# FIRST AMENDMENT LAW:

## FREEDOM OF EXPRESSION
## AND
## FREEDOM OF RELIGION

### Third Edition

### 2017 Supplement

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# Preface

The Third Edition of our casebook, *First Amendment Law: Freedom of Expression and Freedom of Religion*, was sent to the publisher in the fall of 2013. In April 2014, the Supreme Court handed down the first of the 2013 Term's decisions on the First Amendment. By the time the October 2013 Term ended, the Court had handed down three additional free speech decisions, an important ruling on legislative prayer, and a highly controversial decision interpreting the Religious Freedom Restoration Act of 1993 (RFRA). In the Term that followed, the Court decided three more free speech cases and another statutory religious-freedom case. By contrast, the October 2015 term was a quiet one from the perspective of the First Amendment. Perhaps due to Justice Scalia's death in February, 2016, the Court avoided making major statements on First Amendment issues. It divided 4-4 on an important case challenging the constitutionality of compelled employee exactions for union representation fees, and, in an unusual move, it vacated a lower court decision concerning a challenge to RFRA's contraception mandate while suggesting how the parties could settle the case. By contrast, in the term just completed, the Court decided two free speech cases and an important case under the religion clauses. This Supplement provides coverage of those subsequent decisions.

The Court sustained the First Amendment claim in the great majority of these cases:

- In *Packingham v. North Carolina* (Chapter 10), the Court struck down a state statute that made it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become member or to create or maintain personal web pages." The majority opinion expounded at length about the significance of social media and the internet for the exercise of First Amendment rights. Three Justices criticized that "undisciplined *dicta*" and concurred only in the judgment in a cautionary separate opinion. The opinions do open a window — pun intended — onto the minds of the Justices for the future of the First Amendment and the internet.
- In *Matal v. Tam* (Chapter 13), the Court struck down the "disparagement clause" in the Lanham Act that prohibited registration of trademarks that disparage or bring into disrepute persons or groups. The Court ruled in favor of the rock group "The Slants," who chose that moniker explicitly to reclaim that racist term and take away its denigrating force as a derogatory term for persons of Asian descent. The decision obliged the Court to revisit the juridical category of government speech and (implicitly) the non-juridical category of so-called "hate speech."
- In *Lutheran Trinity Church v. Comers* (Chapter 18), the Court held that the state violated the Free Exercise Clause when it disqualified a church day care center from receiving a grant to resurface its playground with recycled tires solely on the ground that the applicant was a church. A strongly-worded dissent criticized the majority for ignoring the Establishment Clause implications of state funds being paid directly to a church. The opinions neatly illustrate the tensions between the Religion Clauses.

- In *Harris v. Quinn* (Chapter 5 Note), the Court held that Illinois violated the rights of personal home care providers by requiring them to pay "agency fees" to a union after the state designated the caregivers as state employees "solely for the purpose of coverage under the Illinois Public Labor Relations Act." The Court found "an unprecedented violation of the bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." Four Justices dissented, arguing that the 1977 decision in *Abood v. Detroit Bd. of Ed.* foreclosed the constitutional challenge.
- In *McCullen v. Coakley* (Chapter 7), the Court struck down a Massachusetts law that made it a crime to knowingly stand on a "public way or sidewalk" within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed. Although the Court was unanimous in its result, four Justices sharply criticized the Court's opinion for rejecting the petitioners' argument that the Massachusetts law discriminated on the basis of both content and viewpoint. We think that *McCullen* can replace *Hill v. Colorado* (2000) (Casebook p. 412) as a principal case, although there is certainly value in studying the two decisions together.
- In *Reed v. Town of Gilbert* (Chapter 8), the Court held that a sign ordinance violated the First Amendment. The Court was unanimous in result, but the opinions revealed sharp disagreement over a fundamental question of First Amendment law: the treatment of content-based regulations. The majority took the position that any "facially content based restriction" must satisfy strict scrutiny. Three Justices argued for a more flexible approach, saying that as long as there is no realistic possibility that a regulation has "the intent or effect of favoring some ideas over others," the Court should "relax [its] guard."
- In *McCutcheon v. FEC* (Chapter 11), the Court struck down the "aggregate limits" on campaign contributions — restrictions on how much money a donor may contribute in total to all candidates or committees — in the federal campaign finance statute. Four Justices dissented, argued that the decision, in tandem with *Citizens United v. FEC* (2010) (Casebook p. 695), "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."
- In *Lane v. Franks* (Chapter 12), the Court unanimously agreed that the Eleventh Circuit had read *Garcetti v. Ceballos* (2006) (Casebook p. 730) "far too broadly." The Court held that "the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities." And that is so "even when the testimony relates to his public employment or concerns information learned during that employment."

Another decision from last Term may be the future occasion for important developments in the commercial speech doctrine. In *Expressions Hair Design v.*

*Schneiderman*, 137 S. Ct. 1144 (2017), the Court held that a New York statute regulating credit card surcharges was a regulation of the communication of prices rather than a regulation of prices. Therefore, the case was remanded to the Second Circuit for a determination whether the regulations satisfied the four-prong *Central Hudson* test for commercial speech.

Two other decisions since the Third Edition rejected free-speech claims, both by a vote of 5-4. First, in *Williams-Yulee v. Florida Bar* (Chapter 11), the Court upheld a Florida canon of judicial ethics that bars candidates for elected judgeships from "personally solicit[ing] campaign funds." A five-Justice majority conceded that the canon constituted a content-based speech restriction, but concluded that it satisfied strict scrutiny. Second, in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* (Chapter 13), the Court held that specialty license plates authorized by Texas law constitute government speech and thus are not subject to First Amendment constraints.

In two statutory religious-freedom decisions the claimants prevailed. First, in *Burwell v. Hobby Lobby, Inc.* (Chapter 17 Note), the Court held that regulations of the Department of Health and Human Services implementing the contraceptive care mandate under the 2010 health care law violated RFRA as applied to closely-held for-profit corporations whose owners hold sincere religious beliefs that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point. Four Justices, in dissent, saw the decision as one of "startling breath." The case neatly illustrates the significance of bringing a challenge under the statute as opposed to the Constitution.

Second, in *Holt v. Hobbs* (Chapter 17 Note), the Court unanimously ruled in favor of a prisoner who sought a religious exemption under the Religious Land Use and Institutionalized Persons Act (RLUIPA) from a state prison regulation prohibiting beards. The opinion for the Court applied a very strict scrutiny under the federal statute.

In contrast, in *Town of Greece v. Galloway* (Chapter 16), the Court rejected an Establishment Clause challenge to a town's practice of opening its monthly board meetings with a prayer, even though many of the prayers included sectarian references and the prayers were mostly Christian. Four Justices, dissenting, argued that the Town's practice "does not square with the First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in her government." This new principal case reveals the views of the current Justices about religion in public settings.

We recognize that some of the decisions that loom large on first reading may fade in importance as time goes by. Still, there is pedagogical value in studying recent cases that highlight current issues and reveal philosophical divisions among the Justices now on the Court. We have therefore opted to err on the side of inclusion. Finally, we have included several new problems in this annual Supplement for classroom discussion.

* * *

The authors express their appreciation to the staff of the University of Pittsburgh School of Law Document Technology Center for their dedicated efforts that made it possible to produce this Supplement under a pressing deadline. As with the Casebook, we welcome comments and suggestions from users and readers.

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# Chapter 5
# Compelled Expression

## B. Compelled Subsidy

**Page 350:** ***add before the Note:***

### Note: Further Limitations on *Abood*

**1.** In *Knox v. Service Employees International* (2012) (Casebook p. 347 Note) the Court struck down a public-sector union's procedure for collecting supplemental assessments from non-members for the purpose of funding political speech beyond that paid for by the union's regular annual collection. Limiting the scope of the Court's previous understanding that "dissent is not to be presumed," *Machinists v. Street*, 367 U.S. 740 (1961) (Casebook p. 346 Note), *Knox* ruled that dissenting non-members in an agency shop workplace have a constitutional right to not have such supplemental funds collected from them unless they affirmatively opt in to that collection.

Two years later, in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), the Court questioned at length a more foundational premise of *Abood*, which allows unions to collect from non-members fees to pay for the union's collective bargaining activities. However, rather than overruling *Abood*, the Court distinguished it, thus preserving that precedent, at least for the time being.

*Harris* considered an Illinois law allowing a union of government-funded home health-care workers ("personal assistants" or "PAs") to collect fees from non-members to defray the union's cost of performing certain activities, including collective bargaining. PAs who objected to paying those fees sued. The Seventh Circuit ruled for the state, applying *Abood*.

On a 5-4 vote, the Supreme Court reversed. Writing for the majority, Justice Alito (who also wrote the majority opinion in *Knox*) distinguished *Abood* on the ground that the employment status of personal assistants is "much different" from that of the "full-fledged public employees" in *Abood*. Relying on Illinois law, the Court concluded that PAs are essentially private-sector employees of the individual clients to whom they are assigned. According to the Court, the personal assistants' status as something other than "full-fledged public employees" altered the union's role in representing the interests of non-members in ways that rendered inapplicable *Abood*'s justifications for allowing mandatory collection of agency fees to defray collective bargaining expenses.

An important part of the Court's refusal to apply *Abood* appeared to be its skepticism about the correctness of that case's analysis. The Court explained its concerns:

> The *Abood* Court's analysis is questionable on several grounds. Some of these were noted or apparent at or before the time of the decision, but several have become more evident and troubling in the years since then. . . .
>
> *Abood* failed to appreciate the difference between the core union speech involuntarily subsidized by dissenting public-sector employees and the core union speech involuntarily funded by their counterparts in the private sector. In the public sector, core issues

> such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector. . . .
>
> *Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends. In the private sector, the line is easier to see. Collective bargaining concerns the union's dealings with the employer; political advocacy and lobbying are directed at the government. But in the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government.
>
> *Abood* does not seem to have anticipated the magnitude of the practical administrative problems that would result in attempting to classify public-sector union expenditures as either "chargeable" (in *Abood*'s terms, expenditures for "collective-bargaining, contract administration, and grievance-adjustment purposes") or nonchargeable (*i.e.*, expenditures for political or ideological purposes). In the years since *Abood*, the Court has struggled repeatedly with this issue. *See* [*e.g.*] *Teachers v. Hudson* (1986) [Casebook p. 347 Note] . . . .
>
> *Abood* likewise did not foresee the practical problems that would face objecting nonmembers. Employees who suspect that a union has improperly put certain expenses in the [chargeable] category must bear a heavy burden if they wish to challenge the union's actions. Because of the open-ended nature of the . . . test, classifying particular categories of expenses may not be straightforward. . . .
>
> Finally, a critical pillar of the *Abood* Court's analysis rests on an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop. . . . [This] assumption is unwarranted.

What the Court described as "*Abood*'s questionable foundations," when combined with the Court's conclusion that "the personal assistants are quite different from full-fledged public employees," led the Court to "refuse to extend *Abood* to the new situation before us." Applying "generally applicable First Amendment standards" to this new situation, the Court held that the agency fee provision at issue in *Harris* failed the "exacting scrutiny" *Knox* required. In particular, the Court concluded that there was no "inextricable link" between "the union's status as exclusive bargaining agent and the right to collect an agency fee from non-members." Even if there were, the Court concluded, "features of the Illinois scheme would still undermine the argument that the agency fee plays an important role in maintaining labor peace." For example, the Court noted that "any threat to labor peace [was] diminished because the personal assistants do not work together in a common state facility but instead spend all their time in private homes."

Justice Kagan dissented in an opinion joined by Justices Ginsburg, Breyer, and Sotomayor. She began by disputing the majority's characterization of the state's role in employing PAs and the significance of the extent to which individual clients rather than the state supervise PAs. She concluded that the details of the

state's involvement with PAs gave it the same interest that the Detroit School Board had in working with one entity that represented the entire relevant workforce in *Abood*. Turning to *Abood* itself, she argued that *stare decisis* counseled against reconsidering that decision, particularly because "more than 20 States" had enacted laws authorizing such agency-fee arrangements, leading "public entities of all stripes" to enter into "multi-year contracts containing such clauses." She also questioned the majority's claim that courts had encountered particular difficulties in applying the distinction between chargeable collective-bargaining expenses and non-chargeable ideological expenses.

Justice Kagan concluded her analysis by arguing that the Court's decision made it harder for states to further their interest in bargaining with a viable employee representative, since PAs acting in their self-interest would now have an incentive to decline to join the union, thus depriving it of the funds it needed to serve as a bargaining representative. Justice Kagan suggested that even pro-union PAs would act in this way, given the temptation to free-ride on other employees' decisions to join and thus fund the union.

**2.** Consider the Court's criticism that *Abood* "failed to appreciate the difference between the core union speech involuntarily subsidized by dissenting public-sector employees and the core union speech involuntarily funded by their counterparts in the private sector." Do you agree that "in the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector"? If you agree that there is a difference, how should the Court balance the governmental interest in labor peace in government workplaces — for example, the government-employer's interest in having one, and only one, entity to negotiate with over wages — and dissenters' rights not to be compelled to fund collective bargaining activities with which they might disagree as a political matter? For example, assume that Justice Kagan's prediction is borne out, and employees' temptation to free ride leads unions to begin losing the financial support they need to engage in collective bargaining, even though a majority of the employees in the relevant workplace support the union as a general matter. Would federal and state labor policies allowing agency shop arrangements in government workplaces for the very purpose of avoiding such free-riding nevertheless violate the First Amendment?

What if you don't agree with the Court's view that there's a difference between the political salience of labor issues in government workplaces and the salience of analogous issues in private sector workplaces? Is the entire concept of the agency shop — in private or public workplaces — unconstitutional?

# Chapter 7
# Regulating the "Time, Place, and Manner" of Protected Speech

## B. Applications of the Doctrine

**Page 412:** ***replace the* Hill *case and the Note with the following new case, Note, and Problem:***

### McCullen v. Coakley
*573 U.S. ___ (2014)*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

A Massachusetts statute makes it a crime to knowingly stand on a "public way or sidewalk" within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed. Petitioners are individuals who approach and talk to women outside such facilities, attempting to dissuade them from having abortions. The statute prevents petitioners from doing so near the facilities' entrances. The question presented is whether the statute violates the First Amendment.

I

A

In 2000, the Massachusetts Legislature enacted the Massachusetts Reproductive Health Care Facilities Act. The law was designed to address clashes between abortion opponents and advocates of abortion rights that were occurring outside clinics where abortions were performed. The Act established a defined area with an 18-foot radius around the entrances and driveways of such facilities. Anyone could enter that area, but once within it, no one (other than certain exempt individuals) could knowingly approach within six feet of another person — unless that person consented — "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." A separate provision subjected to criminal punishment anyone who "knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility."

The statute was modeled on a similar Colorado law that this Court had upheld in *Hill v. Colorado*, 530 U.S. 703 (2000). Relying on *Hill*, the United States Court of Appeals for the First Circuit sustained the Massachusetts statute against a First Amendment challenge.

By 2007, some Massachusetts legislators and law enforcement officials had come to regard the 2000 statute as inadequate. At legislative hearings, multiple witnesses recounted apparent violations of the law. Massachusetts Attorney General Martha Coakley, for example, testified that protestors violated the statute "on a routine basis." To illustrate this claim, she played a video depicting protestors approaching patients and clinic staff within the buffer zones, ostensibly without the latter individuals' consent. Clinic employees and volunteers also testified that protestors congregated near the doors and in the driveways of the clinics, with the result that prospective patients occasionally retreated from the clinics rather than try to make their way to the clinic entrances or parking lots.

Captain William B. Evans of the Boston Police Department . . . testified that the 18-foot zones were so crowded with protestors that they resembled "a goalie's crease," making it hard to determine whether a protestor had deliberately approached a patient or, if so, whether the patient had consented. . . .

To address these concerns, the Massachusetts Legislature amended the statute in 2007, replacing the six-foot no-approach zones (within the 18-foot area) with a 35-foot fixed buffer zone from which individuals are categorically excluded. The statute now provides:

> No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.

A "reproductive health care facility," in turn, is defined as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed."

The 35-foot buffer zone applies only "during a facility's business hours," and the area must be "clearly marked and posted." In practice, facilities typically mark the zones with painted arcs and posted signs on adjacent sidewalks and streets. A first violation of the statute is punishable by a fine of up to $500, up to three months in prison, or both, while a subsequent offense is punishable by a fine of between $500 and $5,000, up to two and a half years in prison, or both.

The Act exempts four classes of individuals: (1) "persons entering or leaving such facility"; (2) "employees or agents of such facility acting within the scope of their employment"; (3) "law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment"; and (4) "persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility." The legislature also retained the separate provision from the 2000 version that proscribes the knowing obstruction of access to a facility.

