestors were moved away from a position in which they had a clear sight line to the patio on which the President was having dinner. The President’s supporters’ sight was blocked by a large building. Valid security reasons undermined plaintiffs’ argument that they were moved solely because of their viewpoint.

Writing for the Court, Justice Ginsburg rejected plaintiffs’ argument that the Secret Service discriminated against them because they failed to even check the other guests at the inn at which the President made an impromptu stop to have dinner. Since the President made an impromptu stop, the other guests could not have anticipated his presence at the restaurant. Moreover, the Secret Service could easily keep the small group on the patio under surveillance in sharp contrast to the 200 to 300 protestors. Finally, the Court refused to consider plaintiffs’ allegations that the Secret Service had at times discriminated against protesters based on viewpoint. Only the actions of the particular Secret Service before the Court were at issue.

⁶³² *Id.* at 2068.

Chapter 16

SPECIAL DOCTRINES IN THE SYSTEM OF FREEDOM OF EXPRESSION

§ 16.02 EXPENDITURES OF MONEY IN THE POLITICAL ARENA

Page 694: Insert the following after Ysura v. Pocatello Education

In *Harris v. Quinn*,⁶³³ the Court refused to extend *Abood v. Detroit Bd. of Ed.*⁶³⁴ to home caregivers funded by the State of Illinois and Medicare. The *Abood* Court had held that state employees who elected not to join a public-sector union could still be forced to pay an agency fee to support union work that concerns the collective bargaining process. The Court distinguished “a union’s expenditures for ‘collective-bargaining, contact administration, and grievance-adjustment purposes,’ ”⁶³⁵ from their “expenditures for political or ideological purposes.”⁶³⁶

Writing for the majority, Justice Alito stated that *Abood* underestimated the difficulty of distinguishing between the union’s ideological and collective bargaining activities because, in the public sector, both are directed at the government. Consequently, the Court refused to extend *Abood* to personal caregivers funded by Illinois and Medicare. Such individuals are hired, supervised, and fired by the individual customer to whom they give care. As the *Abood* rule is problematical, Justice Alito refused to extend it to these individuals who were not full state employees. In conclusion, the majority emphasized that it is a “bedrock”⁶³⁷ First Amendment principle that, except in extremely rare circumstances, no person may be forced to subsidize a third-party’s speech.

Justice Kagan dissented, joined by Justices Ginsburg, Breyer, and Sotomayor. Justice Kagan maintained that employees should pay for collective bargaining activities that the union undertakes on their behalf. The dissent characterized personal caregivers as joint public employees to whom *Abood* should apply. The agency fee is justified by “ ‘the fact that the State compels the union to promote and protect the interests of nonmembers.’ ”⁶³⁸ The dissent strongly disagreed with the majority’s extensive dicta critiquing *Abood*. At least the majority did not find a basis to overrule *Abood*.

In *McCutcheon v. FEC*,⁶³⁹ the Court struck down the aggregate limitations on how much

⁶³³ 134 S. Ct. 2618 (2014).

⁶³⁴ 431 U.S. 209 (1977). This case is discussed *supra* § 16.02.

⁶³⁵ *Harris*, 134 S. Ct. at 2632.

⁶³⁶ *Id.* at 2632 (quoting *Abood*, 431 U.S. at 236).

⁶³⁷ *Id.* at 2644.

⁶³⁸ *Id.* at 2657 (Kagan, J., dissenting).

⁶³⁹ 134 S. Ct. 1434 (2014).

individuals and certain entities could give as political contributions over a particular period of time. Writing for a plurality of four, Chief Justice Roberts initially noted that while generally government can regulate campaign financing to prevent corruption and the appearance of corruption, precedent contrasted “ ‘quid pro quo’ ”⁶⁴⁰ exchanges for money, which government could regulate, with “[i]ngratiation and access,”⁶⁴¹ which, as part of the democratic process, regulations may not target. The Bipartisan Campaign Reform Act (BCRA) § 441a(a)(3) limited the amount that individuals could contribute to an aggregate total of \$123,200, with a maximum of \$48,600 to federal candidates and \$74,600 to other political committees including PACs. The aggregate limits were in addition to limits on individual contributions.⁶⁴²

In upholding aggregate contribution limits, the *Buckley v. Valeo*⁶⁴³ Court determined: “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.”⁶⁴⁴ However, the *Buckley* Court considered such ceiling a “modest restraint”⁶⁴⁵ that validly served to prevent circumvention of the contribution limitation by individuals 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 plurality in *McCutcheon* stated that it was not bound by these three sentences written “without the benefit of full briefing or argument on the issue.”⁶⁴⁶ Moreover, *McCutcheon* involved a new statutory scheme. After *Buckley*, Congress had limited contributions to political committees; Congress also prohibited donors from creating or controlling multiple PACs, which could have been used as a tool for circumvention. Although earmarking regulations existed when *Buckley* was decided, Congress broadened them to make more difficult earmarking to a particular candidate through conduits. Chief Justice Roberts disagreed with *Buckley*’s characterization of the aggregate contribution limitations as “‘modest’”⁶⁴⁷ as it constrained how many candidates, committees, or policy concerns an individual could support.

The only interest upon which the plurality would uphold the law was actual corruption or the appearance of corruption. The plurality defined corruption narrowly to *quid pro quo* corruption. The plurality saw no need to determine whether the aggregate contribution limitation should be analyzed under the compelling state interest standard that *Buckley* applied to campaign expenditures or the “sufficiently important” test applied to contributions. Avoiding *quid pro quo* corruption satisfied both tests. Under either test, the Court must assess the fit between the means selected and the government interest to “‘avoid unnecessary abridgement’ of First Amendment rights.” The “substantial mismatch” between the government interests and the

⁶⁴⁰ *Id.* at 1441.

⁶⁴¹ *Id.*

⁶⁴² For the 2013-2014 election cycle, BCRA permitted “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.’” *Id.* at 1442.

⁶⁴³ 424 U.S. 1 (1976). This case is discussed *supra* § 16.02.

⁶⁴⁴ *McCutcheon*, 134 S. Ct. at 1445 (quoting *Buckley*, 424 U.S. at 38).

⁶⁴⁵ *Id.* (quoting *Buckley*, 424 U.S. at 38).

⁶⁴⁶ *Id.* at 1447.

⁶⁴⁷ *Id.* at 1448.

means selected make the law fail even the more lenient “‘closely drawn’ test.”

In its individual contribution limitations, Congress had already determined that \$5200 was the threshold for corruption. If Congress thought that there was no danger of corruption beyond that amount, then Congress had to defend its aggregate limits on circumvention grounds rather than on corruption grounds. But, circumvention was rendered improbable by various earmarking restrictions. For example, once the donor reached his \$5200 threshold for a particular candidate, the donor could not give an additional contribution to a PAC that only supported that candidate, or one that the donor knew would direct “‘a substantial portion’ ”⁶⁴⁸ to that candidate. Also, the donor could only contribute \$5000 to the PAC. The PAC is also limited to \$2600 in how much it could give in each election to a particular candidate. All this diminished the possibility of corruption or its appearance.

Turning to the District Court’s example of a \$500,000 gift to a joint committee, an individual donor could give to a joint committee comprised of national and state committees, and then all of the committees comprising the joint committee could turn around and give this money to one committee. However, the donor could not telegraph his desire to earmark the gift to a particular candidate.⁶⁴⁹ Moreover, that state committees would funnel funds given them to committees in other states was highly improbable.⁶⁵⁰

The plurality opinion did suggest certain alternative measures that might be used to avoid channeling large sums to a small group of candidates even though “currently no such limits on transfers among party committees and from candidates to party committees”⁶⁵¹ exist. One possible restriction would be to require contributions above the current aggregate limits to be deposited into segregated, nontransferable accounts and spent only by their recipients. Another possibility would be to require any donations made to joint committees to be spent by the joint committee, and further restrict earmarking. Alternatively, donors who had already given the maximum contributions to particular candidates could be prohibited from additional contributions to PACs that have indicated they will support the same candidates. The Chief Justice cautioned, however, that the plurality was not constitutionally pre-approving any of these ideas. The plurality also noted that disclosure is a more effective alternative in an Internet world than it was when *Buckley* was decided. Organizations like Open-Secrets.org and FollowTheMoney.org have rendered disclosure far more effective.

The plurality also rejected the argument that contributions of a large check to an individual legislator presented an opportunity for corruption, even when the check was divided among other candidates, the political party, and PACs who supported that party. But, the plurality had “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

⁶⁴⁸ *Id.* at 1459.

⁶⁴⁹ The \$500,000 example was designed around contributions to a presidential candidate, not just any candidate.

⁶⁵⁰ In 2012, PACs spent \$7 billion on political campaigns. At the same time, the four Democratic and Republican senatorial and congressional committees “spent less than \$1 million each on direct candidate contributions and less than \$10 million each on coordinated expenditures.” *Id.* at 1457. Even if a donor gave \$2600 to each of 100 congressmen who are in safe races in hopes that each would reroute \$2000 to one particular candidate in a contested race, only one donor could do this. This is because for that particular election cycle, the 100 congressmen would have reached their contribution limits to the single congressman in the contested race.

⁶⁵¹ *McCutcheon*, 134 S.Ct. at 1458.

add up to a large sum.”⁶⁵² While it also burdened speech, disclosure of contributions was also a less restrictive alternative than limiting aggregate contributions. In summary, campaign finance jurisprudence should focus “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.”⁶⁵³

Concurring in the judgment, Justice Thomas reiterated his view that individual contribution limitations were also invalid. The plurality’s rationale for striking down aggregate contribution limitations could not be squared with *Buckley*’s basic rationale for allowing any contribution limitations at all. The plurality’s decision effectively continued to chip away at *Buckley*’s upholding contribution limitations.

Justice Breyer dissented, joined by Justices Ginsburg, Sotomayor, and Kagan. The dissent argued that the plurality created a loophole permitting “a single individual to contribute millions”⁶⁵⁴ to a party or candidate. With *Citizens United v. Federal Election Comm’n*,⁶⁵⁵ the plurality “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.”⁶⁵⁶ The plurality’s narrow definition of corruption, as *quid pro quo* corruption or bribery, which excluded influence and access, was inconsistent with prior case law including *McConnell v. FEC*.⁶⁵⁷ In prior cases, the Court understood corruption “‘not only as quid pro quo agreements, but also as undue influence on an officeholder’s judgment.’”⁶⁵⁸ In *Nixon v. Shrink Missouri*,⁶⁵⁹ the Court upheld limitations on contributions “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.’”⁶⁶⁰

The *McConnell* Court articulated corruption concerns that went far beyond the plurality’s narrow approach: “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.”⁶⁶¹ Moreover, the *McConnell* Court relied on the District Court’s extensive record of over 100,000 pages and over 200 witnesses that carefully depicted the extensive “web of relationships and understandings among parties, candidates, and large donors that underlies privileged access and influence.”⁶⁶² In that extensive record, there was not one instance of a bribe. Finally, *Citizens United* does contain some language supporting the plurality’s definition of corruption. But not a single opinion in *Citizens United* interpreted this language as overruling *McConnell*.

⁶⁵² *Id.* at 1461.

⁶⁵³ *Id.*

⁶⁵⁴ *Id.* at 1465. (Breyer, J., dissenting).

⁶⁵⁵ 558 U.S. 310 (2010). This case is discussed *supra* § 16.02.

⁶⁵⁶ *McCutcheon*, 134 S. Ct. at 1465 (Breyer, J., dissenting).

⁶⁵⁷ 540 U.S. 93 (2003). This case is discussed *supra* § 16.02.

⁶⁵⁸ *McCutcheon*, 134 S. Ct. at 1469.

⁶⁵⁹ 528 U.S. 377 (2000). This case is discussed *supra* § 16.02.

⁶⁶⁰ *McCutcheon*, 134 S. Ct. at 1469 (quoting *Nixon*, 528 U.S. at 389).

⁶⁶¹ *Id.* at 1470 (quoting *McConnell*, 540 U.S. at 153).

⁶⁶² *Id.* at 1469-70 (quoting *McConnell*, 540 U.S. at 146-152).

The dissent outlined several examples of the problems that could stem from the removal of the aggregate contribution limitations. First, the dissent showed how the aggregate contribution limit capped the amount that a donor could give to a Joint Party Committee, during a two-year election cycle, at \$74,600. Removing the aggregate limits allowed the same donor to contribute \$1.2 million during the same election cycle.

In example two, when one added the same donor contributing to congressional candidates, the \$1.2 million increased to \$3.6 million every two years. The \$3.6 million could be distributed \$64,800 to national party committees, \$20,000 to state committees, and \$5,200 to individual candidates. The donor could give \$5,200 to 435 congressional candidates and 33 senatorial candidates.

In example three, the joint committee could give \$2.37 million to a single candidate. A donor could give \$64,800 to each of the three national committees of each party, and \$20,000 to each of the 50 state political party committees. In addition, for a general election, coordinated expenditures could be directed to the candidate valued from \$46,600 to \$2.68 million.⁶⁶³ Thus, the entire \$3.6 million in contributions by a single donor could be channeled to a single candidate. These funds could be directed to candidates in hotly contested races. The aggregate contribution limit had been \$123,200. This third example demonstrated how PACs would be able to channel \$2 million from each of ten wealthy donors to ten candidates in close races.

Justice Breyer further elaborated his third example: “Groups of party supporters—individuals, corporations, or trade unions—create 200 PACs.”⁶⁶⁴ During “a 2-year election cycle, Rich Donor One gives \$10,000 to each PAC (\$5,000 per year)—yielding \$2 million total. Rich Donor Two does the same. So, too, do the other eight Rich Donors.”⁶⁶⁵ In total, each Embattled Candidate would receive \$10,000 from 200 PACs equaling \$2 million.

The dissent contested the plurality’s claim that these examples could simply not happen. First, while contribution limits to political committees have been added since *Buckley*, there is still no limit on the number of political committees that can be created which supported a party or a group of party candidates. Second, while the nonproliferation rule attributes all contributions to political committees by the same corporation, labor union or person to the contribution limit of that organization, there were still 2700 non-connected political committees operating during the 2012 election. Removal of aggregate contribution limits will only cause that number to grow. Third, the earmarking restrictions in political committees when *Buckley* was decided are virtually the same as the provisions in place today. Fourth, the contribution limitations do not apply to one political committee supporting a particular candidate and another supporting multiple candidates including that one. Fifth, the FEC can attribute the contributors’ grand total contributions 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

⁶⁶³ The amount depended on the size of the candidate’s State and whether the election was for the House or the Senate.

⁶⁶⁴ *McCutcheon*, 134 S.Ct. at 1474. The PACs would favor those candidates most in danger of losing their position.

⁶⁶⁵ *Id.* at 1475. “This brings their total donations to \$20 million 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.” *Id.*

contributed to, or expected on behalf of, ‘that candidate.’ ”⁶⁶⁶ Since 2000, the FEC has met this heavy burden in only one case.⁶⁶⁷ As these groups were not prosecuted under the \$123,200 aggregate contribution limits, they will certainly not be prosecuted under the new limits of effectively several million dollars.

The dissent rejected the alternatives offered by the plurality as ineffective. In any event, the plurality did not endorse the constitutionality of any of them. The dissent also questioned why the plurality did not remand the case, which had come up on a motion to dismiss. In fact, the plurality itself noted the substantial factual disputes between the dissent and the plurality. There were a tremendous number of factual questions left open including the existence of a compelling state interest, the fit between that interest and statute, and the extent to which the plurality should defer to the judgment of Congress.⁶⁶⁸

§ 16.03 GOVERNMENT SPENDING ON SPEECH RELATED ACTIVITIES

Page 707: Insert the following before § 16.04 COMMERCIAL SPEECH

In *Agency for Int’l Dev., et al. v. Alliance for Open Soc’y Int’l, Inc.*,⁶⁶⁹ the Court invalidated under the First Amendment a funding condition, referred to as the Policy Requirement, of the Leadership Act, which was designed to halt the spread of HIV/AIDS around the world. To effectuate the Act, Congress appropriated billions of dollars for nongovernmental organizations. The Policy Requirement refused funds to any “organization ‘that does not have a policy explicitly opposing prostitution and sex trafficking.’ ”⁶⁷⁰

Congress found that “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.”⁶⁷¹ In sub-Saharan Africa, AIDS “was projected to kill a full quarter of the population”⁶⁷² over the next 10 years. Sex trafficking was a major factor in the spread of the HIV/AIDS epidemic. These findings led Congress to conclude that United States policy should seek “ ‘to eradicate’ prostitution and ‘other sexual victimization.’ ”⁶⁷³

Respondents were domestic organizations fighting HIV/AIDS abroad. They received private funding, in addition to funds from the United States. Respondents worried that “explicitly opposing prostitution may alienate certain host governments”⁶⁷⁴ and make “it more

⁶⁶⁶ *Id.* at 1477.

⁶⁶⁷ Demonstrating the lack of efficacy of this FEC regulation, political parties and candidates had over 500 joint fundraising committees in the last election and candidates established over 450 “‘Leadership PACs.’ ” *Id.* at 1478.

⁶⁶⁸ Justice Breyer elaborated: “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?” *Id.* at 1480.

⁶⁶⁹ 133 S. Ct. 2321 (2013).

⁶⁷⁰ *Id.*

⁶⁷¹ *Id.* at 2325.