B

Some of the individuals who stand outside Massachusetts abortion clinics are fairly described as protestors, who express their moral or religious opposition to abortion through signs and chants or, in some cases, more aggressive methods such as face-to-face confrontation. Petitioners take a different tack. They attempt to engage women approaching the clinics in what they call "sidewalk counseling," which involves offering information about alternatives to abortion and help pursuing those options. Petitioner Eleanor McCullen, for instance, will typically initiate a conversation this way: "Good morning, may I give you my literature? Is there anything I can do for you? I'm available if you have any questions." If the woman seems receptive, McCullen will provide additional information. McCullen and the other petitioners consider it essential to maintain a caring demeanor, a calm tone of voice, and direct eye contact during these exchanges. Such interactions, petitioners believe, are a much more effective means of dissuading women from having abortions than confrontational methods such as shouting or brandishing signs, which in petitioners' view tend only to antagonize their intended

audience. In unrefuted testimony, petitioners say they have collectively persuaded hundreds of women to forgo abortions.

The buffer zones have displaced petitioners from their previous positions outside the clinics. [For example, McCullen and other petitioners are effectively excluded from a 56-foot-wide expanse of the public sidewalk in front of the Boston clinic.] Petitioners at all three clinics claim that the buffer zones have considerably hampered their counseling efforts. . . .

The second statutory exemption allows clinic employees and agents acting within the scope of their employment to enter the buffer zones. Relying on this exemption, the Boston clinic uses "escorts" to greet women as they approach the clinic, accompanying them through the zones to the clinic entrance. Petitioners claim that the escorts sometimes thwart petitioners' attempts to communicate with patients by blocking petitioners from handing literature to patients, telling patients not to "pay any attention" or "listen to" petitioners, and disparaging petitioners as "crazy."

C

In January 2008, petitioners sued Attorney General Coakley and other Commonwealth officials. They sought to enjoin enforcement of the Act, alleging that it violates the First and Fourteenth Amendments, both on its face and as applied to them. [After two bench trials, the district court rejected all of petitioners' constitutional challenges, and the Court of Appeals for the First Circuit affirmed. The Supreme Court granted certiorari.]

II

By its very terms, the Massachusetts Act regulates access to "public way[s]" and "sidewalk[s]." Such areas occupy a "special position in terms of First Amendment protection" because of their historic role as sites for discussion and debate. [We have labeled these places] "traditional public fora." . . .

It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment's purpose "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail," this aspect of traditional public fora is a virtue, not a vice.

In short, traditional public fora are areas that have historically been open to the public for speech activities. Thus, even though the Act says nothing about speech on its face, there is no doubt — and respondents do not dispute — that it restricts access to traditional public fora and is therefore subject to First Amendment scrutiny.

Consistent with the traditionally open character of public streets and sidewalks, we have held that the government's ability to restrict speech in such locations is "very limited." In particular, the guiding First Amendment principle that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content" applies with full force in a traditional public forum. *Police Dept. of Chicago v. Mosley* [Casebook p. 437]. . . .

We have, however, afforded the government somewhat wider leeway to regulate features of speech unrelated to its content. "[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' " *Ward v. Rock Against Racism* (1989) [Casebook p. 399].

While the parties agree that this test supplies the proper framework for assessing the constitutionality of the Massachusetts Act, they disagree about whether the Act satisfies the test's three requirements.

III

Petitioners contend that the Act is not content neutral for two independent reasons: First, they argue that it discriminates against abortion-related speech because it establishes buffer zones only at clinics that perform abortions. Second, petitioners contend that the Act, by exempting clinic employees and agents, favors one viewpoint about abortion over the other. If either of these arguments is correct, then the Act must satisfy strict scrutiny — that is, it must be the least restrictive means of achieving a compelling state interest. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). Respondents do not argue that the Act can survive this exacting standard. . . .

A

The Act applies only at a "reproductive health care facility," defined as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." Given this definition, petitioners argue, "virtually all speech affected by the Act is speech concerning abortion," thus rendering the Act content based.

We disagree. To begin, the Act does not draw content-based distinctions on its face. Contrast *Boos v. Barry* (1987) [Casebook p. 481] (ordinance prohibiting the display within 500 feet of a foreign embassy of any sign that tends to bring the foreign government into "public odium" or "public disrepute"). The Act would be content based if it required "enforcement authorities" to "examine the content of the message that is conveyed to determine whether" a violation has occurred. But it does not. Whether petitioners violate the Act "depends" not "on what they say," *Holder v. Humanitarian Law Project* (2010) [Casebook p. 462], but simply on where they say it. Indeed, petitioners can violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word.

It is true, of course, that by limiting the buffer zones to abortion clinics, the Act has the "inevitable effect" of restricting abortion-related speech more than speech on other subjects. *United States v. O'Brien* (1968) [Casebook p. 444]. But a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics. On the contrary, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*. The question in such a case is whether the law is "justified without reference to the content of the regulated speech." *Renton v. Playtime Theatres, Inc.* (1986) [Casebook p. 475].

The Massachusetts Act is. Its stated purpose is to "increase forthwith public safety at reproductive health care facilities." Respondents have articulated similar purposes before this Court — namely, "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways." It is not the case that "[e]very objective indication shows that the provision's primary purpose is to restrict speech that opposes abortion."

We have previously deemed the foregoing concerns to be content neutral. Obstructed access and congested sidewalks are problems no matter what caused them. A group of individuals can obstruct clinic access and clog sidewalks just as much when they loiter as when they protest abortion or counsel patients.

To be clear, the Act would not be content neutral if it were concerned with undesirable effects that arise from "the direct impact of speech on its audience" or "[l]isteners' reactions to speech." *Boos*. If, for example, the speech outside Massachusetts abortion clinics caused offense or made listeners uncomfortable, such offense or discomfort would not give the Commonwealth a content-neutral justification to restrict the speech. All of the problems identified by the Commonwealth here, however, arise irrespective of any listener's reactions. Whether or not a single person reacts to abortion protestors' chants or petitioners' counseling, large crowds outside abortion clinics can still compromise public safety, impede access, and obstruct sidewalks.

Petitioners do not really dispute that the Commonwealth's interests in ensuring safety and preventing obstruction are, as a general matter, content neutral. But petitioners note that these interests "apply outside every building in the State that hosts any activity that might occasion protest or comment," not just abortion clinics. By choosing to pursue these interests only at abortion clinics, petitioners argue, the Massachusetts Legislature evinced a purpose to "single[ ] out for regulation speech about one particular topic: abortion."

We cannot infer such a purpose from the Act's limited scope. The broad reach of a statute can help confirm that it was not enacted to burden a narrower category of disfavored speech. *See* Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 451-52 (1996). At the same time, however, "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist." *Burson v. Freeman* (1992) [Casebook p. 443 Note]. The Massachusetts Legislature amended the Act in 2007 in response to a problem that was, in its experience, limited to abortion clinics. There was a record of crowding, obstruction, and even violence outside such clinics. . . . In light of the limited nature of the problem, it was reasonable for the Massachusetts Legislature to enact a limited solution. When selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more. . . .

B

Petitioners also argue that the Act is content based because it exempts four classes of individuals, one of which comprises "employees or agents of [a reproductive healthcare] facility acting within the scope of their employment." This exemption, petitioners say, favors one side in the abortion debate and thus constitutes viewpoint discrimination — an "egregious form of content discrimination," *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) [Casebook p. 568 Note]. In particular, petitioners argue that the exemption allows

clinic employees and agents — including the volunteers who "escort" patients arriving at the Boston clinic — to speak inside the buffer zones.

It is of course true that "an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.' " *City of Ladue v. Gilleo* (1994) [Casebook p. 404]. At least on the record before us, however, the statutory exemption for clinic employees and agents acting within the scope of their employment does not appear to be such an attempt.

There is nothing inherently suspect about providing some kind of exemption to allow individuals who work at the clinics to enter or remain within the buffer zones. In particular, the exemption cannot be regarded as simply a carve-out for the clinic escorts; it also covers employees such as the maintenance worker shoveling a snowy sidewalk or the security guard patrolling a clinic entrance.

Given the need for an exemption for clinic employees, the "scope of their employment" qualification simply ensures that the exemption is limited to its purpose of allowing the employees to do their jobs. . . . There is no suggestion in the record that any of the clinics authorize their employees to speak about abortion in the buffer zones. The "scope of their employment" limitation thus seems designed to protect against exactly the sort of conduct that petitioners and Justice Scalia fear. . . .

It would be a very different question if it turned out that a clinic authorized escorts to speak about abortion inside the buffer zones. See [concurring opinion of Justice Alito]. In that case, the escorts would not seem to be violating the Act because the speech would be within the scope of their employment. The Act's exemption for clinic employees would then facilitate speech on only one side of the abortion debate — a clear form of viewpoint discrimination that would support an as-applied challenge to the buffer zone at that clinic. But the record before us contains insufficient evidence to show that the exemption operates in this way at any of the clinics, perhaps because the clinics do not want to doom the Act by allowing their employees to speak about abortion within the buffer zones.

We thus conclude that the Act is neither content nor viewpoint based and therefore need not be analyzed under strict scrutiny.

IV

Even though the Act is content neutral, it still must be "narrowly tailored to serve a significant governmental interest." *Ward.* The tailoring requirement does not simply guard against an impermissible desire to censor. The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily "sacrific[ing] speech for efficiency."

For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward.* Such a regulation, unlike a content-based restriction of speech, "need not be the least restrictive or least intrusive means of " serving the government's interests. *Id.* But the government still "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.*

A

As noted, respondents claim that the Act promotes "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways." Petitioners do not dispute the significance of these interests. . . . The buffer zones clearly serve these interests.

At the same time, the buffer zones impose serious burdens on petitioners' speech. At each of the three Planned Parenthood clinics where petitioners attempt to counsel patients, the zones carve out a significant portion of the adjacent public sidewalks, pushing petitioners well back from the clinics' entrances and driveways. The zones thereby compromise petitioners' ability to initiate the close, personal conversations that they view as essential to "sidewalk counseling."

For example, in uncontradicted testimony, McCullen explained that she often cannot distinguish patients from passersby outside the Boston clinic in time to initiate a conversation before they enter the buffer zone. And even when she does manage to begin a discussion outside the zone, she must stop abruptly at its painted border, which she believes causes her to appear "untrustworthy" or "suspicious." Given these limitations, McCullen is often reduced to raising her voice at patients from outside the zone — a mode of communication sharply at odds with the compassionate message she wishes to convey. Clark gave similar testimony about her experience at the Worcester clinic.

These burdens on petitioners' speech have clearly taken their toll. [For example, Zarrella estimated having about 100 successful interactions over the years before the 2007 amendment, but not a single one since.]

The buffer zones have also made it substantially more difficult for petitioners to distribute literature to arriving patients. [Because] petitioners in Boston cannot readily identify patients before they enter the zone, they often cannot approach them in time to place literature near their hands — the most effective means of getting the patients to accept it. In Worcester and Springfield, the zones have pushed petitioners so far back from the clinics' driveways that they can no longer even attempt to offer literature as drivers turn into the parking lots. In short, the Act operates to deprive petitioners of their two primary methods of communicating with patients.

The Court of Appeals and respondents are wrong to downplay these burdens on petitioners' speech. As the Court of Appeals saw it, the Constitution does not accord "special protection" to close conversations or "handbilling." But while the First Amendment does not guarantee a speaker the right to any particular form of expression, some forms — such as normal conversation and leafletting on a public sidewalk — have historically been more closely associated with the transmission of ideas than others.

In the context of petition campaigns, we have observed that "one-on-one communication" is "the most effective, fundamental, and perhaps economical avenue of political discourse." And "handing out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression"; "[n]o form of speech is entitled to greater constitutional protection." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden.

Respondents also emphasize that the Act does not prevent petitioners from engaging in various forms of "protest" — such as chanting slogans and displaying signs — outside the buffer zones. That misses the point. Petitioners are not protestors. They seek not merely to express their opposition to abortion, but to inform women of various alternatives and to provide help in pursuing them. Petitioners believe that they can accomplish this objective only through personal, caring, consensual conversations. And for good reason: It is easier to ignore a strained voice or a waving hand than a direct greeting or an outstretched arm. While the record indicates that petitioners have been able to have a number of quiet conversations outside the buffer zones, respondents have not refuted petitioners' testimony that the conversations have been far less frequent and far less successful since the buffer zones were instituted. It is thus no answer to say that petitioners can still be "seen and heard" by women within the buffer zones. If all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners' message. . . .

B

1

The buffer zones burden substantially more speech than necessary to achieve the Commonwealth's asserted interests. At the outset, we note that the Act is truly exceptional: Respondents and their amici identify no other State with a law that creates fixed buffer zones around abortion clinics. That of course does not mean that the law is invalid. It does, however, raise concern that the Commonwealth has too readily forgone options that could serve its interests just as well, without substantially burdening the kind of speech in which petitioners wish to engage.

That is the case here. The Commonwealth's interests include ensuring public safety outside abortion clinics, preventing harassment and intimidation of patients and clinic staff, and combating deliberate obstruction of clinic entrances. The Act itself contains a separate provision, subsection (e) — unchallenged by petitioners — that prohibits much of this conduct. That provision subjects to criminal punishment "[a]ny person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility." If Massachusetts determines that broader prohibitions along the same lines are necessary, it could enact legislation similar to the federal Freedom of Access to Clinic Entrances Act of 1994 (FACE Act), which subjects to both criminal and civil penalties anyone who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services." Some dozen other States have done so. If the Commonwealth is particularly concerned about harassment, it could also consider an ordinance such as the one adopted in New York City that not only prohibits obstructing access to a clinic, but also makes it a crime "to follow and harass another person within 15 feet of the premises of a reproductive health care facility."[8]

[8] We do not "give [our] approval" to this or any of the other alternatives we discuss. We merely suggest that a law like the New York City ordinance could in principle constitute a permissible alternative. Whether such a law would pass constitutional muster would depend on a number of other factors, such as whether the term "harassment" had been

The Commonwealth points to a substantial public safety risk created when protestors obstruct driveways leading to the clinics. That is, however, an example of its failure to look to less intrusive means of addressing its concerns. Any such obstruction can readily be addressed through existing local ordinances. *See, e.g.*, Worcester, Mass., Revised Ordinances of 2008 ("No person shall stand, or place any obstruction of any kind, upon any street, sidewalk or crosswalk in such a manner as to obstruct a free passage for travelers thereon").

All of the foregoing measures are, of course, in addition to available generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like.

In addition, subsection (e) of the Act, the FACE Act, and the New York City anti-harassment ordinance are all enforceable not only through criminal prosecutions but also through public and private civil actions for injunctions and other equitable relief. . . . [Injunctive relief] focuses on the precise individuals and the precise conduct causing a particular problem. The Act, by contrast, categorically excludes non exempt individuals from the buffer zones, unnecessarily sweeping in innocent individuals and their speech.

The Commonwealth also asserts an interest in preventing congestion in front of abortion clinics. According to respondents, even when individuals do not deliberately obstruct access to clinics, they can inadvertently do so simply by gathering in large numbers. But the Commonwealth could address that problem through more targeted means. Some localities, for example, have ordinances that require crowds blocking a clinic entrance to disperse when ordered to do so by the police, and that forbid the individuals to reassemble within a certain distance of the clinic for a certain period. We upheld a similar law forbidding three or more people "to congregate within 500 feet of [a foreign embassy], and refuse to disperse after having been ordered so to do by the police," *Boos* — an order the police could give only when they "reasonably believe[d] that a threat to the security or peace of the embassy [was] present."

And to the extent the Commonwealth argues that even these types of laws are ineffective, it has another problem. The portions of the record that respondents cite to support the anticongestion interest pertain mainly to one place at one time: the Boston Planned Parenthood clinic on Saturday mornings. Respondents point us to no evidence that individuals regularly gather at other clinics, or at other times in Boston, in sufficiently large groups to obstruct access. For a problem shown to arise only once a week in one city at one clinic, creating 35-foot buffer zones at every clinic across the Commonwealth is hardly a narrowly tailored solution.

The point is not that Massachusetts must enact all or even any of the proposed measures discussed above. The point is instead that the Commonwealth has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate.

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authoritatively construed to avoid vagueness and overbreadth problems of the sort noted by Justice Scalia.

2

Respondents have but one reply: "We have tried other approaches, but they do not work." . . . We cannot accept that contention. Although respondents claim that Massachusetts "tried other laws already on the books," they identify not a single prosecution brought under those laws within at least the last 17 years. . . . In short, the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor has it shown that it considered different methods that other jurisdictions have found effective.

Respondents contend that the alternatives we have discussed suffer from two defects: First, given the "widespread" nature of the problem, it is simply not "practicable" to rely on individual prosecutions and injunctions. But far from being "widespread," the problem appears from the record to be limited principally to the Boston clinic on Saturday mornings. Moreover, by their own account, the police appear perfectly capable of singling out lawbreakers. . . . If Commonwealth officials can compile an extensive record of obstruction and harassment to support their preferred legislation, we do not see why they cannot do the same to support injunctions and prosecutions against those who might deliberately flout the law.

The second supposed defect in the alternatives we have identified is that laws like subsection (e) of the Act and the federal FACE Act require a showing of intentional or deliberate obstruction, intimidation, or harassment, which is often difficult to prove. As Captain Evans predicted in his legislative testimony, fixed buffer zones would "make our job so much easier."

Of course they would. But that is not enough to satisfy the First Amendment. To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier. A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency. In any case, we do not think that showing intentional obstruction is nearly so difficult in this context as respondents suggest. To determine whether a protestor intends to block access to a clinic, a police officer need only order him to move. If he refuses, then there is no question that his continued conduct is knowing or intentional. . . .

Given the vital First Amendment interests at stake, it is not enough for Massachusetts simply to say that other approaches have not worked.[9]

* * *

Petitioners wish to converse with their fellow citizens about an important subject on the public streets and sidewalks — sites that have hosted discussions about the issues of the day throughout history. Respondents assert undeniably significant interests in maintaining public safety on those same streets and sidewalks, as well as in preserving access to adjacent healthcare facilities. But here the Commonwealth has pursued those interests by the extreme step of closing a substantial portion of a traditional public forum to all speakers. It has done so without seriously addressing the problem through alternatives that leave the

[9] Because we find that the Act is not narrowly tailored, we need not consider whether the Act leaves open ample alternative channels of communication. Nor need we consider petitioners' overbreadth challenge.

forum open for its time-honored purposes. The Commonwealth may not do that consistent with the First Amendment.

The judgment of the Court of Appeals for the First Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in the judgment.

Today's opinion carries forward this Court's practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents. There is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion. *See, e.g.*, *Hill v. Colorado* (2000) [Casebook p. 412]; *Madsen v. Women's Health Center, Inc.* (1994) [Casebook p. 426].

The second half of the Court's analysis today, invalidating the law at issue because of inadequate "tailoring," is certainly attractive to those of us who oppose an abortion speech edition of the First Amendment. But think again. This is an opinion that has Something for Everyone, and the more significant portion continues the onward march of abortion-speech-only jurisprudence. That is the first half of the Court's analysis, which concludes that a statute of this sort is not content based and hence not subject to so-called strict scrutiny. The Court reaches out to decide that question unnecessarily — or at least unnecessarily insofar as legal analysis is concerned.

I disagree with the Court's dicta (Part III) and hence see no reason to opine on its holding (Part IV).

I. The Court's Content-Neutrality Discussion Is Unnecessary

The gratuitous portion of today's opinion is Part III, which concludes — in seven pages of the purest dicta — that subsection (b) of the Massachusetts Reproductive Health Care Facilities Act is not specifically directed at speech opposing (or even concerning) abortion and hence need not meet the strict-scrutiny standard applicable to content-based speech regulations. Inasmuch as Part IV holds that the Act is unconstitutional because it does not survive the lesser level of scrutiny associated with content-neutral "time, place, and manner" regulations, there is no principled reason for the majority to decide whether the statute is subject to strict scrutiny. . . .

The Court points out that its opinion goes on to suggest (in Part IV) possible alternatives that apply only at abortion clinics, which therefore "raises the question whether those provisions are content neutral." Of course, the Court has no obligation to provide advice on alternative speech restrictions, and appending otherwise unnecessary constitutional pronouncements to such advice produces nothing but an impermissible advisory opinion.

By the way, there is dictum favorable to advocates of abortion rights even in Part IV. The Court invites Massachusetts, as a means of satisfying the tailoring requirement, to "consider an ordinance such as the one adopted in New York City that . . . makes it a crime 'to follow and harass another person within 15 feet of the premises of a reproductive health care facility.' " Is it harassment, one wonders, for Eleanor McCullen to ask a woman, quietly and politely, two times, whether she will take literature or whether she has any questions? Three times? Four times? It seems to me far from certain that First Amendment rights can be imperiled by

threatening jail time (only at "reproductive health care facilit[ies]," of course) for so vague an offense as "follow[ing] and harass[ing]." It is wrong for the Court to give its approval to such legislation without benefit of briefing and argument.

II. The Statute Is Content Based and Fails Strict Scrutiny

Having eagerly volunteered to take on the level-of-scrutiny question, the Court provides the wrong answer. Petitioners argue for two reasons that subsection (b) articulates a content-based speech restriction — and that we must therefore evaluate it through the lens of strict scrutiny.

A. Application to Abortion Clinics Only

First, petitioners maintain that the Act targets abortion-related — for practical purposes, abortion-opposing — speech because it applies outside abortion clinics only (rather than outside other buildings as well).

Public streets and sidewalks are traditional forums for speech on matters of public concern. . . . Moreover, "the public spaces outside of [abortion-providing] facilities . . . ha[ve] become, by necessity and by virtue of this Court's decision s, a forum of last resort for those who oppose abortion." *Hill* (Scalia, J., dissenting). It blinks reality to say, as the majority does, that a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur — and where that speech can most effectively be communicated — is not content based. Would the Court exempt from strict scrutiny a law banning access to the streets and sidewalks surrounding the site of the Republican National Convention? Or those used annually to commemorate the 1965 Selma-to-Montgomery civil rights marches? Or those outside the Internal Revenue Service? Surely not.

The majority says, correctly enough, that a facially neutral speech restriction escapes strict scrutiny, even when it "may disproportionately affect speech on certain topics," so long as it is "justified without reference to the content of the regulated speech." [But in concluding that the Massachusetts statute is "justified without reference to the content of the regulated speech," the] majority points only to the statute's stated purpose of increasing "public safety" at abortion clinics and to the additional aims articulated by respondents before this Court — namely, protecting "patient access to healthcare . . . and the unobstructed use of public side walks and roadways." Really? Does a statute become "justified without reference to the content of the regulated speech" simply because the statute itself and those defending it in court say that it is? Every objective indication shows that the provision's primary purpose is to restrict speech that opposes abortion.

I begin, as suggested above, with the fact that the Act burdens only the public spaces outside abortion clinics. One might have expected the majority to defend the statute's peculiar targeting by arguing that those locations regularly face the safety and access problems that it says the Act was designed to solve. But the majority does not make that argument because it would be untrue. As the Court belatedly discovers in Part IV of its opinion, although the statute applies to all abortion clinics in Massachusetts, only one is known to have been beset by the problems that the statute supposedly addresses. The Court uses this striking fact (a smoking gun, so to speak) as a basis for concluding that the law is insufficiently "tailored" to safety and access concerns (Part IV) rather than as a basis for concluding that it is not *directed* to those concerns at all, but to the suppression of antiabortion speech. That is rather like invoking the eight missed human targets of

a shooter who has killed one victim to prove, not that he is guilty of attempted mass murder, but that *he has bad aim*.

Whether the statute "restrict[s] more speech than necessary" in light of the problems that it allegedly addresses is, to be sure, relevant to the tailoring component of the First Amendment analysis (the shooter doubtless did have bad aim), but it is also relevant — powerfully relevant — to whether the law is really directed to safety and access concerns or rather to the suppression of a particular type of speech. Showing that a law that suppresses speech on a specific subject is so far-reaching that it applies even when the asserted non-speech-related problems are not present is persuasive evidence that the law is content based. In its zeal to treat abortion-related speech as a special category, the majority distorts not only the First Amendment but also the ordinary logic of probative inferences.

The structure of the Act also indicates that it rests on content-based concerns. The goals of "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways" are already achieved by an earlier-enacted subsection of the statute, which provides criminal penalties for "[a]ny person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility." As the majority recognizes, that provision is easy to enforce. Thus, the speech-free zones carved out by subsection (b) add nothing to safety and access; what they achieve, and what they were obviously designed to achieve, is the suppression of speech opposing abortion.

Further contradicting the Court's fanciful defense of the Act is the fact that subsection (b) was enacted as a more easily enforceable substitute for a prior provision. That provision did not exclude people entirely from the restricted areas around abortion clinics; rather, it forbade people in those areas to approach within six feet of another person *without that person's consent* "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person." As the majority acknowledges, that provision was "modeled on a . . . Colorado law that this Court had upheld in *Hill*." And in that case, the Court recognized that the statute in question was directed at the suppression of unwelcome speech, vindicating what Hill called "[t]he unwilling listener's interest in avoiding unwanted communication." The Court held that interest to be content neutral.

The provision at issue here was indisputably meant to serve the same interest in protecting citizens' supposed right to avoid speech that they would rather not hear. For that reason, we granted a second question for review in this case (though one would not know that from the Court's opinion, which fails to mention it): whether *Hill* should be cut back or cast aside. The majority avoids that question by declaring the Act content neutral on other (entirely unpersuasive) grounds. In concluding that the statute is content based and therefore subject to strict scrutiny, I necessarily conclude that *Hill* should be overruled. Reasons for doing so are set forth in the dissents in that case, and in the abundance of scathing academic commentary describing how *Hill* stands in contradiction to our First Amendment jurisprudence.[4] Protecting people from speech they do not want to

[4] "*Hill* . . . is inexplicable on standard free-speech grounds[,] and . . . it is shameful the Supreme Court would have upheld this piece of legislation on the reasoning that it gave ." Constitutional Law Symposium, *Professor Michael W. McConnell's Response*, 28

hear is not a function that the First Amendment allows the government to undertake in the public streets and sidewalks.

One final thought regarding *Hill*: It can be argued, and it should be argued in the next case, that by stating that "the Act would not be content neutral if it were concerned with undesirable effects that arise from . . . '[l]isteners' reactions to speech,' " and then holding the Act unconstitutional for being insufficiently tailored to safety and access concerns, the Court itself has sub silentio (and perhaps inadvertently) overruled *Hill*. The unavoidable implication of that holding is that protection against unwelcome speech cannot justify restrictions on the use of public streets and sidewalks.

B. Exemption for Abortion-Clinic Employees or Agents

Petitioners contend that the Act targets speech opposing abortion (and thus constitutes a presumptively invalid viewpoint-discriminatory restriction) for another reason as well: It exempts "employees or agents" of an abortion clinic "acting within the scope of their employment." [For discussion of this point, see Justice Alito's opinion concurring in the judgment, *infra*.]

C. Conclusion

In sum, the Act should be reviewed under the strict-scrutiny standard applicable to content-based legislation. . . . Respondents do not even attempt to argue that subsection (b) survives this test. "Suffice it to say that if protecting people from unwelcome communications" — the actual purpose of the provision — "is a compelling state interest, the First Amendment is a dead letter." *Hill* (Scalia, J., dissenting).

III. Narrow Tailoring

Having determined that the Act is content based and does not withstand strict scrutiny, I need not pursue the inquiry conducted in Part IV of the Court's opinion . . . . [If] I did, I suspect I would agree with the majority that the legislation is not narrowly tailored to advance the interests asserted by respondents. But I prefer not to take part in the assembling of an apparent but specious unanimity. . . .

* * *

The obvious purpose of the challenged portion of the Massachusetts Reproductive Health Care Facilities Act is to "protect" prospective clients of abortion clinics from having to hear abortion-opposing speech on public streets and sidewalks. The provision is thus unconstitutional root and branch and cannot be saved, as the majority suggests, by limiting its application to the single facility that has experienced the safety and access problems to which it is quite obviously not addressed. I concur only in the judgment that the statute is unconstitutional under the First Amendment.

JUSTICE ALITO, concurring in the judgment.

I agree that the Massachusetts statute at issue in this case violates the First Amendment. As the Court recognizes, if the Massachusetts law discriminates on the basis of viewpoint, it is unconstitutional, and I believe the law clearly discriminates on this ground.

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PEPPERDINE L. REV. 747 (2001). "I don't think [*Hill*] was a difficult case. I think it was slam-dunk simple and slam-dunk wrong." *Id.* at 750 (remarks of Laurence Tribe). The list could go on.

The Massachusetts statute generally prohibits any person from entering a buffer zone around an abortion clinic during the clinic's business hours, but the law contains an exemption for "employees or agents of such facility acting within the scope of their employment." Thus, during business hours, individuals who wish to counsel against abortion or to criticize the particular clinic may not do so within the buffer zone. If they engage in such conduct, they commit a crime. By contrast, . . . [a clinic] may direct or authorize an employee or agent, while within the zone, to express favorable views about abortion or the clinic, and if the employee exercises that authority, the employee's conduct is perfectly lawful. In short, petitioners and other critics of a clinic are silenced, while the clinic may authorize its employees to express speech in support of the clinic and its work.

Consider this entirely realistic situation. A woman enters a buffer zone and heads haltingly toward the entrance. A sidewalk counselor, such as petitioners, enters the buffer zone, approaches the woman and says, "If you have doubts about an abortion, let me try to answer any questions you may have. The clinic will not give you good information." At the same time, a clinic employee, as instructed by the management, approaches the same woman and says, "Come inside and we will give you honest answers to all your questions." The sidewalk counselor and the clinic employee expressed opposing viewpoints, but only the first violated the statute. . . .

It is clear on the face of the Massachusetts law that it discriminates based on viewpoint. Speech in favor of the clinic and its work by employees and agents is permitted; speech criticizing the clinic and its work is a crime. This is blatant viewpoint discrimination. . . .

[If] the law were truly content neutral, I would agree with the Court that the law would still be unconstitutional on the ground that it burdens more speech than is necessary to serve the Commonwealth's asserted interests.

## Note: Restrictions on Anti-Abortion Speech

**1.** As Justice Scalia notes in his opinion concurring (only) in the judgment, the petitioners in *McCullen* asked the Court to limit or overrule its decision in *Hill v. Colorado*, 530 U.S. 703 (2000). In *Hill*, the Court upheld a statute that regulated speech-related conduct within 100 feet of the entrance to any health care facility. The specific section of the statute that was challenged made it unlawful within the regulated areas for any person to "knowingly approach" within eight feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." The *Hill* majority found that the statute satisfied all three prongs of the *Ward* test.

Except for a brief reference in Part I (describing the genesis of the Massachusetts statute), the Court's opinion in *McCullen* does not mention *Hill* at all. What is the status of *Hill* today? This Note provides some excerpts to help you answer that question.

**2.** In *Hill*, the Court found that the Colorado statute was content-neutral. The *Hill* opinion also emphasized "[t]he unwilling listener's interest in avoiding unwanted communication," and implied that the purpose of the Colorado statute was to protect that interest. In *McCullen*, the Court finds that the Massachusetts statute too is content-neutral. But the Court cautions that "the Act would *not* be content neutral if it were concerned with undesirable effects that arise from . . .

listeners' reactions to speech." If the statute's purpose was to protect "[t]he unwilling listener's interest in avoiding unwanted communication," would that be content-neutral?

**3.** In *McCullen*, the Court finds that the Massachusetts law was not narrowly tailored. The Court reached the opposite conclusion in *Hill* with respect to the Colorado statute. In reaching its conclusion, the Court said the following:

> [Whether] or not the 8-foot interval is the best possible accommodation of the competing interests at stake, we must accord a measure of deference to the judgment of the Colorado Legislature. Once again, it is worth reiterating that only attempts to address unwilling listeners are affected. . . .
>
> The statute seeks to protect those who wish to enter health care facilities, many of whom may be under special physical or emotional stress, from close physical approaches by demonstrators. In doing so, the statute takes a prophylactic approach; it forbids all unwelcome demonstrators to come closer than eight feet. We recognize that by doing so, it will sometimes inhibit a demonstrator whose approach in fact would have proved harmless. But the statute's prophylactic aspect is justified by the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior, demanding in each case an accurate characterization (as harassing or not harassing) of each individual movement within the 8-foot boundary. Such individualized characterization of each individual movement is often difficult to make accurately. A bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself.

Does the *McCullen* opinion "accord a measure of deference to the judgment of the [Massachusetts] legislature" in determining whether the 35-foot buffer zone is narrowly tailored? Is a "prophylactic rule" consistent with *McCullen*'s approach to the "narrow tailoring" prong?

**4.** The Court, in a footnote near the end of its opinion, says that because the Massachusetts statute is not narrowly tailored, there is no need to consider whether the law leaves open ample alternative channels of communication. But look at Part IV-A of the Court's opinion. Is the question really open?

In *Hill*, the Court did consider this prong and found it satisfied. The Court said:

> With respect to oral statements, the [8-foot separation between the speaker and the audience] certainly can make it more difficult for a speaker to be heard, particularly if the level of background noise is high and other speakers are competing for the pedestrian's attention. Notably, the statute places no limitation on the number of speakers or the noise level, including the use of amplification equipment, although we have upheld such restrictions in past cases.