⁶⁷² *Id.*

⁶⁷³ *Id.*

⁶⁷⁴ *Id.* at 2326.

difficult to work with prostitutes in the fight against HIV/AIDS.”⁶⁷⁵ Moreover, the policy “may require them to censor their privately funded discussions”⁶⁷⁶ about preventing “the spread of HIV/AIDS among prostitutes.”⁶⁷⁷

Writing for a 6-2 majority,⁶⁷⁸ Chief Justice Roberts noted that had it been “a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment.”⁶⁷⁹ *Rust v. Sullivan*⁶⁸⁰ interpreted the Spending Clause as granting Congress broad discretion. But, *Rumsfeld v. Forum for Academic & Institutional Rights*⁶⁸¹ said that Congress could not use this discretion to deny free speech.⁶⁸² Under *Sullivan*, however, Congress can choose to “selectively fund certain programs.”⁶⁸³ In *Sullivan*, the Court emphasized that Title X regulations “governed only the scope of the grantee’s Title X projects, leaving it “ ‘unfettered in its other activities.’ ”⁶⁸⁴ Thus, a Title X grantee could participate in activities prohibited by the Title X regulations; it is just required to engage in such “ ‘activities through programs that are separate and independent from the project that receives Title X funds.’ ”⁶⁸⁵

The key distinction among these cases is “between conditions that define the federal program and those that reach outside it.”⁶⁸⁶ The first condition in the Leadership Act was unchallenged. It disallowed Leadership Act funds from promoting or advocating “the legalization or practice of prostitution or sex trafficking.”⁶⁸⁷ The Government conceded that the first condition alone “ensures that federal funds will not be used for the prohibited purposes.”⁶⁸⁸ Disagreeing with Justice Scalia’s dissent, the Chief Justice noted that the Policy Requirement’s “effects go beyond selection”⁶⁸⁹ as it “is an ongoing condition on the recipients’ speech and activities, a ground for terminating a grant after selection is complete.”⁶⁹⁰ Unlike *Sullivan*, by requiring recipients that receive funds “to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program.”⁶⁹¹

In an attempt to save the Policy Requirement, the Government created a set of guidelines, which allowed recipients “to work with affiliated organizations that do not abide by the condition.”⁶⁹² These guidelines were insufficient to save the Act. “If the affiliate is distinct”⁶⁹³

⁶⁷⁵ *Id.*

⁶⁷⁶ *Id.*

⁶⁷⁷ *Id.*

⁶⁷⁸ Justice Kagan did not participate in this case.

⁶⁷⁹ 133 S. Ct. at 2327.

⁶⁸⁰ 500 U.S. 173 (1991). This case is discussed *supra* § 16.03.

⁶⁸¹ 547 U.S. 47 (2006). This case is discussed *supra* § 16.03.

⁶⁸² 133 S. Ct. at 2328 (quoting *Rumsfeld*, 547 U.S. at 59).

⁶⁸³ *Id.* at 2329.

⁶⁸⁴ *Id.* at 2330 (quoting *Sullivan*, 500 U.S. at 196).

⁶⁸⁵ *Id.* (quoting *Sullivan*, 500 U.S. at 196).

⁶⁸⁶ *Id.*

⁶⁸⁷ 22 U.S.C. § 7631(e).

⁶⁸⁸ 133 S. Ct. at 2330.

⁶⁸⁹ *Id.*

⁶⁹⁰ *Id.*

⁶⁹¹ *Id.*

⁶⁹² *Id.* at 2331.

⁶⁹³ *Id.*

the guidelines do not allow fund recipients to express their beliefs.⁶⁹⁴ On the other hand, if the affiliate is “identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy.”⁶⁹⁵

In sum, “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.”⁶⁹⁶ 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.”⁶⁹⁷

Justice Scalia dissented, joined by Justice Thomas. The dissent viewed the Policy Requirement as “a means of selecting suitable agents to implement the Government’s chosen strategy to eradicate HIV/AIDS.”⁶⁹⁸ Free speech does not require “a viewpoint-neutral government.”⁶⁹⁹ Government commonly chooses between competing ideas adopting “some as its own: competition over cartels, solar energy over coal, weapon development over disarmament.”⁷⁰⁰ A spending condition was constitutional if “the unfunded organization remains free to engage in its activities.”⁷⁰¹ Justice Scalia would not, “permit the Government to exclude from bidding on defense contracts anyone who refuses to abjure prostitution.”⁷⁰² The dissent found the majority’s distinction between “conditions that operate *inside* a spending program and those that control speech *outside* of it”⁷⁰³ to be in the majority’s own words, “‘hardly clear.’”⁷⁰⁴

⁶⁹⁴ *Id.*

⁶⁹⁵ *Id.*

⁶⁹⁶ *Id.* at 2332.

⁶⁹⁷ *Id.*

⁶⁹⁸ *Id.* (Scalia, J., dissenting).

⁶⁹⁹ *Id.*

⁷⁰⁰ *Id.*

⁷⁰¹ *Id.*

⁷⁰² *Id.* at 2333.

⁷⁰³ *Id.*

⁷⁰⁴ *Id.*

Chapter 17

GOVERNMENT AND RELIGIOUS FREEDOM

§ 17.03 GOVERNMENT SUPPORT OF RELIGIOUS PRACTICES

Page 779: Insert the following after Santa Fe Independent School District v. Doe

In *Town of Greece v. Galloway*,⁷⁰⁵ the Court approved the recital of a sectarian prayer before a local city Council meeting. Relying on *Marsh v. Chambers*,⁷⁰⁶ Justice Kennedy decided that this did not violate the Establishment Clause. Each month, the Town of Greece would invite an unpaid chaplain to deliver an invocation prior to the monthly town board meetings. Town leaders claimed that the invocation could be given by a person of any faith, including an atheist. However, from 1999 to 2007, all of the ministers who gave the prayer were Christian. Almost all of the congregations in town were Christian.

Following complaints that the prayers focused too much on Christian themes, the town invited a Jewish layperson, the chairman of the local Baha'i Temple, and a Wiccan priestess to give the invocation. Plaintiff sought an injunction not to end the prayers, but to “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.”⁷⁰⁷ The District Court noted that the town did not exclude any faiths from giving the prayer. Even though most of the prayer givers were Christian, this stemmed from the town’s congregations being largely Christian, “rather than an official policy or practice of discriminating against minority faiths.”⁷⁰⁸

In *Marsh*, the Court determined that legislative prayer was compatible with the Establishment Clause. Specifically: “As practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society.”⁷⁰⁹ In fact, the First Congress appointed and paid chaplains; both the House and Senate have retained such an office since then. State Legislatures have also used this practice for many years. The *Marsh* Court stated that “‘the unambiguous and unbroken history of more than 200 years’ ”⁷¹⁰ of beginning legislative sessions with prayer “‘has become part of the fabric of our society.’ ”⁷¹¹ Moreover, since history demonstrates that the practice of legislative prayer was permitted, it was not necessary to determine exactly what the Establishment Clause permits.

Plaintiff first argued that *Marsh* did not permit prayers containing sectarian language, such as those offered in the Town of Greece that referred directly to the birth, death, and sacrifice of Jesus Christ on the cross. The prayers also mentioned “‘the workings of the Holy

⁷⁰⁵ 134 S. Ct. 1811 (2014).

⁷⁰⁶ 463 U.S. 783 (1983). This case is discussed *supra* § 17.08.

⁷⁰⁷ *Galloway*, 134 S. Ct. at 1817.

⁷⁰⁸ *Id.*

⁷⁰⁹ *Id.* at 1818.

⁷¹⁰ *Id.* (quoting *Marsh*, 463 U.S. at 792).

⁷¹¹ *Id.* at 1819 (quoting *Marsh*, 463 U.S. at 792).

Spirit, the events of Pentecost, and the belief that God “has raised up the Lord Jesus” and “will raise us, in our turn, and put us by His side.”⁷¹² Plaintiff maintained first that the prayers in the public square could only contain general, nonsectarian references to God. Second, the town meeting setting pressured even non-believers who were present to remain and feign participation.

Writing for the majority, Justice Kennedy stated that requiring “nonsectarian or ecumenical prayer”⁷¹³ is inconsistent “with the tradition of legislative prayer.”⁷¹⁴ For instance, one of the Senate’s first chaplains gave a series of prayers, which included: “the Lord’s Prayer, the Collect for Ash Wednesday, prayers for peace and grace, a general thanksgiving, St. Chrysostom’s Prayer, and a prayer seeking ‘the grace of our Lord Jesus Christ.’”⁷¹⁵ Moreover, *Marsh* explicitly determined that the content of the prayer in question was not an issue for judges assuming that “ ‘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.’ ”⁷¹⁶ Additionally, requiring non-sectarian prayers would force the legislatures and the Court to supervise and censor religious speech. This would increase government’s involvement in religious matters much more than Greece’s method of not approving or editing prayers in advance or criticizing them after they are given. Government may not “mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy.”⁷¹⁷ Justice Kennedy also doubted that a consensus could be reached as to which prayers are “generic or nonsectarian.”⁷¹⁸

When government invites public prayer, it must allow the prayer giver to discuss his or her own God or gods as her own conscience dictates, without reference to what an administrator or judge considers nonsectarian. Beyond their content, there must be “a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose.”⁷¹⁹ *Marsh* focused on the prayer opportunity as a whole rather than one prayer.