> The burden on the ability to distribute handbills is more serious because it seems possible that an 8-foot interval could hinder the ability of a leafletter to deliver handbills to some unwilling recipients. The statute does not, however, prevent a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians can easily accept. And, as in all leafletting situations, pedestrians continue to be free to decline the tender. . . .
>
> [The] 8-foot restriction on an unwanted physical approach leaves ample room to communicate a message through speech. Signs, pictures, and voice itself can cross an 8-foot gap with ease. If the clinics in Colorado resemble those in [a prior case], demonstrators with leaflets might easily stand on the sidewalk at entrances (without blocking the entrance) and, without physically approaching those who are entering the clinic, peacefully hand them leaflets as they pass by.

Is this assessment consistent with the analysis in Part IV-A of the Court's opinion in *McCullen*?

## Problem: Buffer or Bubble?

In 2005, the City of Pittsburgh enacted an ordinance that established two different kinds of zones — "buffer zones" and "bubble zones" — around hospitals, medical offices, and clinics. The "buffer zone" extended "15 feet from any entrance to the hospital or health care facility." The ordinance provided that within the buffer zone, no person shall "knowingly congregate, patrol, picket or demonstrate." The "bubble zone" encompassed "the public way or sidewalk area within a radius of 100 feet from any entrance door to a hospital and/or medical office/clinic." Within this 100-foot zone, the ordinance provided that "no person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person." The "bubble zone" provision in the ordinance was virtually identical to the one in the Colorado statute found facially valid in *Hill*.

Mary Kathryn Brown, a registered nurse and "sidewalk counsellor," challenged the ordinance under the First Amendment. The Third Circuit held that "in tandem the buffer and bubble zones [were] inadequately tailored, but either of them individually would be facially valid." *Brown v. City of Pittsburgh*, 586 F.3d 263 (3d Cir. 2009). In response to the Court of Appeals decision, the City jettisoned the bubble zone but retained the 15-foot buffer zone.

You are the counsel to the Mayor of Pittsburgh, who voted for the law as a city councilman in 2005. The mayor says to you, "Is our ordinance still valid after *McCullen*? Would we be on surer ground in abandoning the buffer zone and reinstating the bubble ordinance instead?"

How would you answer the mayor's question?

# Chapter 8
# Content Neutrality: The Principle and Its Progeny

## A. The Principle

**Page 444:** ***insert before Section B:***

### Reed v. Town of Gilbert
*135 S. Ct. 2218 (2015)*

JUSTICE THOMAS delivered the opinion of the Court.

The town of Gilbert, Arizona (or Town), has adopted a comprehensive code governing the manner in which people may display outdoor signs. The Sign Code identifies various categories of signs based on the type of information they convey, then subjects each category to different restrictions. One of the categories is "Temporary Directional Signs Relating to a Qualifying Event," loosely defined as signs directing the public to a meeting of a nonprofit group. The Code imposes more stringent restrictions on these signs than it does on signs conveying other messages. We hold that these provisions are content-based regulations of speech that cannot survive strict scrutiny.

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A

The Sign Code prohibits the display of outdoor signs anywhere within the Town without a permit, but it then exempts 23 categories of signs from that requirement. These exemptions include everything from bazaar signs to flying banners. Three categories of exempt signs are particularly relevant here.

The first is "Ideological Signs." This category includes any "sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency." Of the three categories discussed here, the Code treats ideological signs most favorably, allowing them to be up to 20 square feet in area and to be placed in all "zoning districts" without time limits.

The second category is "Political Signs." This includes any "temporary sign designed to influence the outcome of an election called by a public body." The Code treats these signs less favorably than ideological signs. The Code allows the placement of political signs up to 16 square feet on residential property and up to 32 square feet on nonresidential property, undeveloped municipal property, and "rights-of-way." These signs may be displayed up to 60 days before a primary election and up to 15 days following a general election.

The third category is "Temporary Directional Signs Relating to a Qualifying Event." This includes any "Temporary Sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.' " A "qualifying event" is defined as any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." The Code treats temporary directional signs even less favorably than political signs. Temporary directional signs may be no larger than six square feet. They may be placed on private property or on a public right-of-way, but no more than four signs may be placed on a single property at any

time. And, they may be displayed no more than 12 hours before the "qualifying event" and no more than 1 hour afterward.

B

Petitioners Good News Community Church (Church) and its pastor, Clyde Reed, wish to advertise the time and location of their Sunday church services. The Church is a small, cash-strapped entity that owns no building, so it holds its services at elementary schools or other locations in or near the Town. In order to inform the public about its services, which are held in a variety of different locations, the Church began placing 15 to 20 temporary signs around the Town, frequently in the public right-of-way abutting the street. The signs typically displayed the Church's name, along with the time and location of the upcoming service. Church members would post the signs early in the day on Saturday and then remove them around midday on Sunday. The display of these signs requires little money and manpower, and thus has proved to be an economical and effective way for the Church to let the community know where its services are being held each week.

This practice caught the attention of the Town's Sign Code compliance manager, who twice cited the Church for violating the Code. [Pastor Reed attempted to reach an accommodation with the Sign Department, but his efforts were unsuccessful. Quite the contrary; the Compliance Manager promised to punish any future violations. Pastor Reed filed suit in Federal District Court. Ultimately the Ninth Circuit held that the Code's sign categories were content-neutral. It applied a lower level of scrutiny and found no First Amendment violation. The Supreme Court granted certiorari.]

II

A

. . . Under [the First Amendment], a government, including a municipal government vested with state authority, "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley* (1972) [Chapter 8]. Content-based laws — those that target speech based on its communicative content — are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *R.A.V. v. City of St. Paul* (1992) [Chapter 11]; *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.* (1991) [Chapter 8 Note].

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *E.g.*, *Sorrell v. IMS Health, Inc.* (2011) [Chapter 3 Note]; *Mosley*. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. *Sorrell*. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be "justified without reference to the

content of the regulated speech," or that were adopted by the government "because of disagreement with the message [the speech] conveys," *Ward v. Rock Against Racism* (1989) [Chapter 7]. Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

B

The Town's Sign Code is content based on its face. It defines "Temporary Directional Signs" on the basis of whether a sign conveys the message of directing the public to church or some other "qualifying event." It defines "Political Signs" on the basis of whether a sign's message is "designed to influence the outcome of an election." And it defines "Ideological Signs" on the basis of whether a sign "communicat[es] a message or ideas" that do not fit within the Code's other categories. It then subjects each of these categories to different restrictions.

The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government. More to the point, the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

C

In reaching the contrary conclusion, the Court of Appeals offered several theories to explain why the Town's Sign Code should be deemed content neutral. None is persuasive.

1

The Court of Appeals first determined that the Sign Code was content neutral because the Town "did not adopt its regulation of speech [based on] disagree[ment] with the message conveyed," and its justifications for regulating temporary directional signs were "unrelated to the content of the sign." In its brief to this Court, the United States similarly contends that a sign regulation is content neutral — even if it expressly draws distinctions based on the sign's communicative content — if those distinctions can be "justified without reference to the content of the regulated speech." Brief for United States as *Amicus Curiae* (quoting *Ward*).

But this analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati v. Discovery Network, Inc.* (1993) [Chapter 3 Note]. We have thus made clear that "illicit legislative intent is not the *sine qua non* of a violation of the First Amendment," and a party opposing the government "need adduce 'no evidence of an improper censorial motive.' " *Simon & Schuster*. Although "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary." *Turner Broadcasting System v. FCC* (1994) [Chapter 10]. In other words, an

innocuous justification cannot transform a facially content-based law into one that is content neutral.

That is why we have repeatedly considered whether a law is content neutral on its face *before* turning to the law's justification or purpose. *See, e.g.*, *United States v. O'Brien* (1968) [Chapter 8] (noting that the statute "on its face deals with conduct having no connection with speech," but examining whether the "the governmental interest is unrelated to the suppression of free expression"). Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.

The Court of Appeals and the United States misunderstand our decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content based on its face. That is incorrect. *Ward* had nothing to say about facially content-based restrictions because it involved a facially content-*neutral* ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city. In that context, we looked to governmental motive, including whether the government had regulated speech "because of disagreement" with its message, and whether the regulation was " 'justified without reference to the content of the speech.' " But *Ward*'s framework "applies only if a statute is content neutral." *Hill v. Colorado* (2000) [Chapter 7] (Kennedy, J., dissenting). Its rules thus operate "to protect speech," not "to restrict it." *Id.*

The First Amendment requires no less. Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws — *i.e.*, the "abridg[ement] of speech" — rather than merely the motives of those who enacted them. "The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Hill* (Scalia, J., dissenting). . . .

[One] could easily imagine a Sign Code compliance manager who disliked the Church's substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services. Accordingly, we have repeatedly "rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.' " *Discovery Network*. We do so again today.

2

The Court of Appeals next reasoned that the Sign Code was content neutral because it "does not mention any idea or viewpoint, let alone single one out for differential treatment." It reasoned that, for the purpose of the Code provisions, "[i]t makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted." . . .

This analysis conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints — or the regulation of speech based on "the specific motivating ideology or the opinion or perspective of the speaker" — is a "more blatant" and "egregious form of content discrimination." *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) [Chapter 18]. But it is well established that "[t]he First Amendment's hostility to content-based regulation extends not

only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."

Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. For example, a law banning the use of sound trucks for political speech — and only political speech — would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed. *See Discovery Network*. The Town's Sign Code likewise singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter. Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals. That is a paradigmatic example of content-based discrimination.

3

Finally, the Court of Appeals characterized the Sign Code's distinctions as turning on "the content-neutral elements of who is speaking through the sign and whether and when an event is occurring." That analysis is mistaken on both factual and legal grounds.

To start, the Sign Code's distinctions are not speaker based. . . . In any case, the fact that a distinction is speaker based does not, as the Court of Appeals seemed to believe, automatically render the distinction content neutral. Because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content," *Citizens United v. Federal Election Comm'n* (2010) [Chapter 11], we have insisted that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." Thus, a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based. Likewise, a content-based law that restricted the political speech of all corporations would not become content neutral just because it singled out corporations as a class of speakers. *See Citizens United*. Characterizing a distinction as speaker based is only the beginning — not the end — of the inquiry.

Nor do the Sign Code's distinctions hinge on "whether and when an event is occurring." The Code does not permit citizens to post signs on any topic whatsoever within a set period leading up to an election, for example. Instead, come election time, it requires Town officials to determine whether a sign is "designed to influence the outcome of an election" (and thus "political") or merely "communicating a message or ideas for noncommercial purposes" (and thus "ideological"). That obvious content-based inquiry does not evade strict scrutiny review simply because an event (*i.e.*, an election) is involved.

And, just as with speaker-based laws, the fact that a distinction is event based does not render it content neutral. The Court of Appeals cited no precedent from this Court supporting its novel theory of an exception from the content-neutrality requirement for event-based laws. As we have explained, a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed. A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea. Here, the Code singles out signs bearing a particular message: the time and location of a specific event. This type of ordinance may seem like a perfectly rational way to regulate

signs, but a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem "entirely reasonable" will sometimes be "struck down because of their content-based nature." *City of Ladue v. Gilleo* (1994) (O'Connor, J., concurring) [Chapter 7].

III

Because the Town's Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny, "which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." Thus, it is the Town's burden to demonstrate that the Code's differentiation between temporary directional signs and other types of signs, such as political signs and ideological signs, furthers a compelling governmental interest and is narrowly tailored to that end.

The Town cannot do so. It has offered only two governmental interests in support of the distinctions the Sign Code draws: preserving the Town's aesthetic appeal and traffic safety. Assuming for the sake of argument that those are compelling governmental interests, the Code's distinctions fail as hopelessly underinclusive.

Starting with the preservation of aesthetics, temporary directional signs are "no greater an eyesore," *Discovery Network*, than ideological or political ones. Yet the Code allows unlimited proliferation of larger ideological signs while strictly limiting the number, size, and duration of smaller directional ones. The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.

The Town similarly has not shown that limiting temporary directional signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not. The Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting.

In light of this underinclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest. Because a "law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited," *Republican Party of Minn. v. White* (2002) [Chapter 11], the Sign Code fails strict scrutiny.

IV

Our decision today will not prevent governments from enacting effective sign laws. The Town asserts that an "absolutist" content-neutrality rule would render "virtually all distinctions in sign laws . . . subject to strict scrutiny," but that is not the case. Not "all distinctions" are subject to strict scrutiny, only *content-based* ones are. Laws that are *content neutral* are instead subject to lesser scrutiny.

The Town has ample content-neutral options available to resolve problems with safety and aesthetics. For example, its current Code regulates many aspects of signs that have nothing to do with a sign's message: size, building materials, lighting, moving parts, and portability. And on public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner. Indeed, some lower courts have long held

that similar content-based sign laws receive strict scrutiny, but there is no evidence that towns in those jurisdictions have suffered catastrophic effects.

We acknowledge that a city might reasonably view the general regulation of signs as necessary because signs "take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." *City of Ladue*. At the same time, the presence of certain signs may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety. A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers — such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses — well might survive strict scrutiny. The signs at issue in this case, including political and ideological signs and signs for events, are far removed from those purposes. As discussed above, they are facially content based and are neither justified by traditional safety concerns nor narrowly tailored.

* * *

We reverse the judgment of the Court of Appeals and remand the case for proceedings consistent with this opinion.

JUSTICE ALITO, with whom JUSTICE KENNEDY and JUSTICE SOTOMAYOR join, concurring.

I join the opinion of the Court but add a few words of further explanation.

As the Court holds, what we have termed "content-based" laws must satisfy strict scrutiny. Content-based laws merit this protection because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint. Limiting speech based on its "topic" or "subject" favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth.

As the Court shows, the regulations at issue in this case are replete with content-based distinctions, and as a result they must satisfy strict scrutiny. This does not mean, however, that municipalities are powerless to enact and enforce reasonable sign regulations. . . .

In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. *See Pleasant Grove City v. Summum* (2009) [Chapter 13]. They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.

JUSTICE BREYER, concurring in the judgment.

. . . Like Justice Kagan I believe that categories alone cannot satisfactorily resolve the legal problem before us. The First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories, such as "content discrimination" and "strict scrutiny," would permit. In my view, the category "content discrimination" is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic "strict scrutiny" trigger, leading to almost certain legal condemnation.

To use content discrimination to trigger strict scrutiny sometimes makes perfect sense. There are cases in which the Court has found content discrimination an unconstitutional method for suppressing a viewpoint. *E.g.*, *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) [Chapter 18]. And there are cases where the Court has found content discrimination to reveal that rules governing a traditional public forum are, in fact, not a neutral way of fairly managing the forum in the interest of all speakers. *Police Dept. of Chicago v. Mosley* (1972) [Chapter 8]. In these types of cases, strict scrutiny is often appropriate, and content discrimination has thus served a useful purpose.

But content discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not *always* trigger strict scrutiny. . . . I readily concede . . . that content discrimination, as a conceptual tool, can sometimes reveal weaknesses in the government's rationale for a rule that limits speech. If, for example, a city looks to litter prevention as the rationale for a prohibition against placing newsracks dispensing free advertisements on public property, why does it exempt other newsracks causing similar litter? *Cf. Cincinnati v. Discovery Network, Inc.* (1993) [Chapter 3 Note]. I also concede that, whenever government disfavors one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas and with an individual's ability to express thoughts and ideas that can help that individual determine the kind of society in which he wishes to live, help shape that society, and help define his place within it.

Nonetheless, in these latter instances to use the presence of content discrimination automatically to trigger strict scrutiny and thereby call into play a strong presumption against constitutionality goes too far. That is because virtually all government activities involve speech, many of which involve the regulation of speech. Regulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity. . . .

I recognize that the Court could escape the problem by watering down the force of the presumption against constitutionality that "strict scrutiny" normally carries with it. But, in my view, doing so will weaken the First Amendment's protection in instances where "strict scrutiny" should apply in full force.

The better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it a helpful, but not determinative legal tool, in an appropriate case, to determine the strength of a justification. I would use content discrimination as a supplement to a more basic analysis, which, tracking most of our First Amendment cases, asks whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives. Answering this question requires examining the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so. Admittedly, this approach does not have the simplicity of a mechanical use of categories. But it does permit the government to regulate speech in numerous instances where the voters have authorized the government to regulate and where courts should hesitate to substitute judicial judgment for that of administrators.

Here, regulation of signage along the roadside, for purposes of safety and beautification is at issue. There is no traditional public forum nor do I find any general effort to censor a particular viewpoint. Consequently, the specific regulation at issue does not warrant "strict scrutiny."