From the earliest days of the country, we have assumed that adults could tolerate and perhaps even value the ceremonial prayer of a different faith. That the majority of guest chaplains were Christians was understandable as the majority of congregations in the town were Christian. While prayers did invoke “ ‘Christ’ ”⁷²⁰ or “ ‘the Holy Spirit,’ ”⁷²¹ they also invoked universal themes, for example, urging town leaders to cooperate with each other. Moreover, the town extended a general invitation to ministers and lay persons of all denominations, and made an effort to seek out all congregations. Requiring the town to monitor the frequency with which certain religions were represented inevitably would result in excessive entanglement. The Establishment Clause did not obligate the town to find ministers beyond its borders to achieve religious diversity.

⁷¹² *Id.* at 1820.

⁷¹³ *Id.*

⁷¹⁴ *Id.*

⁷¹⁵ *Id.*

⁷¹⁶ *Id.* at 1821 (quoting *Marsh*, 463 U.S. at 794-95).

⁷¹⁷ *Id.* at 1822.

⁷¹⁸ *Id.*

⁷¹⁹ *Id.* at 1824.

⁷²⁰ *Id.*

⁷²¹ *Id.*

The remainder of Justice Kennedy's majority opinion was only joined by the Chief Justice and Justice Alito. The plurality rejected the contention that council members and those present at the meeting seeking council support felt pressured to participate in the prayer. No evidence suggested coercion. This fact-sensitive inquiry focuses on the prayer's setting and its audience. The audience was the council itself rather than its constituents. The prayer's purpose was "largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers."⁷²² This analysis would differ had the board members required the public to participate or stigmatized dissidents, or indicated that participation would influence their decisions. Some citizens did testify that they took offense at the prayers, but this alone did not amount to coercion. According to the plurality, courts could "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."⁷²³ But generally, exposing constituents to an unwanted prayer does not amount to coercion if they do not have to participate.

The plurality distinguished *Lee v. Weisman*.⁷²⁴ *Lee* concerned a high school graduation where school authorities had closely monitored the students. The ceremony had a religious invocation, which a student claimed was coercive. In contrast to the high school graduation in *Lee*, those attending Greece's town board meetings could come and go as they pleased. Nor, as *Marsh* put it, were the individuals here " 'readily susceptible to religious indoctrination or peer pressure.' "⁷²⁵

Justice Alito concurred, joined by Justice Scalia. Responding to Justice Kagan's dissent, Justice Alito noted that for the first four years, a clerical employee randomly called religious leaders to offer the prayer. Eventually, the town relied on a list of ministers who accepted the invitation, and continued to invite others as well. Virtually all of the churches in town were Christian; synagogues were not on the list because they lay outside the town's borders. When complaints came that the town was not being inclusive, it immediately invited other denominations, including nonbelievers. Recently, many non-Christian denominations have been represented. Justice Alito also maintained that "any argument that nonsectarian prayer is constitutionally required runs headlong into a long history of contrary congressional practice."⁷²⁶ Sectarian prayer has been a tradition from the first Congress. Non-Christian congressional chaplains have also followed this practice. For instance, the first rabbi that delivered prayer at a session of the House in 1860, appeared in full rabbinic dress, which included a white tallit and a large velvet skullcap. His prayer consisted of several Jewish themes. He also invoked the Biblical priestly blessing in Hebrew. Other rabbis have given distinctively Jewish prayers, and prayers of other religions, including Islam, Hinduism, and Buddhism, have also been delivered. As the nation has grown more diverse, such generic prayers have become more and more difficult to fashion. Justice Alito then asked whether the dissent would entail requiring towns to screen all prayers.

To avoid this problem, the dissent offered a second alternative of inviting chaplains from

⁷²² *Id.* at 1826.

⁷²³ *Id.* at 1826-27.

⁷²⁴ 505 U.S. 577 (1992). This case is discussed *supra* § 17.03.

⁷²⁵ *Galloway*, 134 S. Ct. at 1827 (quoting *Marsh*, 463 U.S. at 792).

⁷²⁶ *Id.* at 1829-30.

different religious faiths each month. If this is a viable alternative, then the dissent's real problem was with the process followed by the town's clerical employees. Many municipalities, Justice Alito continued, stressed the costly legal bills that mistakes deviating from such exactitude might entail. Puzzled by the Court's complex establishment jurisprudence, many municipalities elect to be a "religion-free zone"⁷²⁷ and avoid prayers entirely. Before this kind of legislative session, the principal dissent would ban any prayer not universally accepted by all in the audience. The inevitable effect of the dissent's logic would be to ban prayers for local legislative bodies fairly generally while permitting them for state and national bodies. No sound basis exists for this distinction. Finally, Justice Alito rejected the various slippery slope arguments made by the dissent.

Justice Thomas wrote an opinion concurring in part and concurring in the judgment. Justice Thomas viewed the Establishment Clause as a provision in Federalism. As the Framers never intended to incorporate the Clause against the states, it has no applicability to the municipality in this case. The Clause "probably prohibits Congress from establishing a national religion."⁷²⁸ It also prevents Congress from meddling with state establishments. In 1789, six states had established churches, and New England states permitted local governments to choose their minister and denomination. Three southern states allowed taxation for Christian religion; another, for Protestant religions. Some states imposed religious tests for office. Since the Establishment Clause protected the states' power to establish a religion, incorporating it against the states would invert its original meaning. Justice Thomas also reviewed how abruptly, and without any reasoning, the Supreme Court incorporated the Establishment Clause against the states in *Everson v. Board of Ed. of Ewing*.⁷²⁹

Justice Scalia joined the following portion of Justice Thomas's concurrence. The coercion around which establishment revolved " 'was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.*' "⁷³⁰ Even if establishment was viewed as an individual right by the time of the framing of the Fourteenth Amendment, no support existed for the idea that the framers of the Fourteenth Amendment accepted modern beliefs that the Establishment Clause is infringed whenever a " 'reasonable observer' feels 'subtle pressure,' or perceives governmental 'endors[ement].' "⁷³¹ Neither offensiveness nor peer pressure comprise the actual legal coercion necessary to violate the Establishment Clause.

Dissenting, Justice Breyer stated that this fact sensitive inquiry consists of several factors. First, the Town is primarily, but not exclusively, Christian. Between 1999 and 2010, the Council had 120 monthly meetings at which prayers were delivered. Non-Christians only gave four of those prayers. All four of them were given in 2008, after plaintiffs began complaining about the Town's almost solely Christian prayer practice and almost ten years after the practice first began. Second, the Chamber of Commerce list of churches from which the Town compiled its invitations did not mention the Buddhist temple or the Jewish synagogues located just outside of town. Third, until 2008, the prayers all reflected a single denomination, Christian. Fourth,

⁷²⁷ *Id.* at 1831.

⁷²⁸ *Id.* at 1835.

⁷²⁹ 330 U.S. 1 (1947). This case is discussed *supra* § 17.01.

⁷³⁰ *Galloway*, 134 S. Ct. at 1837 (Thomas, J., concurring in part) (quoting *Lee*, 505 U.S. at 640 (Scalia, J., dissenting)).

⁷³¹ *Id.* at 1838.

individuals with business to conduct attended the prayers, which further emphasizes the importance of including members of other denominations. Fifth, while government should neither write nor critique prayers, the Constitution does not “forbid efforts to explain to those who give the prayers the nature of the occasion and the audience.”⁷³²

The key question was whether the town had done enough to prevent “‘political division along religious lines’ that ‘was one of the principal evils against which the First Amendment was intended to protect.’”⁷³³ Agreeing with Justice Kagan, Justice Breyer concluded that unintentionally or otherwise, “the town of Greece failed to make reasonable efforts to include prayer givers of minority faiths.”⁷³⁴ While the town has “several faiths, its prayer givers were almost exclusively persons of a single faith.”⁷³⁵

Justice Kagan dissented, joined by Justices Ginsburg, Breyer and Sotomayor. “A Christian, a Jew, a Muslim (and so forth) has ‘the same relationship with her country’⁷³⁶ including ‘every level and body of government.’⁷³⁷ The ‘norm of religious equality’⁷³⁸ does not translate here into a bright separationist line. Agreeing with *Marsh*, “pluralism and inclusion in a town hall can satisfy the constitutional requirement of neutrality.”⁷³⁹ However, unlike *Marsh*, ordinary citizens attended Greece’s town hall meetings. Furthermore, it failed to recognize the town’s religious diversity. Until this suit, Greece’s board never invited non-Christians. *Larson v. Valente*⁷⁴⁰ emphasized that the clearest command of the Establishment Clause “‘is that one religious denomination cannot be officially preferred over another.’”⁷⁴¹

Unlike *Marsh*, the prayers delivered in Greece were addressed to citizens. The prayers greatly departed from the traditions of Congress and state legislatures, in being “*more* sectarian, and *less* inclusive, than anything sustained in *Marsh*.”⁷⁴² The prayer sessions in *Marsh* took place early in the morning when few state senators were present and only a few members of the general public may have been watching from the upstairs gallery. The prayer itself contained no allusions to Christ; those were eliminated when one Jewish senator complained.⁷⁴³ They were directed only at the legislators. In contrast, the prayer at issue here began the council session. The entire council was present as well as perhaps 10 members of the public. The prayer itself contained allusions to Christ and no one informed those present that they need not participate.⁷⁴⁴

⁷³² *Id.* at 1840 (Breyer, J., dissenting).