Nonetheless, for the reasons that Justice Kagan sets forth, I believe that the Town of Gilbert's regulatory rules violate the First Amendment. I consequently concur in the Court's judgment only.

JUSTICE KAGAN, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring in the judgment.

Countless cities and towns across America have adopted ordinances regulating the posting of signs, while exempting certain categories of signs based on their subject matter. For example, some municipalities generally prohibit illuminated signs in residential neighborhoods, but lift that ban for signs that identify the address of a home or the name of its owner or occupant. In other municipalities, safety signs such as "Blind Pedestrian Crossing" and "Hidden Driveway" can be posted without a permit, even as other permanent signs require one. Elsewhere, historic site markers — for example, "George Washington Slept Here" — are also exempt from general regulations. And similarly, the federal Highway Beautification Act limits signs along interstate highways unless, for instance, they direct travelers to "scenic and historical attractions" or advertise free coffee.

Given the Court's analysis, many sign ordinances of that kind are now in jeopardy. Says the majority: When laws "single[ ] out specific subject matter," they are "facially content based"; and when they are facially content based, they are automatically subject to strict scrutiny. And although the majority holds out hope that some sign laws with subject-matter exemptions "might survive" that stringent review, the likelihood is that most will be struck down. . . . To clear that high bar, the government must show that a content-based distinction "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." So on the majority's view, courts would have to determine that a town has a compelling interest in informing passersby where George Washington slept. And likewise, courts would have to find that a town has no other way to prevent hidden-driveway mishaps than by specially treating hidden-driveway signs. (Well-placed speed bumps? Lower speed limits? Or how about just a ban on hidden driveways?) The consequence — unless courts water down strict scrutiny to something unrecognizable — is that our communities will find themselves in an unenviable bind: They will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter.

Although the majority insists that applying strict scrutiny to all such ordinances is "essential" to protecting First Amendment freedoms, I find it challenging to understand why that is so. This Court's decisions articulate two important and related reasons for subjecting content-based speech regulations to the most exacting standard of review. The first is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen v. Coakley* (2014) [Chapter 7 this Supp.]. The second is to ensure that the government has not regulated speech "based on hostility — or favoritism — towards the underlying message expressed." *R.A.V. v. St. Paul* (1992) [Chapter 11]. Yet the subject-matter exemptions included in many sign ordinances do not implicate those concerns.

Allowing residents, say, to install a light bulb over "name and address" signs but no others does not distort the marketplace of ideas. Nor does that different treatment give rise to an inference of impermissible government motive.

We apply strict scrutiny to facially content-based regulations of speech, in keeping with the rationales just described, when there is any "realistic possibility that official suppression of ideas is afoot." *R.A.V.* That is always the case when the regulation facially differentiates on the basis of viewpoint. *See Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) [Chapter 18]. It is also the case (except in non-public or limited public forums) when a law restricts "discussion of an entire topic" in public debate. . . . Subject-matter regulation, . . . may have the intent or effect of favoring some ideas over others. When that is realistically possible — when the restriction "raises the specter that the Government may effectively drive certain ideas or view-points from the marketplace" — we insist that the law pass the most demanding constitutional test.

But when that is not realistically possible, we may do well to relax our guard so that "entirely reasonable" laws imperiled by strict scrutiny can survive. . . . To do its intended work, of course, the category of content-based regulation triggering strict scrutiny must sweep more broadly than the actual harm; that category exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints. But that buffer zone need not extend forever. We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function.

And indeed we have done just that: Our cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws — including in cases just like this one. [*See, e.g.*,] *Renton v. Playtime Theatres, Inc.* (1986) [Chapter 8] (applying intermediate scrutiny to a zoning law that facially distinguished among movie theaters based on content because it was "designed to prevent crime, protect the city's retail trade, [and] maintain property values . . . , not to suppress the expression of unpopular views"). And another decision involving a similar law provides an alternative model. In *City of Ladue v. Gilleo* (1994) [Chapter 7], the Court assumed *arguendo* that a sign ordinance's exceptions for address signs, safety signs, and for-sale signs in residential areas did not trigger strict scrutiny. We did not need to, and so did not, decide the level-of-scrutiny question because the law's breadth made it unconstitutional under any standard.

The majority could easily have taken *Ladue*'s tack here. The Town of Gilbert's defense of its sign ordinance — most notably, the law's distinctions between directional signs and others — does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test. The Town, for example, provides no reason at all for prohibiting more than four directional signs on a property while placing no limits on the number of other types of signs. Similarly, the Town offers no coherent justification for restricting the size of directional signs to 6 square feet while allowing other signs to reach 20 square feet. The best the Town could come up with at oral argument was that directional signs "need to be smaller because they need to guide travelers along a route." Why exactly a smaller sign better helps travelers get to where they are going is left a mystery. The absence of any sensible basis for these and other distinctions dooms the Town's ordinance under even the intermediate scrutiny that the Court typically applies to "time, place, or manner" speech regulations. Accordingly, there is no need to decide in this case

whether strict scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption.

I suspect this Court and others will regret the majority's insistence today on answering that question in the affirmative. As the years go by, courts will discover that thousands of towns have such ordinances, many of them "entirely reasonable." And as the challenges to them mount, courts will have to invalidate one after the other. (This Court may soon find itself a veritable Supreme Board of Sign Review.) And courts will strike down those democratically enacted local laws even though no one — certainly not the majority — has ever explained why the vindication of First Amendment values requires that result. Because I see no reason why such an easy case calls for us to cast a constitutional pall on reasonable regulations quite unlike the law before us, I concur only in the judgment.

## Note: A Narrower View of Content Neutrality?

**1.** Recall that in *Ward v. Rock Against Racism* (1989) (Chapter 7), the Court said:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. *The government's purpose is the controlling consideration.*

(Emphasis added.) Based on this language (and its repetition in *Hill v. Colorado*, 530 U.S. 703 (2000)), some courts took a "purposive" approach to determining content neutrality. For instance, the Fourth Circuit summarized its position as follows: "if a regulation is 'justified without reference to the content of regulated speech,' 'we have not hesitated to deem [that] regulation content neutral even if it facially differentiates between types of speech.' " *Brown v. Town of Cary*, 706 F.3d 294 (4th Cir. 2013). An amicus brief in *McCullen v. Coakley* (2014) (this Supplement, Chapter 7) urged the Court to hold that "*Ward*'s inquiry into legislative purpose was added to, not substituted for this Court's traditional test, and speech restrictions are content-based *either* when (1) the restrictions require the government to look at the content of one's speech in determining whether or not it is subject to regulation; or (2) they are motivated by antipathy toward a particular subject matter or viewpoint." Brief of the Institute for Justice as Amicus Curiae at 36. The Court did not accept that invitation in *McCullen*. Does the *Reed* opinion do so?

**2.** In Section C of this Chapter, we examine the "secondary effects doctrine." When you read the cases in that section, consider whether the doctrine is consistent with the Court's analysis in *Reed*.

**3.** Justice Breyer, in his opinion concurring in the judgment, gives several "examples of speech regulated by government that inevitably involve content discrimination, but where a strong presumption against constitutionality has no place." These include:

- requirements for content that must be included on labels of certain consumer electronics;
- a regulation requiring pilots to ensure that each passenger has been briefed on flight procedures, such as seatbelt fastening;

- a New York statute requiring petting zoos to post a sign at every exit "strongly recommending that persons wash their hands upon exiting the petting zoo area."

Would the Court apply strict scrutiny to requirements such as these? If so, does that lead you to agree with Justice Breyer that a more flexible approach is preferable?

**4.** *Ward* is notable not only for its definition of content neutrality but also for its explanation of narrow tailoring. Recall the Court's language: "the essence of narrow tailoring" is that the regulation "focuses on the source of the evils the [government] seeks to eliminate . . . and eliminates them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." Is that how the Court in *Reed* carries out the "narrow tailoring" analysis?

**5.** The Court insists that its decision "will not prevent governments from enacting effective sign laws." Consider these possibilities, drawn from the concurring opinions of Justice Alito and Justice Kagan:

- A rule that distinguishes between the placement of signs on commercial and residential property. [Query: Would it make a difference which rules are more restrictive?]
- A rule imposing time restrictions on signs announcing a one-time event.
- A rule sharply limiting the number and location of electronic signs with messages that change.
- A rule that generally prohibits illuminated signs in residential neighborhoods, but lifts that ban for signs that identify the address of a home or the name of its owner or occupant.
- A rule that generally requires a permit to post a permanent sign but does not require a permit for "safety signs" such as "Blind Pedestrian Crossing" and "Hidden Driveway"

Would these laws be subject to strict scrutiny? If so, how might the government satisfy that standard?

# Chapter 10
# Adapting Doctrine to New Technologies

## A. Different Media/Different Standards?

**Page 593:** ***insert before Part B:***

### Packingham v. North Carolina

*137 S. Ct. 1730 (2017)*

JUSTICE KENNEDY delivered the opinion of the Court.

In 2008, North Carolina enacted a statute making it a felony for a registered sex offender to gain access to a number of websites, including commonplace social media websites like Facebook and Twitter. The question presented is whether that law is permissible under the First Amendment's Free Speech Clause, applicable to the States under the Due Process Clause of the Fourteenth Amendment.

I

A

North Carolina law makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." N.C. GEN. STAT. ANN. § 14–202.5. A "commercial social networking Web site" is defined as a website that meets four criteria. First, it "[i]s operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site." Second, it "[f]acilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges." Third, it "[a]llows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site." And fourth, it "[p]rovides users or visitors . . . mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger."

The statute includes two express exemptions. The statutory bar does not extend to websites that "[p]rovid[e] only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform." The law also does not encompass websites that have as their "primary purpose the facilitation of commercial transactions involving goods or services between [their] members or visitors."

According to sources cited to the Court, § 14–202.5 applies to about 20,000 people in North Carolina and the State has prosecuted over 1,000 people for violating it.

B

In 2002, petitioner Lester Gerard Packingham — then a 21-year-old college student — had sex with a 13-year-old girl. He pleaded guilty to taking indecent liberties with a child. Because this crime qualifies as "an offense against a minor," petitioner was required to register as a sex offender — a status that can endure for

30 years or more. As a registered sex offender, petitioner was barred under § 14–202.5 from gaining access to commercial social networking sites.

In 2010, a state court dismissed a traffic ticket against petitioner. In response, he logged on to Facebook.com and posted the following statement on his personal profile:

> "Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent. . . . Praise be to GOD, WOW! Thanks JESUS!" . . . .

Petitioner was indicted by a grand jury for violating § 14–202.5. The trial court denied his motion to dismiss the indictment on the grounds that the charge against him violated the First Amendment. Petitioner was ultimately convicted and given a suspended prison sentence. At no point during trial or sentencing did the State allege that petitioner contacted a minor — or committed any other illicit act — on the Internet.

Petitioner appealed to the Court of Appeals of North Carolina. That court struck down § 14-202.5 on First Amendment grounds, explaining that the law is not narrowly tailored to serve the State's legitimate interest in protecting minors from sexual abuse. . . . The North Carolina Supreme Court reversed, concluding that the law is "constitutional in all respects." Among other things, the court explained that the law is "carefully tailored . . . to prohibit registered sex offenders from accessing only those Web sites that allow them the opportunity to gather information about minors." The court also held that the law leaves open adequate alternative means of communication because it permits petitioner to gain access to websites that the court believed perform the "same or similar" functions as social media, such as the Paula Deen Network and the website for the local NBC affiliate. . . .

II

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. *See Ward v. Rock Against Racism* (1989) [Chapter 7]. Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.

While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace — the "vast democratic forums of the Internet" in general, *Reno v. American Civil Liberties Union* (1997) [Chapter 10], and social media in particular. Seven in ten American adults use at least one Internet social networking service. One of the most popular of these sites is Facebook, the site used by petitioner leading to his conviction in this case. According to sources cited to the Court in this case, Facebook has 1.79 billion active users. This is about three times the population of North America.

Social media offers "relatively unlimited, low-cost capacity for communication of all kinds." *Reno*. On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on

entrepreneurship. And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics "as diverse as human thought." *Reno*.

The nature of a revolution in thought can be that, in its early stages, even its participants may be unaware of it. And when awareness comes, they still may be unable to know or foresee where its changes lead. . . . While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.

This case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.

III

This background informs the analysis of the North Carolina statute at issue. Even making the assumption that the statute is content neutral and thus subject to intermediate scrutiny, the provision cannot stand. In order to survive intermediate scrutiny, a law must be "narrowly tailored to serve a significant governmental interest." *McCullen v. Coakley* (2014) [*supra* Supplement to Chapter 7]. In other words, the law must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.*

For centuries now, inventions heralded as advances in human progress have been exploited by the criminal mind. New technologies, all too soon, can become instruments used to commit serious crimes. The railroad is one example, see M. CRICHTON, THE GREAT TRAIN ROBBERY at xv (1975), and the telephone another. So it will be with the Internet and social media.

There is also no doubt that, as this Court has recognized, "[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people." *Ashcroft v. Free Speech Coalition* (2002) [Chapter 3]. And it is clear that a legislature "may pass valid laws to protect children" and other victims of sexual assault "from abuse." *See id.*; *accord New York v. Ferber* (1982) [Chapter 3]. The government, of course, need not simply stand by and allow these evils to occur. But the assertion of a valid governmental interest "cannot, in every context, be insulated from all constitutional protections." *Stanley v. Georgia* (1969) [Chapter 2].

It is necessary to make two assumptions to resolve this case. First, given the broad wording of the North Carolina statute at issue, it might well bar access not only to commonplace social media websites but also to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com. The Court need not decide the precise scope of the statute. It is enough to assume that the law applies (as the State concedes it does) to social networking sites "as commonly understood" — that is, websites like Facebook, LinkedIn, and Twitter.

Second, this opinion should not be interpreted as barring a State from enacting more specific laws than the one at issue. Specific criminal acts are not protected speech even if speech is the means for their commission. *See Brandenburg v. Ohio* (1969) [Chapter 1]. Though the issue is not before the Court, it can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor. . . .

Even with these assumptions about the scope of the law and the State's interest, the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to "become a town crier with a voice that resonates farther than it could from any soapbox." *Reno*.

In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals — and in some instances especially convicted criminals — might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.

IV

The primary response from the State is that the law must be this broad to serve its preventative purpose of keeping convicted sex offenders away from vulnerable victims. The State has not, however, met its burden to show that this sweeping law is necessary or legitimate to serve that purpose. *See McCullen*. . . .

* * *

It is well established that, as a general rule, the Government "may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft v. Free Speech Coalition*. That is what North Carolina has done here. Its law must be held invalid.

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

JUSTICE GORSUCH took no part in the consideration or decision of this case.

ALITO, J., with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, concurring in the judgment.

The North Carolina statute at issue in this case was enacted to serve an interest of "surpassing importance." *New York v. Ferber* (1982) [Chapter 3] — but it has a staggering reach. It makes it a felony for a registered sex offender simply to visit a vast array of websites, including many that appear to provide no realistic opportunity for communications that could facilitate the abuse of children. Because

of the law's extraordinary breadth, I agree with the Court that it violates the Free Speech Clause of the First Amendment.

I cannot join the opinion of the Court, however, because of its undisciplined dicta. The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks. And this language is bound to be interpreted by some to mean that the States are largely powerless to restrict even the most dangerous sexual predators from visiting any internet sites, including, for example, teenage dating sites and sites designed to permit minors to discuss personal problems with their peers. I am troubled by the implications of the Court's unnecessary rhetoric.

I

A

. . . Packingham and the State debate the analytical framework that governs this case. The State argues that the law in question is content neutral and merely regulates a "place" (*i.e.*, the internet) where convicted sex offenders may wish to engage in speech. Therefore, according to the State, the standard applicable to "time, place, or manner" restrictions should apply. *See Ward v. Rock Against Racism* (1989) [Chapter 7]. Packingham responds that the challenged statute is "unlike any law this Court has considered as a time, place, or manner restriction," and he advocates a more demanding standard of review.

Like the Court, I find it unnecessary to resolve this dispute because the law in question cannot satisfy the standard applicable to a content-neutral regulation of the place where speech may occur.

B

A content-neutral "time, place, or manner" restriction must serve a "legitimate" government interest, *Ward*, and the North Carolina law easily satisfies this requirement. As we have frequently noted, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Ferber* . . . .

Repeat sex offenders pose an especially grave risk to children. "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault."

The State's interest in protecting children from recidivist sex offenders plainly applies to internet use. Several factors make the internet a powerful tool for the would-be child abuser. First, children often use the internet in a way that gives offenders easy access to their personal information — by, for example, communicating with strangers and allowing sites to disclose their location. Second, the internet provides previously unavailable ways of communicating with, stalking, and ultimately abusing children. An abuser can create a false profile that misrepresents the abuser's age and gender. The abuser can lure the minor into engaging in sexual conversations, sending explicit photos, or even meeting in person. And an abuser can use a child's location posts on the internet to determine the pattern of the child's day-to-day activities — and even the child's location at a given moment. Such uses of the internet are already well documented, both in research and in reported decisions.