⁷³³ *Id.* at 1841 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971)).

⁷³⁴ *Id.*

⁷³⁵ *Id.*

⁷³⁶ *Id.* (Kagan, J., dissenting).

⁷³⁷ *Id.*

⁷³⁸ *Id.*

⁷³⁹ *Id.* at 1842.

⁷⁴⁰ 456 U.S. 228 (1982). This case is discussed *supra* § 17.02.

⁷⁴¹ *Galloway*, 134 S. Ct. at 1843 (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)). In an age when almost no one in this country was not a Christian of one kind or another, George Washington consistently declined to use language or imagery associated only with that religion.

⁷⁴² *Id.* at 1845.

⁷⁴³ The typical prayer stated: “‘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.’” *Id.* at 1846.

⁷⁴⁴ A Town prayer read: “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

The differences with *Marsh* were many. First, the nature and purpose of the government proceedings differed significantly in that the general public were active participants in the town council meetings. Second, the audiences differed. Rather than only being directed at state senators, the guest chaplains for Greece faced the public with his back to the council. He began the very intimate, albeit brief, prayer service: “ ‘Let us all pray together.’ ”⁷⁴⁵ Third, “*Marsh* characterized the prayers in the Nebraska Legislature as ‘in the Judeo-Christian tradition,’ ”⁷⁴⁶ removing all allusions to Christianity. Further, *Marsh* hinged on there being no attempt to proselytize a particular religion. Here: “About two-thirds of the prayers given over this decade or so invoked ‘Jesus,’ ‘Christ,’ ‘Your Son,’ or ‘the Holy Spirit’; in the 18 months before the record closed, 85% included those references.”⁷⁴⁷ Finally, neither the history cited by *Marsh* nor the majority “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.”⁷⁴⁸ The majority glided over these factual differences with *Marsh*.

No valid complaint would have existed had the Town Board “let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups.”⁷⁴⁹ Alternatively, the Board could have invited chaplains from many different faiths.

The majority also minimized that for a long time all the chaplains were Christians and that they were not cautioned to make the prayer inclusive. Moreover, the majority understated the substantial differences between the various religions, thereby fearing “too little the ‘religiously based divisiveness that the Establishment Clause seeks to avoid.’ ”⁷⁵⁰

§ 17.05 FREE EXERCISE OF RELIGION

Page 808: Insert the following after Cutter v. Wilkinson

*Holt v. Hobbs*⁷⁵¹ invalidated a prison ban on inmates wearing a beard for religious reasons as violating the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). After the Court’s decision in *Oregon v. Smith*,⁷⁵² Congress enacted the Religious Freedom Restoration Act (RFRA) which requires that a substantial burden on religious liberty be the least restrictive means of effectuating a compelling state interest. After *City of Boerne v.*

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 as of today. And so . . . [w]e pray this evening for the guidance of the Holy S pirit as the Greece Town Board meets.’ ” *Id.* at 1847. 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.’ ”

Id.

⁷⁴⁵ *Id.* at 1848.

⁷⁴⁶ *Id.*

⁷⁴⁷ *Id.*

⁷⁴⁸ *Id.* at 1849.

⁷⁴⁹ *Id.* at 1851.

⁷⁵⁰ *Id.* at 1853.

⁷⁵¹ 135 S. Ct. 853 (2015).

⁷⁵² 494 U.S. 872 (1990).

Flores,⁷⁵³ Congress enacted RLUIPA. Section 2 governs land use regulation, and Section 3 governs prisoners. Its protections mirror those of RFRA. Signaling its broad protection, RLUIPA states that a “religious exercise”⁷⁵⁴ encompasses “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”⁷⁵⁵ Congress charged that this idea “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.”⁷⁵⁶ RLUIPA “may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.”⁷⁵⁷

Holt is a prisoner. He objected to the prison’s prohibition of facial hair except a neatly trimmed mustache unless there were medical, dermatological reasons to maintain a 1/4 inch beard. This objection to the grooming policy was based on a sincerely held religious belief. The policy also substantially burdened that belief. It forced Holt to choose between ignoring his religious beliefs and facing severe disciplinary action. That the Arkansas Department of Corrections provides him with a prayer book and rug is irrelevant, as these do not address the prohibition on being able to grow a 1/2 inch beard. Justice Scalia also rejected the claim that the burden on religious liberty was small because “his religion would ‘credit’ him for attempting to follow his religious beliefs.”⁷⁵⁸ Moreover, the District Court erred in relying on Holt’s testimony that not every Muslim believed he had to grow a beard. First, growing beards was hardly “idiosyncratic”⁷⁵⁹ in the Muslim faith. Second, neither RLUIPA nor the Free Exercise Clause was limited to protecting beliefs shared by all members of a particular faith.

Once Holt showed that the policy substantially burdens a sincerely held religious belief, the burden shifted to the Department to demonstrate that the prohibition was the least restrictive means of advancing a compelling state interest. The Court rejected the proffered government interest in prohibiting beards to prevent hiding contraband. The Department offered no reason why 1/4 inch beards could be searched and 1/2 inch beards could not. The Department offers an interest in quick and reliable identification of prisoners and preventing disguises. To avert this problem, the Department could institute a policy of dual photographing each prisoner – shaven and unshaven – as other states had done.

The prison contended that two photographs helped with escapees but not with guards identifying prisoners who had quickly shaved. “The Department contends that the identification concern is particularly acute at petitioner’s prison, where inmates live in barracks and work in fields.”⁷⁶⁰ The Court was unpersuaded that this prison was so different from others that the dual photograph solution would not work. Moreover, the Department failed to establish that the risk

⁷⁵³ 521 U.S. 507 (1997).

⁷⁵⁴ 135 S. Ct., at 860 (quoting 42 U.S.C. § 2000 cc-1(a)).

⁷⁵⁵ 135 S. Ct., at 860 (quoting 42 U.S.C. § 2000 cc-5 (7) (A)).

⁷⁵⁶ 135 S. Ct., at 860 (quoting 42 U.S.C. § 2000 cc-3(g)).

⁷⁵⁷ 135 S. Ct., at 860 (quoting 42 U.S.C. § 2000 cc-3(c)).

⁷⁵⁸ 135 S. Ct., at 862.

⁷⁵⁹ *Id.*

⁷⁶⁰ *Id.* at 865.

of disguise with a 1/2 inch beard was so great “even though prisoners are allowed to grow mustaches, head hair, or 1/4-inch beards for medical reasons.”⁷⁶¹

In addition, the grooming policy was underinclusive in permitting 1/4 inch beards for medical reasons and hair length longer than 1/2-inch. “Hair on the head is a more plausible place to hide contraband than a 1/2-inch beard — and the same is true of an inmate’s clothing and shoes.”⁷⁶² The Corrections Department argues that few inmates requested beards for medical reasons while many may request one for religious reasons. However, “the Department has not argued that denying petitioner an exemption is necessary to further a compelling interest in cost control or program administration.”⁷⁶³ This is a classic bureaucratic argument of having to make exceptions for many people if an exception is made for one.

The Department also failed to show why it needed to prohibit 1/2 inch beards when the federal government and the vast majority of states permit them. That so many other prisons permit them suggests that less restrictive means would satisfy the Department’s security concerns. Justice Scalia was not suggesting that a few jurisdictions permitting a religious practice requires all others to follow suit. But the widespread prevalence of this exemption requires the prison to give “persuasive reasons”⁷⁶⁴ for denying it.

While RLUIPA protected religious exercise, it also maintained prison security. First, in assessing exemptions for religious practices, courts should consider the prison setting. “Second, if an institution suspects that an inmate is using religious activity to cloak illicit conduct, ‘prison officials may appropriately question’”⁷⁶⁵ the authenticity of the prisoner’s asserted religiosity. Third, even an exemption for a sincere belief can be withdrawn “if the claimant abuses the exemption in a manner that undermines the prison’s compelling interests.”⁷⁶⁶

Justice Ginsburg concurred, joined by Justice Sotomayor. The Court does not “preclude deferring to prison officials’ reasoning.”⁷⁶⁷ The officials should “offer a plausible explanation for their chosen policy that is supported by whatever evidence is reasonably available to them.”⁷⁶⁸ This case turns on “the Department’s failure to demonstrate why the less restrictive policies petitioner identified in the course of the litigation were insufficient to achieve its compelling interests—not the Court’s independent judgment concerning the merit of these alternative approaches.”⁷⁶⁹ The “‘least restrictive means’ is, by definition, a relative term.”⁷⁷⁰ While the

⁷⁶¹ *Id.*

⁷⁶² *Id.* at 865-66.