Because protecting children from abuse is a compelling state interest and sex offenders can (and do) use the internet to engage in such abuse, it is legitimate and

entirely reasonable for States to try to stop abuse from occurring before it happens.

C

1

It is not enough, however, that the law before us is designed to serve a compelling state interest; it also must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*; *see also McCullen v. Coakley* (2014) [Supplement to Chapter 7]. The North Carolina law fails this requirement.

A straightforward reading of the text of § 14-202.5 compels the conclusion that it prohibits sex offenders from accessing an enormous number of websites. The law defines a "commercial social networking Web site" as one with four characteristics. First, the website must be "operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site." Due to the prevalence of advertising on websites of all types, this requirement does little to limit the statute's reach.

Second, the website must "[f]acilitat[e] the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges." The term "social introduction" easily encompasses any casual exchange, and the term "information exchanges" seems to apply to any site that provides an opportunity for a visitor to post a statement or comment that may be read by other visitors. Today, a great many websites include this feature.

Third, a website must "[a]llo[w] users to create Web pages or personal profiles that contain information *such as* the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site." This definition covers websites that allow users to create anything that can be called a "personal profile," *i.e.*, a short description of the user. Contrary to the argument of the State, everything that follows the phrase "such as" is an illustration of features that a covered website or personal profile may (but need not) include.

Fourth, in order to fit within the statute, a website must "[p]rovid[e] users or visitors . . . mechanisms to communicate with other users, *such as* a message board, chat room, electronic mail, or instant messenger." This requirement seems to demand no more than that a website allow back-and-forth comments between users. And since a comment function is undoubtedly a "mechanis[m] to communicate with other users," it appears to follow that any website with such a function satisfies this requirement.

2

The fatal problem for § 14-202.5 is that its wide sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child. A handful of examples illustrates this point.

Take, for example, the popular retail website Amazon.com, which allows minors to use its services and meets all four requirements of § 14–202.5's definition of a commercial social networking website. First, as a seller of products, Amazon unquestionably derives revenue from the operation of its website. Second, the Amazon site facilitates the social introduction of people for the purpose of

information exchanges. When someone purchases a product on Amazon, the purchaser can review the product and upload photographs, and other buyers can then respond to the review. This information exchange about products that Amazon sells undoubtedly fits within the definition in § 14–202.5. It is the equivalent of passengers on a bus comparing notes about products they have purchased. Third, Amazon allows a user to create a personal profile, which is then associated with the product reviews that the user uploads. Such a profile can contain an assortment of information, including the user's name, e-mail address, and picture. And fourth, given its back-and-forth comment function, Amazon satisfies the final statutory requirement.

Many news websites are also covered by this definition. For example, the Washington Post's website gives minors access and satisfies the four elements that define a commercial social networking website. The website (1) derives revenue from ads and (2) facilitates social introductions for the purpose of information exchanges. Users of the site can comment on articles, reply to other users' comments, and recommend another user's comment. Users can also (3) create personal profiles that include a name or nickname and a photograph. The photograph and name will then appear next to every comment the user leaves on an article. Finally (4), the back-and-forth comment section is a mechanism for users to communicate among themselves. The site thus falls within § 14-202.5 and is accordingly off limits for registered sex offenders in North Carolina.

Or consider WebMD — a website that contains health-related resources, from tools that help users find a doctor to information on preventative care and the symptoms associated with particular medical problems. WebMD, too, allows children on the site. And it exhibits the four hallmarks of a "commercial social networking" website. It obtains revenue from advertisements. It facilitates information exchanges — via message boards that allow users to engage in public discussion of an assortment of health issues. It allows users to create basic profile pages: Users can upload a picture and some basic information about themselves, and other users can see their aggregated comments and "likes." WebMD also provides message boards, which are specifically mentioned in the statute as a "mechanis[m] to communicate with other users."

As these examples illustrate, the North Carolina law has a very broad reach and covers websites that are ill suited for use in stalking or abusing children. The focus of the discussion on these sites — shopping, news, health — does not provide a convenient jumping off point for conversations that may lead to abuse. In addition, the social exchanges facilitated by these websites occur in the open, and this reduces the possibility of a child being secretly lured into an abusive situation. These websites also give sex offenders little opportunity to gather personal details about a child; the information that can be listed in a profile is limited, and the profiles are brief. What is more, none of these websites make it easy to determine a child's precise location at a given moment. For example, they do not permit photo streams (at most, a child could upload a single profile photograph), and they do not include up-to-the minute location services. Such websites would provide essentially no aid to a would-be child abuser.

Placing this set of websites categorically off limits from registered sex offenders prohibits them from receiving or engaging in speech that the First Amendment protects and does not appreciably advance the State's goal of protecting children from recidivist sex offenders. I am therefore compelled to

conclude that, while the law before us addresses a critical problem, it sweeps far too broadly to satisfy the demands of the Free Speech Clause.[15]

II

While I thus agree with the Court that the particular law at issue in this case violates the First Amendment, I am troubled by the Court's loose rhetoric. After noting that "a street or a park is a quintessential forum for the exercise of First Amendment rights," the Court states that "cyberspace" and "social media in particular" are now "the most important places (in a spatial sense) for the exchange of views." The Court declines to explain what this means with respect to free speech law, and the Court holds no more than that the North Carolina law fails the test for content-neutral "time, place, and manner" restrictions. But if the entirety of the internet or even just "social media" sites are the 21st century equivalent of public streets and parks, then States may have little ability to restrict the sites that may be visited by even the most dangerous sex offenders. May a State preclude an adult previously convicted of molesting children from visiting a dating site for teenagers? Or a site where minors communicate with each other about personal problems? The Court should be more attentive to the implications of its rhetoric for, contrary to the Court's suggestion, there are important differences between cyberspace and the physical world.

I will mention a few that are relevant to internet use by sex offenders. First, it is easier for parents to monitor the physical locations that their children visit and the individuals with whom they speak in person than it is to monitor their internet use. Second, if a sex offender is seen approaching children or loitering in a place frequented by children, this conduct may be observed by parents, teachers, or others. Third, the internet offers an unprecedented degree of anonymity and easily permits a would-be molester to assume a false identity.

The Court is correct that we should be cautious in applying our free speech precedents to the internet. Cyberspace is different from the physical world, and if it is true, as the Court believes, that "we cannot appreciate yet" the "full dimensions and vast potential" of "the Cyber Age," we should proceed circumspectly, taking one step at a time. It is regrettable that the Court has not heeded its own admonition of caution.

## Note: The Internet as the New Public Forum?

**1.** After discussing traditional public forums, Justice Kennedy's majority opinion states that "[w]hile in the past there may have been difficulty in identifying the most important place (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace. . . ." Does this mean that the Court intends to apply the entire public forum doctrine to the Internet? What are the differences between the Internet and traditional public forums such as streets and parks? What implications should those differences have for First Amendment doctrine?

**2.** Both Justice Kennedy and Justice Alito agree that given the novelty of the Internet, the Court should "exercise extreme caution" or "be cautious" in deciding how to apply existing First Amendment precedents to the Internet. Yet their need for caution drives them in opposite directions regarding how to apply the First

[15] I express no view on whether a law that does not reach the sort of sites discussed above would satisfy the First Amendment. Until such a law is before us, it is premature to address that question.

Amendment to the Internet. What are the differences between them? And where do they stem from?

**3.** Justice Alito, in his opinion concurring in the judgment, emphasizes that the North Carolina statute is not narrowly tailored because it reaches websites such as Amazon.com, the Washington Post, and Web MD, which are not easily misused by child molesters. Therefore, he refuses to decide whether a more tailored law, which reached only true social media sites such as Facebook and Twitter, would be constitutional. But is it so clear that the North Carolina statute *does* cover sites such as Amazon and the Washington Post? After all, in common parlance few would describe those sites as "social networking" sites.

**4.** The majority and the concurrence in *Packingham* obviously have very different views of the relationship between technology and First Amendment protections. The majority sees the power of the Internet as a cause for celebration, while the concurrence sees it as a cause for caution. Who is right?

## Problem: Net Neutrality

Over the last several years, concerns have grown that Internet Service Providers ("ISPs"), such as Verizon, Comcast and Time-Warner Cable, have imposed restrictions on the speed with which some online content can be accessed by end users. Complaints have been raised that ISPs have imposed these restrictions in order to drive traffic to the ISP's own websites (for example, an ISP's own news website), or to allow the ISP to extract payments from website owners as a condition of receiving favorable end-user access.

In response to these complaints, the Federal Communications Commission ("FCC") is considering promulgating administrative regulations colloquially known as "net neutrality" rules. Boiled down, those regulations would mandate that ISPs not discriminate between different websites with regard to the ease with which an end user can access a given site.

As an FCC lawyer, you are given two tasks. First, you are asked to identify the factual conclusions that the agency would need to make in order to buttress the agency's argument that its rules not only survive First Amendment scrutiny but do not even implicate the First Amendment. Second, you are asked to suggest limitations on the types of ISPs subject to the net neutrality requirement that would help ensure that a court concludes that the regulations in fact do not implicate the First Amendment.

As part of your assignment, you are given the following pieces of information.

- Some ISPs produce their own content, in addition to simply transmitting the content of other websites. For example, Time-Warner Cable provides its own news websites.
- Some ISPs feature filtering software that blocks certain content (*e.g.*, sexually-oriented websites).
- The record developed by the agency reveals that the technology of modern broadband communications is such that there are no technological limits to the amount of content an ISP can transmit over its network.

What factual conclusions about ISPs and end users would help immunize the proposed regulation from First Amendment scrutiny? What limitations to the scope of that regulation would help accomplish the same task?

# Chapter 11
# Testing the Boundaries of Doctrine

## B. Judicial Campaign Speech

**Page 666:** ***insert before Part C:***

### Williams-Yulee v. Florida Bar
*135 S. Ct. 1656 (2015)*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to Part II.

Our Founders vested authority to appoint federal judges in the President, with the advice and consent of the Senate, and entrusted those judges to hold their offices during good behavior. The Constitution permits States to make a different choice, and most of them have done so. In 39 States, voters elect trial or appellate judges at the polls. In an effort to preserve public confidence in the integrity of their judiciaries, many of those States prohibit judges and judicial candidates from personally soliciting funds for their campaigns. We must decide whether the First Amendment permits such restrictions on speech.

We hold that it does. Judges are not politicians, even when they come to the bench by way of the ballot. And a State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office. A State may assure its people that judges will apply the law without fear or favor — and without having personally asked anyone for money. We affirm the judgment of the Florida Supreme Court.

I

A

When Florida entered the Union in 1845, its Constitution provided for trial and appellate judges to be elected by the General Assembly. Florida soon followed more than a dozen of its sister States in transferring authority to elect judges to the voting public. . . .

In the early 1970s, four Florida Supreme Court justices resigned from office following corruption scandals. Florida voters responded by amending their Constitution again. Under the system now in place, appellate judges are appointed by the Governor from a list of candidates proposed by a nominating committee — a process known as "merit selection." Then, every six years, voters decide whether to retain incumbent appellate judges for another term. Trial judges are still elected by popular vote, unless the local jurisdiction opts instead for merit selection. FLA. CONST. art. V, § 10.

Amid the corruption scandals of the 1970s, the Florida Supreme Court adopted a new Code of Judicial Conduct. In its present form, the first sentence of Canon 1 reads, "An independent and honorable judiciary is indispensable to justice in our society." Canon 1 instructs judges to observe "high standards of conduct" so that "the integrity and independence of the judiciary may be preserved." Canon 2 directs that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Other provisions prohibit judges from lending the prestige of their offices to private interests, engaging in certain business transactions, and personally participating in soliciting funds for nonprofit organizations.

Canon 7C(1) governs fundraising in judicial elections. The Canon, which is based on a provision in the American Bar Association's Model Code of Judicial Conduct, provides:

> A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law.

Florida statutes impose additional restrictions on campaign fundraising in judicial elections. Contributors may not donate more than $1,000 per election to a trial court candidate or more than $3,000 per retention election to a Supreme Court justice. Campaign committee treasurers must file periodic reports disclosing the names of contributors and the amount of each contribution.

Judicial candidates can seek guidance about campaign ethics rules from the Florida Judicial Ethics Advisory Committee. The Committee has interpreted Canon 7 to allow a judicial candidate to serve as treasurer of his own campaign committee, learn the identity of campaign contributors, and send thank you notes to donors.

Like Florida, most other States prohibit judicial candidates from soliciting campaign funds personally, but allow them to raise money through committees. According to the American Bar Association, 30 of the 39 States that elect trial or appellate judges have adopted restrictions similar to Canon 7C(1).

B

Lanell Williams-Yulee, who refers to herself as Yulee, has practiced law in Florida since 1991. In September 2009, she decided to run for a seat on the county court for Hillsborough County, a jurisdiction of about 1.3 million people that includes the city of Tampa. Shortly after filing paperwork to enter the race, Yulee drafted a letter announcing her candidacy. The letter described her experience and desire to "bring fresh ideas and positive solutions to the Judicial bench." The letter then stated:

> An early contribution of $25, $50, $100, $250, or $500, made payable to "Lanell Williams-Yulee Campaign for County Judge," will help raise the initial funds needed to launch the campaign and get our message out to the public. I ask for your support [i]n meeting the primary election fund raiser goals. Thank you in advance for your support.

Yulee signed the letter and mailed it to local voters. She also posted the letter on her campaign Web site.

Yulee's bid for the bench did not unfold as she had hoped. She lost the primary to the incumbent judge. Then the Florida Bar filed a complaint against her. As relevant here, the Bar charged her with violating Rule 4-8.2(b) of the Rules Regulating the Florida Bar. That Rule requires judicial candidates to comply with applicable provisions of Florida's Code of Judicial Conduct, including the ban on personal solicitation of campaign funds in Canon 7C(1).

Yulee admitted that she had signed and sent the fundraising letter. But she argued that the Bar could not discipline her for that conduct because the First Amendment protects a judicial candidate's right to solicit campaign funds in an election. The Florida Supreme Court appointed a referee, who held a hearing and recommended a finding of guilt. As a sanction, the referee recommended that Yulee be publicly reprimanded and ordered to pay the costs of the proceeding ($1,860).

The Florida Supreme Court adopted the referee's recommendations. The court explained that Canon 7C(1) "clearly restricts a judicial candidate's speech" and therefore must be "narrowly tailored to serve a compelling state interest." The court held that the Canon satisfies that demanding inquiry [and rejected Yulee's First Amendment claim]. We granted certiorari.

II

. . . The parties agree that Canon 7C(1) restricts Yulee's speech on the basis of its content by prohibiting her from soliciting contributions to her election campaign. The parties disagree, however, about the level of scrutiny that should govern our review.

We have applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest. As we have explained, noncommercial solicitation "is characteristically intertwined with informative and perhaps persuasive speech." Applying a lesser standard of scrutiny to such speech would threaten "the exercise of rights so vital to the maintenance of democratic institutions." *Schneider v. State (Town of Irvington)* (1939) [Casebook p. 385].

The principles underlying these charitable solicitation cases apply with even greater force here. Before asking for money in her fundraising letter, Yulee explained her fitness for the bench and expressed her vision for the judiciary. Her stated purpose for the solicitation was to get her "message out to the public." As we have long recognized, speech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection. Indeed, in our only prior case concerning speech restrictions on a candidate for judicial office, this Court and both parties assumed that strict scrutiny applied. *Republican Party of Minn. v. White* (2002) [Casebook p. 655]. . . .

[We] hold today what we assumed in *White*: A State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest.

III

The Florida Bar faces a demanding task in defending Canon 7C(1) against Yulee's First Amendment challenge. We have emphasized that "it is the rare case" in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest. *Burson v. Freeman*, 504 U.S. 191 (1992) (plurality opinion) [Note, Casebook p. 443]. But those cases do arise. *Holder v. Humanitarian Law Project* (2010) [Casebook p. 462]; *McConnell* (opinion of Kennedy, J.); *cf. Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) ("we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact' "). Here, Canon 7C(1) advances the State's compelling interest in preserving public confidence in the integrity of the judiciary, and it does so through means narrowly tailored to avoid

unnecessarily abridging speech. This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny.

A

The Florida Supreme Court adopted Canon 7C(1) to promote the State's interests in "protecting the integrity of the judiciary" and "maintaining the public's confidence in an impartial judiciary." The way the Canon advances those interests is intuitive: Judges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity. This principle dates back at least eight centuries to Magna Carta, which proclaimed, "To no one will we sell, to no one will we refuse or delay, right or justice." Cl. 40 (1215). The same concept underlies the common law judicial oath, which binds a judge to "do right to all manner of people . . . without fear or favour, affection or ill-will," and the oath that each of us took to "administer justice without respect to persons, and do equal right to the poor and to the rich." Simply put, Florida and most other States have concluded that the public may lack confidence in a judge's ability to administer justice without fear or favor if he comes to office by asking for favors.

The interest served by Canon 7C(1) has firm support in our precedents. We have recognized the "vital state interest" in safeguarding "public confidence in the fairness and integrity of the nation's elected judges." . . .

The principal dissent observes that bans on judicial candidate solicitation lack a lengthy historical pedigree. We do not dispute that fact, but it has no relevance here. As the precedent cited by the principal dissent demonstrates, a history and tradition of regulation are important factors in determining whether to recognize "new categories of unprotected speech." *Brown v. Entertainment Merchants Assn.* (2011) [Casebook p. 260]. But nobody argues that solicitation of campaign funds by judicial candidates is a category of unprotected speech. As explained above, the First Amendment fully applies to Yulee's speech. The question is instead whether that Amendment permits the particular regulation of speech at issue here.

The parties devote considerable attention to our cases analyzing campaign finance restrictions in political elections. But a State's interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections. As we explained in *White*, States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians. Politicians are expected to be appropriately responsive to the preferences of their supporters. Indeed, such "responsiveness is key to the very concept of self-governance through elected officials." *McCutcheon v. Federal Election Comm'n* (2014) (plurality opinion) [Supp., *infra* this Chapter]. The same is not true of judges. In deciding cases, a judge is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors. . . . As in *White*, therefore, our precedents applying the First Amendment to political elections have little bearing on the issues here.

The vast majority of elected judges in States that allow personal solicitation serve with fairness and honor. But "[e]ven if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributions is likely to undermine the public's confidence in the judiciary." *White* (O'Connor, J., concurring). In the eyes of the

public, a judge's personal solicitation could result (even unknowingly) in "a possible temptation . . . which might lead him not to hold the balance nice, clear and true." *Tumey v. Ohio*, 273 U.S. 510 (1927). That risk is especially pronounced because most donors are lawyers and litigants who may appear before the judge they are supporting.

The concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record. But no one denies that it is genuine and compelling. In short, it is the regrettable but unavoidable appearance that judges who personally ask for money may diminish their integrity that prompted the Supreme Court of Florida and most other States to sever the direct link between judicial candidates and campaign contributors. . . . Moreover, personal solicitation by a judicial candidate "inevitably places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate." Potential litigants then fear that "the integrity of the judicial system has been compromised, forcing them to search for an attorney in part based upon the criteria of which attorneys have made the obligatory contributions." A State's decision to elect its judges does not require it to tolerate these risks. The Florida Bar's interest is compelling.

B

Yulee acknowledges the State's compelling interest in judicial integrity. She argues, however, that the Canon's failure to restrict other speech equally damaging to judicial integrity and its appearance undercuts the Bar's position. In particular, she notes that Canon 7C(1) allows a judge's campaign committee to solicit money, which arguably reduces public confidence in the integrity of the judiciary just as much as a judge's personal solicitation. Yulee also points out that Florida permits judicial candidates to write thank you notes to campaign donors, which ensures that candidates know who contributes and who does not.

It is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech. We have recognized, however, that underinclusiveness can raise "doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*. . . . Underinclusiveness can also reveal that a law does not actually advance a compelling interest. For example, a State's decision to prohibit newspapers, but not electronic media, from releasing the names of juvenile defendants suggested that the law did not advance its stated purpose of protecting youth privacy. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

Although a law's underinclusivity raises a red flag, the First Amendment imposes no freestanding "underinclusiveness limitation." *R.A.V. v. St. Paul* (1992) [Casebook p. 622]. A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws — even under strict scrutiny — that conceivably could have restricted even greater amounts of speech in service of their stated interests. *Burson*; *see McConnell; Buckley*.

Viewed in light of these principles, Canon 7C(1) raises no fatal underinclusivity concerns. The solicitation ban aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges and judicial candidates. The Canon applies evenhandedly to all judges and judicial candidates, regardless of their viewpoint or chosen means of solicitation. And unlike some laws that we have found

impermissibly underinclusive, Canon 7C(1) is not riddled with exceptions. *See City of Ladue v. Gilleo* (1994) [Casebook p. 404]. Indeed, the Canon contains zero exceptions to its ban on personal solicitation.

Yulee relies heavily on the provision of Canon 7C(1) that allows solicitation by a candidate's campaign committee. But Florida, along with most other States, has reasonably concluded that solicitation by the candidate personally creates a categorically different and more severe risk of undermining public confidence than does solicitation by a campaign committee. The identity of the solicitor matters, as anyone who has encountered a Girl Scout selling cookies outside a grocery store can attest. When the judicial candidate himself asks for money, the stakes are higher for all involved. The candidate has personally invested his time and effort in the fundraising appeal; he has placed his name and reputation behind the request. The solicited individual knows that, and also knows that the solicitor might be in a position to singlehandedly make decisions of great weight: The same person who signed the fundraising letter might one day sign the judgment. This dynamic inevitably creates pressure for the recipient to comply, and it does so in a way that solicitation by a third party does not. Just as inevitably, the personal involvement of the candidate in the solicitation creates the public appearance that the candidate will remember who says yes, and who says no.

In short, personal solicitation by judicial candidates implicates a different problem than solicitation by campaign committees. However similar the two solicitations may be in substance, a State may conclude that they present markedly different appearances to the public. Florida's choice to allow solicitation by campaign committees does not undermine its decision to ban solicitation by judges.

Likewise, allowing judicial candidates to write thank you notes to campaign donors does not detract from the State's interest in preserving public confidence in the integrity of the judiciary. Yulee argues that permitting thank you notes heightens the likelihood of actual bias by ensuring that judicial candidates know who supported their campaigns, and ensuring that the supporter knows that the candidate knows. Maybe so. But the State's compelling interest is implicated most directly by the candidate's personal solicitation itself. A failure to ban thank you notes for contributions not solicited by the candidate does not undercut the Bar's rationale.

In addition, the State has a good reason for allowing candidates to write thank you notes and raise money through committees. These accommodations reflect Florida's effort to respect the First Amendment interests of candidates and their contributors — to resolve the "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Chisom v. Roemer*, 501 U.S. 380 (1991). They belie the principal dissent's suggestion that Canon 7C(1) reflects general "hostility toward judicial campaigning" and has "nothing to do with the appearances created by judges' asking for money." Nothing?

The principal dissent also suggests that Canon 7C(1) is underinclusive because Florida does not ban judicial candidates from asking individuals for personal gifts or loans. But Florida law treats a personal "gift" or "loan" as a campaign contribution if the donor makes it "for the purpose of influencing the results of an election," and Florida's Judicial Qualifications Commission has determined that a judicial candidate violates Canon 7C(1) by personally soliciting such a loan. In any event, Florida can ban personal solicitation of campaign funds

by judicial candidates without making them obey a comprehensive code to leading an ethical life. Underinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*. The principal dissent offers no basis to conclude that judicial candidates are in the habit of soliciting personal loans, football tickets, or anything of the sort. Even under strict scrutiny, "[t]he First Amendment does not require States to regulate for problems that do not exist."

Taken to its logical conclusion, the position advanced by Yulee and the principal dissent is that Florida may ban the solicitation of funds by judicial candidates only if the State bans *all* solicitation of funds in judicial elections. The First Amendment does not put a State to that all-or-nothing choice. We will not punish Florida for leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pretextual motive.

C

After arguing that Canon 7C(1) violates the First Amendment because it restricts too little speech, Yulee argues that the Canon violates the First Amendment because it restricts too much. In her view, the Canon is not narrowly tailored to advance the State's compelling interest through the least restrictive means.

By any measure, Canon 7C(1) restricts a narrow slice of speech. A reader of Justice Kennedy's dissent could be forgiven for concluding that the Court has just upheld a latter-day version of the Alien and Sedition Acts, approving "state censorship" that "locks the First Amendment out," imposes a "gag" on candidates, and inflicts "dead weight" on a "silenced" public debate. But in reality, Canon 7C(1) leaves judicial candidates free to discuss any issue with any person at any time. Candidates can write letters, give speeches, and put up billboards. They can contact potential supporters in person, on the phone, or online. They can promote their campaigns on radio, television, or other media. They cannot say, "Please give me money." They can, however, direct their campaign committees to do so. Whatever else may be said of the Canon, it is surely not a "wildly disproportionate restriction upon speech." *Post* (Scalia, J., dissenting).

Indeed, Yulee concedes — and the principal dissent seems to agree — that Canon 7C(1) is valid in numerous applications. Yulee acknowledges that Florida can prohibit judges from soliciting money from lawyers and litigants appearing before them. In addition, she says the State "might" be able to ban "direct one-to-one solicitation of lawyers and individuals or businesses that could reasonably appear in the court for which the individual is a candidate." She also suggests that the Bar could forbid "in person" solicitation by judicial candidates. But Yulee argues that the Canon cannot constitutionally be applied to her chosen form of solicitation: a letter posted online and distributed via mass mailing. No one, she contends, will lose confidence in the integrity of the judiciary based on personal solicitation to such a broad audience.

This argument misperceives the breadth of the compelling interest that underlies Canon 7C(1). Florida has reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary. That interest may be implicated to varying degrees in particular contexts, but the

interest remains whenever the public perceives the judge personally asking for money.

Moreover, the lines Yulee asks us to draw are unworkable. Even under her theory of the case, a mass mailing would create an appearance of impropriety if addressed to a list of all lawyers and litigants with pending cases. So would a speech soliciting contributions from the 100 most frequently appearing attorneys in the jurisdiction. Yulee says she might accept a ban on one-to-one solicitation, but is the public impression really any different if a judicial candidate tries to buttonhole not one prospective donor but two at a time? Ten? Yulee also agrees that in person solicitation creates a problem. But would the public's concern recede if the request for money came in a phone call or a text message?

We decline to wade into this swamp. The First Amendment requires that Canon 7C(1) be narrowly tailored, not that it be "perfectly tailored." *Burson*. The impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as public confidence in the integrity of the judiciary. Yulee is of course correct that some personal solicitations raise greater concerns than others. A judge who passes the hat in the courthouse creates a more serious appearance of impropriety than does a judicial candidate who makes a tasteful plea for support on the radio. But most problems arise in greater and lesser gradations, and the First Amendment does not confine a State to addressing evils in their most acute form. Here, Florida has concluded that all personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the judiciary; banning all personal solicitations by judicial candidates is narrowly tailored to address that concern.

In considering Yulee's tailoring arguments, we are mindful that most States with elected judges have determined that drawing a line between personal solicitation by candidates and solicitation by committees is necessary to preserve public confidence in the integrity of the judiciary. These considered judgments deserve our respect, especially because they reflect sensitive choices by States in an area central to their own governance — how to select those who "sit as their judges."

Finally, Yulee contends that Florida can accomplish its compelling interest through the less restrictive means of recusal rules and campaign contribution limits. We disagree. A rule requiring judges to recuse themselves from every case in which a lawyer or litigant made a campaign contribution would disable many jurisdictions. And a flood of postelection recusal motions could "erode public confidence in judicial impartiality" and thereby exacerbate the very appearance problem the State is trying to solve. Moreover, the rule that Yulee envisions could create a perverse incentive for litigants to make campaign contributions to judges solely as a means to trigger their later recusal — a form of peremptory strike against a judge that would enable transparent forum shopping.

As for campaign contribution limits, Florida already applies them to judicial elections. A State may decide that the threat to public confidence created by personal solicitation exists apart from the amount of money that a judge or judicial candidate seeks. . . .

In sum, because Canon 7C(1) is narrowly tailored to serve a compelling government interest, the First Amendment poses no obstacle to its enforcement in this case. . . .

* * *

The desirability of judicial elections is a question that has sparked disagreement for more than 200 years. . . . It is not our place to resolve this enduring debate. Our limited task is to apply the Constitution to the question presented in this case. Judicial candidates have a First Amendment right to speak in support of their campaigns. States have a compelling interest in preserving public confidence in their judiciaries. When the State adopts a narrowly tailored restriction like the one at issue here, those principles do not conflict. A State's decision to elect judges does not compel it to compromise public confidence in their integrity.

The judgment of the Florida Supreme Court is

*Affirmed.*

JUSTICE BREYER, concurring.

As I have previously said, I view this Court's doctrine referring to tiers of scrutiny as guidelines informing our approach to the case at hand, not tests to be mechanically applied. *See, e.g.*, *United States v. Alvarez* (2012) (Breyer, J., concurring in judgment) [Casebook p. 270]. On that understanding, I join the Court's opinion.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins as to Part II, concurring in part and concurring in the judgment.

I

I join the Court's opinion save for Part II. As explained in my dissenting opinion in *White*, I would not apply exacting scrutiny to a State's endeavor sensibly to "differentiate elections for political offices . . . , from elections designed to select those whose office it is to administer justice without respect to persons."

II

I write separately to reiterate the substantial latitude, in my view, States should possess to enact campaign-finance rules geared to judicial elections. "Judges," the Court rightly recognizes, "are not politicians," so "States may regulate judicial elections differently than they regulate political elections." And because "the role of judges differs from the role of politicians," this Court's "precedents applying the First Amendment to political elections [should] have little bearing" on elections to judicial office. . . .

Disproportionate spending to influence court judgments threatens both the appearance and actuality of judicial independence. . . . "A State's decision to elect its judges does not require it to tolerate these risks." . . . States should not be put to the polar choices of either equating judicial elections to political elections, or else abandoning public participation in the selection of judges altogether. Instead, States should have leeway to "balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary." *White* (Ginsburg, J., dissenting).

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

An ethics canon adopted by the Florida Supreme Court bans a candidate in a judicial election from asking anyone, under any circumstances, for a contribution to his campaign. Faithful application of our precedents would have made short work of this wildly disproportionate restriction upon speech. Intent upon upholding the Canon, however, the Court flattens one settled First Amendment principle after another.

I

The first axiom of the First Amendment is this: As a general rule, the state has no power to ban speech on the basis of its content. One need not equate judges with politicians to see that this principle does not grow weaker merely because the censored speech is a judicial candidate's request for a campaign contribution. Our cases hold that speech enjoys the full protection of the First Amendment unless a widespread and longstanding tradition ratifies its regulation. *Entertainment Merchants Assn.* No such tradition looms here. Georgia became the first State to elect its judges in 1812, and judicial elections had spread to a large majority of the States by the time of the Civil War. *White*. Yet there appears to have been no regulation of judicial candidates' speech throughout the 19th and early 20th centuries. The American Bar Association first proposed ethics rules concerning speech of judicial candidates in 1924, but these rules did not achieve widespread adoption until after the Second World War.

Rules against soliciting campaign contributions arrived more recently still. The ABA first proposed a canon advising against it in 1972, and a canon prohibiting it only in 1990. Even now, 9 of the 39 States that elect judges allow judicial candidates to ask for campaign contributions. In the absence of any long-settled custom about judicial candidates' speech in general or their solicitations in particular, we have no basis for relaxing the rules that normally apply to laws that suppress speech because of content.

One likewise need not equate judges with politicians to see that the electoral setting calls for all the more vigilance in ensuring observance of the First Amendment. 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. This expression lies at the heart of what the First Amendment is meant to protect. In addition, banning candidates from asking for money personally "favors some candidates over others — incumbent judges (who benefit from their current status) over non-judicial candidates, the well-to-do (who may not need to raise any money at all) over lower-income candidates, and the well-connected (who have an army of potential fundraisers) over outsiders." This danger of legislated (or judicially imposed) favoritism is the very reason the First Amendment exists.

Because Canon 7C(1) restricts fully protected speech on the basis of content, it presumptively violates the First Amendment. We may uphold it only if the State meets its burden of showing that the Canon survives strict scrutiny — that is to say, only if it shows that the Canon is narrowly tailored to serve a compelling interest. I do not for a moment question the Court's conclusion that States have different compelling interests when regulating judicial elections than when regulating political ones. Unlike a legislator, a judge must be impartial — without bias for or against any party or attorney who comes before him. I accept for the sake of argument that States have a compelling interest in ensuring that its judges are *seen* to be impartial. I will likewise assume that a judicial candidate's request to a litigant or attorney presents a danger of coercion that a political candidate's request to a constituent does not. But Canon 7C(1) does not narrowly target concerns about impartiality or its appearance; it applies even when the person asked for a financial contribution has no chance of ever appearing in the candidate's court. And Florida does not invoke concerns about coercion, presumably because the Canon bans solicitations regardless of whether their

object is a lawyer, litigant, or other person vulnerable to judicial pressure. So Canon 7C(1) fails exacting scrutiny and infringes the First Amendment. This case should have been just that straightforward.