⁷⁶³ *Id.* at 866.

⁷⁶⁴ 135 S. Ct., at 866.

⁷⁶⁵ *Id.* at 866-67 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 725, n. 13 (2005)).

⁷⁶⁶ *Id.* at 867.

⁷⁶⁷ *Id.*

⁷⁶⁸ *Id.*

⁷⁶⁹ *Id.* at 868.

⁷⁷⁰ 135 S. Ct., at 868 (quoting *Couch v. Jabe*, 679 F.3d 197, 203 (CA4 2012)).

term requires comparison, prison officials do not have to “refute”⁷⁷¹ every conceivable alternative. Nor must they demonstrate that they considered every alternative at a particular point in time.

Page 809: Insert the following at the end of Gonzales v. OCentro Espirita Beneficente Uniao do Vegetal

In *Burwell v. Hobby Lobby Stores, Inc.*,⁷⁷² the Court considered whether the Religious Freedom Restoration Act of 1993 (RFRA) “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.”⁷⁷³ The Court (5-4) held that the regulations violated RFRA. Saliently, HHS had already employed a system that both respected the religious liberty of nonprofit corporations and ensured that employees of such entities received the same access to contraceptives as employees of companies whose owners have no such religious objections. This system attained all of the government’s goals while affording superior respect for religious freedom.

Writing for the majority, Justice Alito characterized the Court’s holding as very limited. The majority did not hold, as suggested in Justice Ginsburg’s dissent, that for-profit corporations and other commercial entities can simply “opt out of any law (saving only tax laws) they judge as incompatible with their sincerely held religious beliefs.”⁷⁷⁴ Nor did the Court hold, as the dissent suggested, that such corporations can engage in actions that disadvantage others, or that require the general public to pay the bill. Furthermore, the majority did not hold or imply that the RFRA requires accommodation of a for-profit corporation’s religious beliefs regardless of the impact that accommodation would have on the many women employed by Hobby Lobby. Women employed by Hobby Lobby would still have access to all FDA-approved contraceptives without cost sharing.

Congress enacted RFRA three years after *Department of Human Resources v. Smith*,⁷⁷⁵ *Smith* essentially had overturned *Sherbert v. Verner*⁷⁷⁶ and *Wisconsin v. Yoder*.⁷⁷⁷ In determining whether a government action violated the Free Exercise Clause, those decisions asked whether the action imposed a “substantial burden on the practice of religion”⁷⁷⁸ and if so, whether it was necessary to serve a “compelling government interest.”⁷⁷⁹ *Smith*, however, held that, under the First Amendment, “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.”⁷⁸⁰ RFRA states that

⁷⁷¹ 135 S. Ct., at 868 (quoting *United States v. Wilgus*, 638 F. 3d 1274, 1289 (CA10 2011)).

⁷⁷² 134 S. Ct. 2751.

⁷⁷³ *Id.* at 2759.

⁷⁷⁴ *Id.* at 2760.

⁷⁷⁵ 494 U.S. 872 (1990). This case is discussed *supra* § 17.05

⁷⁷⁶ 374 U.S. 398 (1963). This case is discussed *supra* § 17.05.

⁷⁷⁷ 406 U.S. 205 (1972). This case is discussed *supra* § 17.05.

⁷⁷⁸ *Hobby Lobby*, 134 S. Ct. at 2760.

⁷⁷⁹ *Id.*

⁷⁸⁰ *Id.* at 2761 (quoting *Smith*, 494 U.S. at 888).

laws neutral regarding religion “may burden religious exercise as surely as laws intended to interfere with religious exercise.”⁷⁸¹ Under RFRA, government may not substantially burden the exercise of religion unless government establishes that the burden: (1) furthers a compelling governmental interest; and “(2) is the least restrictive means of furthering”⁷⁸² that interest.

Congress predicated RFRA on its enforcement under Section 5 of the Fourteenth Amendment. In *City of Boerne v. Flores*,⁷⁸³ however, the Court determined that RFRA had exceeded Congress’ Section 5 power. After *City of Boerne*, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). Separating from First Amendment case law, Congress deleted the reference to the First Amendment and re-defined exercise of religion to include “ ‘any exercise of religion, whether or not compelled by, or central to, a system of religious belief.’ ”⁷⁸⁴ In addition, Congress mandated that this protection “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.”⁷⁸⁵

Directly at issue in this case were HHS regulations stemming from the Patient Protection and Affordable Care Act of 2010 (ACA). Hobby Lobby and the other closely held corporations objected to four FDA-approved methods of contraception that may have the effect of inhibiting the attachment of a fertilized egg to the uterus. HHS created exemptions for religious employers, a term that included churches and their integrated partners. HHS also exempted nonprofit organizations that portrayed themselves to the public as religious organizations. Once a group-health-insurance issuer is notified that one of its clients has invoked this provision, the issuer is required to exclude contraceptive coverage from the relevant employer’s plan and afford separate payments for contraceptive services for plan members without levying any cost-sharing obligations on the qualified organization, its insurance plan, or its employees. In 2013, over one-third of 149 million nonelderly Americans with employer-sponsored healthcare were enrolled in grandfathered plans, whereas companies with fewer than 50 employees, that did not have to provide health insurance, numbered 34 million.

The sole owners of the family-owned, closely held business, Conestoga Wood Specialties,⁷⁸⁶ were devout members of the Mennonite Church, which opposes abortion from a fetus’s “earliest stages”⁷⁸⁷ because they believe it “shares humanity with those who conceived it.”⁷⁸⁸ They sued HHS, and other federal officials and agencies seeking to enjoin the ACA’s contraceptive mandate to the extent it required them to provide health insurance for four FDA-sanctioned contraceptives that may operate after the fertilization of an egg.⁷⁸⁹ The owner of Hobby Lobby, and one of his sons, owner of an affiliated business named Mardel, also believed

⁷⁸¹ *Id.*

⁷⁸² *Id.* (quoting 42 U.S.C. § 2000bb-1(b)).

⁷⁸³ 521 U.S. 507 (1997). This case is discussed *supra* § 8.02.

⁷⁸⁴ *Hobby Lobby*, 134 S. Ct. at 2762 (quoting 42 U.S.C. § 2000cc-5(7)(A)).

⁷⁸⁵ *Id.*

⁷⁸⁶ The company’s “Vision and Values Statements” notes that Conestoga seeks to “ensur[e] a reasonable profit” and reflects the owners’ Christian values *Id.* at 2764. Additionally, “Conestoga’s board-adopted ‘Statement on the Sanctity of Human Life,’ ” states that the owners believe human life begins at conception. *Id.*

⁷⁸⁷ *Id.*

⁷⁸⁸ *Id.*

⁷⁸⁹ The four contraceptives at issue include two types of emergency contraception commonly referred to as “morning after” pills and two kinds of intrauterine devices (IUD’s).

that life begins at conception.

Justice Alito first held that the ACA provision at issue applied to for-profit corporations. In *Braunfeld v. Brown*,⁷⁹⁰ five Orthodox Jewish merchants challenged a Pennsylvania Sunday closing law. While the Court ultimately ruled against them on the merits, it did hear their claim. Thus, as demonstrated by *Braunfeld*, the Court has entertained free-exercise of religion claims by for-profit businesses. RFRA went far beyond what the Court has held is constitutionally required. Congress did not intend that someone should lose his ability to make such a claim simply because he incorporates rather than operates as an individual. The Court also determined that the term “person,” as used in RFRA and defined by the Dictionary Act, includes corporations.

The primary argument advanced by HHS and the dissent is that corporations lack RFRA protection because they cannot exercise religion. The dissent distinguished nonprofit corporations because enhancing their religious freedom “ ‘often furthers individual religious freedom as well.’ ”⁷⁹¹ The majority, however, determined that this principle also applies to for-profit corporations because allowing corporate RFRA claims defends the religious liberty of their owners. *Braunfeld* never even implied that a profit-making objective could preclude a corporation from making a free exercise claim. While their main objective is making money, owners of for-profit corporations, if they agree, can take expensive measures, in areas such as pollution control and energy conservation, that go beyond what the law requires.

The principal dissent argued that RFRA merely codified the Court’s pre-*Smith* free exercise jurisprudence, and that none of those precedents directly held that for-profit corporations are entitled to free-exercise rights. This argument was flawed. RLUIPA went far beyond the Free Exercise Clause, requiring protection “to the maximum extent permitted by the terms of this chapter and the Constitution.”⁷⁹² Even under free exercise, in *Gallagher v. Crown Kosher Super Market of Mass., Inc.*,⁷⁹³ a kosher super market contested a Massachusetts Sunday closing law. The Commonwealth sought a finding that the corporation lacked standing to make a free-exercise claim, but not a single Justice agreed with that argument. Finally, similar laws, such as Title VII, demonstrate that Congress speaks with precision when it decides not to grant religious accommodations to for-profit corporations.

HHS also argued that ascertaining the sincere “beliefs”⁷⁹⁴ of a corporation is, as a practical matter, highly difficult. For example, ascertaining the religious identity of large, publicly traded corporations like IBM or General Electric could lead to intense proxy battles. But, HHS failed to provide any example of a publicly traded corporation claiming RFRA rights. In fact, many practical limitations exist that would likely prevent such a situation from arising. For instance, it is highly improbable that unrelated shareholders, or institutional investors, could agree to manage a corporation under a particular set of religious beliefs.

The majority then concluded that the mandate “ ‘substantially burden[s]’ the exercise of

⁷⁹⁰ 366 U.S. 599 (1961) (plurality opinion).

⁷⁹¹ *Hobby Lobby*, 134 S. Ct. at 2769.

⁷⁹² *Id.* at 2772 (quoting 42 U.S.C. § 2000cc-3).

⁷⁹³ 366 U.S. 617 (1961).

⁷⁹⁴ *Hobby Lobby*, 134 S. Ct. at 2774.

religion.’ ”⁷⁹⁵ Refusing to cover the contraceptives at issue would cause Hobby Lobby to be taxed roughly \$1.3 million per day, Conestoga, \$90,000 per day, and Mardel, \$40,000 per day.⁷⁹⁶ By electing not to provide any insurance, these companies could have avoided these payments. However, if only one full-time employee happened to qualify for a subsidy on one of the government-run exchanges, the penalties would amount to approximately \$26 million per year for Hobby Lobby, \$1.8 million for Conestoga, and \$800,000 for Mardel.

HHS and the dissent argued that the act of offering coverage would not itself extinguish an embryo as that would only occur if an employee elected to utilize the coverage and one of the four post-contraception methods at issue. The majority thought that federal courts should not have failed to address this issue. *Thomas v. Review Board*⁷⁹⁷ held that “it is not for us to say that the line”⁷⁹⁸ a free exercise claimant draws is “an unreasonable one.”⁷⁹⁹ The *Thomas* Court specified that its “narrow function”⁸⁰⁰ is to adjudicate whether the assertion of a religious belief reflects “an honest conviction.”⁸⁰¹

HHS next contended that the contraceptive mandate, in assuring access to all FDA-approved contraceptives, serves the compelling interest in ensuring that all women have access to all FDA-approved contraceptives without cost sharing. The majority reiterated that the law exempts many employees from such coverage, specifically those working for companies with fewer than 50 employees or those covered by grandfathered plans. The only government interest served by the exception for grandfathered plans was to save employers the trouble of modifying their existing plan. Moreover, while grandfathered plans are required “to comply with a subset of the Affordable Care Act’s health reform provisions,”⁸⁰² they are not required to comply with the contraceptives requirement. Nevertheless, the majority assumed that the interest in assuring cost-free access to the challenged contraceptive methods was compelling under RFRA.

Nevertheless, the law failed the exceptionally demanding least-restrictive-means standard. HHS failed to demonstrate that it lacked other avenues of attaining its desired goal without imposing a substantial burden on the exercise of religion. HHS did not estimate the average cost per employee of offering access to the four disputed contraceptives. Additionally, HHS failed to provide any statistics concerning the number of employees who could be affected by a religious exemption due to their employment by corporations like Hobby Lobby. Finally, the Congressional Budget Office estimated that the ACA’s insurance-coverage provisions could cost \$1.3 trillion over the next decade. If, as HHS argued, providing all women with cost-free access to all FDA-approved contraceptives is a compelling government interest, then it is difficult to comprehend HHS’s argument that RFRA cannot require government to pay anything to realize this goal. Both the RFRA and RLUIPA can, under certain circumstances, “ ‘require a government to incur expenses’ ”⁸⁰³ to accommodate religious beliefs.

⁷⁹⁵ *Id.* at 2775.

⁷⁹⁶ Continuing to offer group health plans that excluded the disputed contraceptives would have led to the companies at issue being taxed \$100 per day for each affected individual.

⁷⁹⁷ 450 U.S. 707 (1981). This case is discussed *supra* § 17.05.

⁷⁹⁸ *Hobby Lobby*, S. Ct. at 2779 (quoting *Thomas*, 450 U.S. at 715).

⁷⁹⁹ *Id.* (quoting *Thomas*, 450 U.S. at 715).

⁸⁰⁰ *Id.* (quoting *Thomas*, 450 U.S. at 716).

⁸⁰¹ *Id.* (quoting *Thomas*, 450 U.S. at 716).

⁸⁰² *Id.* at 2780.

⁸⁰³ *Id.* at 2781 (quoting 42 U.S.C. § 2000cc-3).

As discussed earlier in the opinion, HHS had already accommodated nonprofit organizations with religious objections. Under that exception, organizations could self-certify that they opposed providing coverage for certain types of contraception. Once an organization so certifies, its insurance issuer must “ ‘[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.’ ”⁸⁰⁴ The primary dissent demonstrated no reason why this accommodation would be unable to protect the needs of women to the same extent as the contraceptive mandate. Paradoxically, the dissent’s methodology would compel religious employers to completely drop health-insurance coverage, thereby leaving their employees to locate their own individual plans on government-run exchanges or elsewhere.

The majority rejected the argument that an adverse ruling would lead to a rush of religious objections to various medical procedures and drugs, like vaccinations and blood transfusions. Neither HHS nor the dissent provided any evidence that pre-ACA insurance plans failed to cover such procedures. Nor was any evidence provided that a significant number of corporations sought religious exemptions from any of ACA’s requirements other than the contraceptive mandate. HHS apparently believed that “no insurance-coverage mandate would violate RFRA”⁸⁰⁵ regardless of how much it intruded on the religious practices of employers. Thus, according to HHS, RFRA would empower the government to force all employers to provide coverage for any medical procedure permitted by law, including “third-trimester abortions or assisted suicide.”⁸⁰⁶

The Court’s decision only concerned the contraceptive mandate; it should not be read as rendering all insurance-coverage mandates that conflict with an employer’s religious beliefs invalid. 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.”⁸⁰⁷

The Court rejected HHS’s comparing the contraceptive mandate to the requirement to pay Social Security taxes that the Court upheld in *United States v. Lee*.⁸⁰⁸ The fulcrum of *Lee*, unlike the contraceptive mandate, tilted on the unique problems of national taxation. The *Lee* Court held that individuals could not claim exemptions from taxes based on religious objections to specific government expenditures. For example, anti-war religious adherents cannot validly claim an exemption from paying that portion of their income tax utilized for war-related activities.

The principal dissent’s fundamental concern was “RFRA itself.”⁸⁰⁹ The main dissent worried that holding in *Hobby Lobby*’s favor would force the federal courts to apply RFRA to a multitude of “claims made by litigants seeking a religious exemption from generally applicable

⁸⁰⁴ *Id.* at 2782 (quoting 45 CFR § 147.131(c)(2); 26 CFR § 54.9815-2713A(c)(2)).

⁸⁰⁵ *Id.* at 2783.

⁸⁰⁶ *Id.*

⁸⁰⁷ *Id.*

⁸⁰⁸ 455 U.S. 252. This case is discussed *supra* § 17.05.

⁸⁰⁹ *Hobby Lobby*, 134 S. Ct. at 2784.

laws.”⁸¹⁰ Congress, in creating RFRA, took the position that the compelling interest test is workable “ ‘for striking sensible balances between religious liberty and competing prior governmental interests.’ ”⁸¹¹ Whether Congress’ judgment was astute was not the Court’s concern. The Court’s statutory decision allowed them to avoid addressing respondents’ First Amendment claims.

Justice Kennedy’s concurrence emphasized that the government had accommodated the religious objections of nonprofit religious organizations by allowing the same contraception coverage at issue in this case. The accommodation works by “requiring insurance companies to cover, without cost-sharing, contraception coverage for female employees who wish it.”⁸¹² Justice Kennedy thought that this model sufficiently distinguished the current case from others where it was “more difficult and expensive”⁸¹³ to make accommodations.

Justice Ginsburg authored the primary dissent, joined in whole by Justice Sotomayor, and in part by Justices Breyer and Kagan. The dissent interpreted the majority holding as granting commercial enterprises, such as corporations, partnerships and sole proprietorships, the ability to opt out of any law, except tax laws, that conflicted with their sincerely held religious beliefs. The holding had “startling breadth”,⁸¹⁴ as the majority would allow such opt outs so long as a “ ‘less restrictive alternative’ ”⁸¹⁵ existed. According to the majority, such an alternative exists whenever the government—the general public—“can pick up the tab.”⁸¹⁶

Justice Ginsburg criticized 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.”⁸¹⁷ Congress had left health care decisions, including what method of contraception, to the discretion of women and their health care providers. The primary dissent noted that the *Oregon v. Smith*⁸¹⁸ barred any Free Exercise Clause claims.

Congress created RFRA to reestablish the compelling interest test of *Sherbert* and *Yoder*. Instead, “the Court sees RFRA as a bold initiative departing from, rather than restoring, pre-*Smith* jurisprudence.”⁸¹⁹ RFRA’s language specifically notes that the compelling interest test “applies to government actions that ‘substantially burden a person’s exercise of religion.’ ”⁸²⁰ Contrary to the majority, which utilized the Dictionary Act in defining the term “person,” the dissent maintained that the Dictionary Act controls “only where ‘context’ does not ‘indicat[e] otherwise.’ ”⁸²¹ Before this decision, the Court recognized the free exercise rights of “shelter

⁸¹⁰ *Id.*

⁸¹¹ *Id.* at 2785 (quoting 42 U.S.C. § 2000bb(a)(5)).

⁸¹² *Id.* at 2786.

⁸¹³ *Id.* at 2787.

⁸¹⁴ *Id.*

⁸¹⁵ *Id.* (Ginsburg, J., dissenting).

⁸¹⁶ *Id.*

⁸¹⁷ *Id.* at 2789.

⁸¹⁸ 494 U.S. 872 (1990). This case is discussed *supra* § 17.05.

⁸¹⁹ *Hobby Lobby*, 134 S. Ct. at 2793.

⁸²⁰ *Id.* at 2791 (quoting 42 U.S.C. 2000bb-1(a)).

⁸²¹ *Id.* at 2793.

Churches and other nonprofit religious organizations.”⁸²² However, the Court had never before granted religious exemptions to commercial, for-profit corporations. “[R]eligious organizations exist to serve a community of believers. For-profit corporations do not.”⁸²³ While the majority attempted to limit its holding to closely held corporations, its reasoning, the dissent argued, extended to any type of corporation. The opinion will likely cause RFRA claims to proliferate as for-profit entities “seek religion-based exemptions from regulations they deem offensive to their faith.”⁸²⁴

The majority agreed with the plaintiffs “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 coverage.”⁸²⁵ Justice Ginsburg took issue with this conclusion because the RFRA clearly distinguishes between factual claims that the plaintiffs’ religious beliefs are “sincere and of a religious nature”⁸²⁶—that a court is required to accept as true—and the legal question of whether the plaintiffs’ religious exercise is substantially burdened—an issue a court must answer. Under this framework, Justice Ginsburg considered the relationship between the families’ religious objections and the contraceptive mandate “too attenuated”⁸²⁷ to be considered a substantial burden. Importantly, the covered employees and dependents decided whether to claim benefits under the relevant insurance plans, not Hobby Lobby or Conestoga.

Even if respondents had met the substantial burden requirement, the ACA advanced compelling health interests, such as preventing unintended pregnancies and other benefits “wholly unrelated to pregnancy.”⁸²⁸ Moreover, the fact that respondents’ contested only “4 of the 20 FDA-approved contraceptives did not lessen these compelling interests.”⁸²⁹ Interestingly, the corporations sought to exclude coverage for intrauterine devices (IUDs), which are more effective and considerably more expensive than other methods of contraception. The majority’s logic seemed to allow entities like Hobby Lobby and Conestoga to reject coverage for all methods of contraception.

Retreating from its supposition that compelling interests provide a foundation for the contraceptive coverage requirement, the Court noted that the requirement did not bind certain types of employers, ones with less than 50 employees and those using grandfathered plans. However, federal statutes frequently exempt small employers. ACA’s grandfathering provision permits a number of the Act’s requirements to be complied with over a period of time. The number of grandfathered plans dropped from 56% in 2011 to 36% in 2013.

The “least restrictive means”⁸³⁰ test should not force employees to “relinquish benefits accorded them by federal law in order to ensure that their commercial employers can adhere

⁸²² *Id.* at 2794.

⁸²³ *Id.* at 2796.

⁸²⁴ *Id.* at 2797.

⁸²⁵ *Id.* at 2798.

⁸²⁶ *Id.*

⁸²⁷ *Id.* at 2799.

⁸²⁸ *Id.* Non-pregnancy related disorders included “preventing certain cancers, menstrual disorders, and pelvic pain.”

Id.

⁸²⁹ *Id.* at 2799-80.

⁸³⁰ *Id.* at 2802.

unreservedly to their religious tenets.”⁸³¹ Justice Ginsburg also questioned whether any stopping point existed for the majority’s “ ‘let the government pay’ alternative.”⁸³² Even the majority, by electing not to decide whether its approach to RFRA applied to all religious claims, hedged its decision to treat for-profit corporations like nonprofit religious-based ones.

Justice Ginsburg questioned whether the RFRA exemption the Court fashioned would extend to objections to “blood transfusions (Jehovah’s Witnesses); antidepressants (Scientologist); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus; and vaccinations (Christian Scientist, among others).”⁸³³ The principal dissent determined that it would restrict religious exemptions stemming from the RFRA to companies formed specifically for religious reasons and committed to executing that religious purpose. The dissent would not allow such exemptions to organizations committed to making money.

Justice Breyer wrote a separate dissent, joined by Justice Kagan. Justice Breyer agreed with Justice Ginsburg’s dissent that plaintiffs’ challenge to the contraception mandate “fails on the merits.”⁸³⁴ However, he did not think the Court needed to decide whether RFRA allowed for-profit corporations or their owners to bring claims.

In *Wheaton College v. Burwell*,⁸³⁵ the Court granted an injunction pending appeal under the Religious Freedom Restoration Act (RFRA) against enforcing a requirement in the Patient Protection and Affordable Care Act (Act) that employers file Form 700 to avoid a requirement under the Act that its health care coverage include contraception. The Court issued this injunction on July 3, 2014, three days after *Burwell v. Hobby Lobby*.⁸³⁶ The government argued that the College’s health care coverage must provide the full range of contraceptive coverage. The College contended that it was exempted on religious grounds from providing coverage for contraceptives once it notified government even without using Form 700. The majority determined: “Nothing in this order precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act.”⁸³⁷ The Court did not express its views on the merits. Some have suggested that the case portends a much broader reading and stringent interpretation of the rights under the Religious Freedom Restoration Act (RFRA) and might have been suggested by some of the language in the majority of *Hobby Lobby*.

Justice Scalia concurred in the result. Justice Sotomayor dissented, joined by Justices Ginsburg and Kagan. The dissent noted that the Act categorically exempted churches. A religious nonprofit organization can also qualify for an exemption if it signs a form certifying: (1) that it is a religious nonprofit; (2) that it objects to the Act’s provision concerning contraceptive services; and (3) provides a copy of Form 700 to its insurance issuer. Wheaton contended that merely filing the form violates RFRA because doing so makes one complicit in

⁸³¹ *Id.*

⁸³² *Id.*

⁸³³ *Id.* at 2805.

⁸³⁴ *Id.* at 2806 (Breyer, J., dissenting).

⁸³⁵ 2014 U.S. LEXIS 4706 (2014).

⁸³⁶ 2014 U.S. LEXIS 4505. This case is discussed *infra* § 17.05.

⁸³⁷ 2014 U.S. LEXIS at *1.

the contraceptive provision by Wheaton's triggering the requirement for a third-party to provide the contraceptive services to which Wheaton objects. The dissent countered by stating that federal law triggers the Act's contraceptive coverage, not completion of the self-certification form; consequently, Wheaton's objection does not state a viable claim under RFRA. Even assuming a burden on RFRA rights, the accommodation should be upheld under RFRA and *Hobby Lobby*, as "the least restrictive means of furthering the Government's compelling interests in public health and women's well-being."⁸³⁸

Even if one assumes that the self-certification obligation contravenes RFRA, the Court's granting an injunction under the All Writs Act when the district court had not even adjudicated the merits of the claim was "extraordinary."⁸³⁹ Precedent permitted such an injunction only when "'(1) it is necessary or appropriate in aid of our jurisdiction, and (2) the legal rights at issue are indisputably clear.'"⁸⁴⁰ However, two Courts of Appeal have explicitly rejected the type of claim asserted by Wheaton. Although in the past the Court used such a split to bar this type of injunction, here the Court inexplicably used the split to justify its order.

Justice Sotomayor concluded that filling out the form is not a substantial burden because doing so is "the *least* intrusive way"⁸⁴¹ of identifying organizations entitled to accommodations under the Act. The government accepted the statement without even inquiring about the sincerity of the employer's [Wheaton College] religious views. The dissent noted that the Court's alternative notification plan or approach was clearly unworkable on a national scale. Moreover, Wheaton College's claim presumably would be the same under this alternative notification system.

⁸³⁸ *Id.* at *4 (Sotomayor, J., dissenting) (quoting 42 U.S.C. § 2000bb-1(b)(2)).

⁸³⁹ *Id.* at *6.

⁸⁴⁰ *Id.* at *11 (quoting *Turner Broad. Sys. v. FCC*, 507 U.S. 1301, 1303 (1993)).

⁸⁴¹ *Id.* at *19.