II

The Court concludes that Florida may prohibit personal solicitations by judicial candidates as a means of preserving "public confidence in the integrity of the judiciary." It purports to reach this destination by applying strict scrutiny, but it would be more accurate to say that it does so by applying the appearance of strict scrutiny.

A

The first sign that mischief is afoot comes when the Court describes Florida's compelling interest. The State must first identify its objective with precision before one can tell whether that interest is compelling and whether the speech restriction narrowly targets it. In *White*, for example, the Court did not allow a State to invoke hazy concerns about judicial impartiality in justification of an ethics rule against judicial candidates' announcing their positions on legal issues. The Court instead separately analyzed the State's concerns about judges' bias against parties, preconceptions on legal issues, and open-mindedness, and explained why each concern (and each for a different reason) did not suffice to sustain the rule.

In stark contrast to *White*, the Court today relies on Florida's invocation of an ill-defined interest in "public confidence in judicial integrity." The Court at first suggests that "judicial integrity" involves the "ability to administer justice without fear or favor." As its opinion unfolds, however, today's concept of judicial integrity turns out to be "a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please." 12 THE WORKS OF THOMAS JEFFERSON (P. Ford ed., 1905). When the Court explains how solicitation undermines confidence in judicial integrity, integrity starts to sound like saintliness. It involves independence from any "'*possible* temptation'" that "'*might* lead'" the judge, "even unknowingly," to favor one party. When the Court turns to distinguishing in-person solicitation from solicitation by proxy, the any-possible-temptation standard no longer helps and thus drops out. The critical factors instead become the "pressure" a listener feels during a solicitation and the "appearance that the candidate will remember who says yes, and who says no." But when it comes time to explain Florida's decision to allow candidates to write thank-you notes, the "appearance that the candidate . . . remember[s] who says yes" gets nary a mention. And when the Court confronts Florida's decision to prohibit mass-mailed solicitations, concern about pressure fades away. More outrageous still, the Court at times molds the interest in the perception that judges have integrity into an interest in the perception that judges do not solicit . . . . This is not strict scrutiny; it is sleight of hand.

B

The Court's twistifications have not come to an end; indeed, they are just beginning. In order to uphold Canon 7C(1) under strict scrutiny, Florida must do more than point to a vital public objective brooding overhead. The State must also meet a difficult burden of demonstrating that the speech restriction substantially advances the claimed objective. The State "bears the risk of uncertainty," so "ambiguous proof will not suffice." *Entertainment Merchants*. In an arresting illustration, this Court held that a law punishing lies about winning military decorations like the Congressional Medal of Honor failed exacting scrutiny,

because the Government could not satisfy its "heavy burden" of proving that "the public's general perception of military awards is diluted by false claims." *Alvarez*.

Now that we have a case about the public's perception of judicial honor rather than its perception of military honors, the Justices of this Court change the rules. The Court announces, on the basis of its "intuiti[on]," that allowing personal solicitations will make litigants worry that " 'judges' decisions may be motivated by the desire to repay campaign contributions.' " But this case is not about whether Yulee has the right to receive campaign contributions. It is about whether she has the right to *ask* for campaign contributions that Florida's statutory law already allows her to receive. Florida bears the burden of showing that banning *requests* for lawful contributions will improve public confidence in judges — not just a little bit, but significantly, because "the Government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Entertainment Merchants*.

Neither the Court nor the State identifies the slightest evidence that banning requests for contributions will substantially improve public trust in judges. Nor does common sense make this happy forecast obvious. The concept of judicial integrity "dates back at least eight centuries," and judicial elections in America date back more than two centuries — but rules against personal solicitations date back only to 1972. The peaceful coexistence of judicial elections and personal solicitations for most of our history calls into doubt any claim that allowing personal solicitations would imperil public faith in judges. . . . In the final analysis, Florida comes nowhere near making the convincing demonstration required by our cases that the speech restriction in this case substantially advances its objective.

C

But suppose we play along with the premise that prohibiting solicitations will significantly improve the public reputation of judges. Even then, Florida must show that the ban restricts no more speech than necessary to achieve the objective.

Canon 7C(1) falls miles short of satisfying this requirement. The Court seems to accept Florida's claim that solicitations erode public confidence by creating the perception that judges are selling justice to lawyers and litigants. Yet the Canon prohibits candidates from asking for money from *anybody* — even from someone who is neither lawyer nor litigant, even 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. The State has not come up with a plausible explanation of how soliciting someone who has no chance of appearing in the candidate's court will diminish public confidence in judges.

No less important, Canon 7C(1) bans candidates from asking for contributions even in messages that do not target any listener in particular — mass-mailed letters, flyers posted on telephone poles, speeches to large gatherings, and Web sites addressed to the general public. Messages like these do not share the features that lead the Court to pronounce personal solicitations a menace to public confidence in the judiciary. Consider online solicitations. They avoid "the spectacle of lawyers or potential litigants directly handing over money to judicial candidates." People who come across online solicitations do not feel "pressure" to comply with the request. Nor does the candidate's signature on the online solicitation suggest "that the candidate will remember who says yes, and who says

no." Yet Canon 7C(1) prohibits these and similar solicitations anyway. This tailoring is as narrow as the Court's scrutiny is strict.

Perhaps sensing the fragility of the initial claim that *all* solicitations threaten public confidence in judges, the Court argues that "the lines Yulee asks [it] to draw are unworkable." That is a difficulty of the Court's own imagination. In reality, the Court could have chosen from a whole spectrum of workable rules. It 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 fund-raising appeals that are not directed to any particular listener (like requests in mass-mailed letters), or at least fundraising appeals plainly directed to the general public (like requests placed online). The Supreme Court of Florida has made similar accommodations in other settings. It 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." And it allows sitting judges to accept gifts if (among other things) "the donor is not a party or other person . . . whose interests have come or are likely to come before the judge." It is not too much to ask that the State show election speech similar consideration. . . .

D

Even if Florida could show that banning all personal appeals for campaign funds is necessary to protect public confidence in judicial integrity, the Court must overpower one last sentinel of free speech before it can uphold Canon 7C(1). Among its other functions, the First Amendment is a kind of Equal Protection Clause for ideas. The state ordinarily may not regulate one message because it harms a government interest yet refuse to regulate other messages that impair the interest in a comparable way. . . .

The Court's decision disregards these principles. The Court tells us that "all personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the judiciary." But Canon 7C(1) does not restrict *all* personal solicitations; it restricts only personal solicitations related to campaigns. The part of the Canon challenged here prohibits personal pleas for "campaign funds," and the Canon elsewhere prohibits personal appeals to attorneys for "publicly stated support." So although Canon 7C(1) prevents Yulee from asking a lawyer for a few dollars to help her buy campaign pamphlets, it does not prevent her asking the same lawyer for a personal loan, access to his law firm's luxury suite at the local football stadium, or even a donation to help her fight the Florida Bar's charges. What could possibly justify these distinctions? Surely the Court does not believe that requests for campaign favors erode public confidence in a way that requests for favors unrelated to elections do not. Could anyone say with a straight face that it looks *worse* for a candidate to say "please give my campaign $25" than to say "please give *me* $25"?

Fumbling around for a fig-leaf, the Court says that "the First Amendment imposes no freestanding underinclusiveness limitation." This analysis elides the distinction between selectivity on the basis of content and selectivity on other grounds. Because the First Amendment does not prohibit underinclusiveness as such, lawmakers may target a problem only at certain times or in certain places. Because the First Amendment *does* prohibit content discrimination as such, lawmakers may *not* target a problem only in certain messages. Explaining this

distinction, we have said that the First Amendment would allow banning obscenity "only in certain media or markets" but would preclude banning "only that obscenity which includes offensive political messages." *R.A.V.* This case involves selectivity on the basis of content. The Florida Supreme Court has decided to eliminate the appearances associated with "personal appeals for money," when the appeals seek money for a campaign but not when the appeals seek money for other purposes. That distinction violates the First Amendment.

Even on the Court's own terms, Canon 7C(1) cannot stand. The Court concedes that "underinclusiveness can raise 'doubts about whether the government is in fact pursuing the interest it invokes.' " Canon 7C(1)'s scope suggests that it has nothing to do with the appearances created by judges' asking for money, and everything to do with hostility toward judicial campaigning. How else to explain the Florida Supreme Court's decision to ban *all* personal appeals for campaign funds (even when the solicitee could never appear before the candidate), but to tolerate appeals for other kinds of funds (even when the solicitee will surely appear before the candidate)? It should come as no surprise that the ABA, whose model rules the Florida Supreme Court followed when framing Canon 7C(1), opposes judicial elections — preferring instead a system in which (surprise!) a committee of lawyers proposes candidates from among whom the Governor must make his selection. *See White*.

The Court tries to strike a pose of neutrality between appointment and election of judges, but no one should be deceived. A Court that sees impropriety in a candidate's request for *any* contributions to his election campaign does not much like judicial selection by the people. . . .

* * *

This Court has not been shy to enforce the First Amendment in recent Terms — even in cases that do not involve election speech. It has accorded robust protection to depictions of animal torture, sale of violent video games to children, and lies about having won military medals. *See United States v. Stevens* (2010) [Casebook p. 254]; *Entertainment Merchants*; *Alvarez*. Who would have thought that the same Court would today exert such heroic efforts to save so plain an abridgement of the freedom of speech? It is no great mystery what is going on here. The judges of this Court, like the judges of the Supreme Court of Florida who promulgated Canon 7C(1), evidently consider the preservation of public respect for the courts a policy objective of the highest order. So it is — but so too are preventing animal torture, protecting the innocence of children, and honoring valiant soldiers. The Court did not relax the Constitution's guarantee of freedom of speech when legislatures pursued those goals; it should not relax the guarantee when the Supreme Court of Florida pursues this one. The First Amendment is not abridged for the benefit of the Brotherhood of the Robe.

I respectfully dissent.

JUSTICE KENNEDY, dissenting.

. . . With all due respect for the Court, it seems fair and necessary to say its decision rests on two premises, neither one correct. One premise is that in certain elections — here an election to choose the best qualified judge — the public lacks the necessary judgment to make an informed choice. Instead, the State must protect voters by altering the usual dynamics of free speech. The other premise is that since judges should be accorded special respect and dignity, their election can be subject to certain content-based rules that would be unacceptable in other

elections. In my respectful view neither premise can justify the speech restriction at issue here. Although States have a compelling interest in seeking to ensure the appearance and the reality of an impartial judiciary, it does not follow that the State may alter basic First Amendment principles in pursuing that goal. *See White*.

While any number of troubling consequences will follow from the Court's ruling, a simple example can suffice to illustrate the dead weight its decision now ties to public debate. Assume a judge retires, and two honest lawyers, Doe and Roe, seek the vacant position. Doe is a respected, prominent lawyer who has been active in the community and is well known to business and civic leaders. Roe, a lawyer of extraordinary ability and high ethical standards, keeps a low profile. As soon as Doe announces his or her candidacy, a campaign committee organizes of its own accord and begins raising funds. But few know or hear about Roe's potential candidacy, and no one with resources or connections is available to assist in raising the funds necessary for even a modest plan to speak to the electorate. Today the Court says the State can censor Roe's speech, imposing a gag on his or her request for funds, no matter how close Roe is to the potential benefactor or donor. The result is that Roe's personal freedom, the right of speech, is cut off by the State.

The First Amendment consequences of the Court's ruling do not end with its denial of the individual's right to speak. For the very purpose of the candidate's fundraising was to facilitate a larger speech process: an election campaign. By cutting off one candidate's personal freedom to speak, the broader campaign debate that might have followed — a debate that might have been informed by new ideas and insights from both candidates — now is silenced. . . .

If there is concern about principled, decent, and thoughtful discourse in election campaigns, the First Amendment provides the answer. That answer is more speech. *See, e.g.*, *Whitney v. California* (1927) (Brandeis, J., concurring) (when the government objects to speech, "the remedy to be applied is more speech, not enforced silence") [Casebook p. 27]. For example, candidates might themselves agree to appoint members of a panel charged with periodic evaluation of campaign statements, candor, and fairness. Those evaluations could be made public. And any number of private organizations or voter groups seeking to evaluate campaign rhetoric could do the same.

Modern communication technologies afford voters and candidates an unparalleled opportunity to engage in the campaign and election process. . . . Whether as a result of disclosure laws or a candidate's voluntary decision to make the campaign transparent, the Internet can reveal almost at once how a candidate sought funds; who the donors were; and what amounts they gave. Indeed, disclosure requirements offer a powerful, speech-enhancing method of deterring corruption — one that does not impose limits on how and when people can speak. . . .

In addition to narrowing the First Amendment's reach, there is another flaw in the Court's analysis. That is its error in the application of strict scrutiny. The Court's evisceration of that judicial standard now risks long-term harm to what was once the Court's own preferred First Amendment test. As Justice Scalia well explains, the state law at issue fails strict scrutiny for any number of reasons. The candidate who is not wealthy or well connected cannot ask even a close friend or relative for a bit of financial help, despite the lack of any increased risk of partiality and despite the fact that disclosure laws might be enacted to make the solicitation

and support public. This law comes nowhere close to being narrowly tailored. And by saying that it survives that vital First Amendment requirement, the Court now writes what is literally a casebook guide to eviscerating strict scrutiny any time the Court encounters speech it dislikes. On these premises, and for the reasons explained in more detail by Justice Scalia, it is necessary for me to file this respectful dissent.

JUSTICE ALITO, dissenting.

I largely agree with what I view as the essential elements of the dissents filed by Justices Scalia and Kennedy. The Florida rule before us regulates speech that is part of the process of selecting those who wield the power of the State. Such speech lies at the heart of the protection provided by the First Amendment. The Florida rule regulates that speech based on content and must therefore satisfy strict scrutiny. This means that it must be narrowly tailored to further a compelling state interest. Florida has a compelling interest in making sure that its courts decide cases impartially and in accordance with the law and that its citizens have no good reason to lack confidence that its courts are performing their proper role. But the Florida rule is not narrowly tailored to serve that interest.

Indeed, this rule is about as narrowly tailored as a burlap bag. It applies to all solicitations made in the name of a candidate for judicial office — including, as was the case here, a mass mailing. It even applies to an ad in a newspaper. It applies to requests for contributions in any amount, and it applies even if the person solicited is not a lawyer, has never had any interest at stake in any case in the court in question, and has no prospect of ever having any interest at stake in any litigation in that court. If this rule can be characterized as narrowly tailored, then narrow tailoring has no meaning, and strict scrutiny, which is essential to the protection of free speech, is seriously impaired. . . .

## Note: "The Appearance of Strict Scrutiny" and the Perception of Fairness

**1.** The phrase quoted above comes from the part of Justice Scalia's dissent in *Williams-Yulee*, where he challenges the majority's claim that it applied strict scrutiny to the challenged Florida judicial canon. Do you agree with Justice Scalia that the majority's scrutiny is not "strict" in the sense required by First Amendment jurisprudence? Consider first his argument that the majority did not define the state's interest with the "precision" the First Amendment requires. In particular, recall his criticism of the majority's conception of the state's interest in "public confidence in judicial integrity" as including concerns about "possible" temptation that "might" lead a judge to favor one party over another. To be sure, his concern here is mainly about the allegedly-shifting character of the interest the Court relies on to uphold the challenged canon. But nevertheless, he criticizes the interest itself, describing it as an interest in judicial "saintliness."

Normally, when lawyers and judges consider rules of professional ethics, they focus not just on actual impropriety but the *appearance* of impropriety. *See, e.g.*, ABA Model Code of Judicial Conduct, Canon 1 ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety *and the appearance* of impropriety.") (emphasis added). Does Justice Scalia's criticism of the majority's conception of the state interest mean that concern for "the appearance of impropriety" is simply not precise enough to count as compelling for First Amendment purposes?

Consider also Justice Scalia's critique of the majority's narrow-tailoring analysis. He criticizes that analysis, arguing that "Florida bears the burden of showing that banning requests for lawful contributions will improve public confidence in judges — not just a little bit, but significantly . . . ." Is it even possible for a state to demonstrate that a rule such as the one challenged in *Williams-Yulee* satisfies that requirement, given the difficulty in demonstrating that such a rule would "improve public confidence in judges — not just a little bit, but significantly"? If you were a judicial ethics official, how would you go about making that showing?

**2.** Consider *Williams-Yulee* in light of *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) [this Supp. *supra*, Chapter 8], in which the Court struck down a town's sign ordinance as a content-based speech restriction that failed strict scrutiny. Dissenting in *Reed*, Justice Kagan raised the possibility that overly-broad application of the strict scrutiny requirement might lead the Court to "water down strict scrutiny to something unrecognizable." Does *Williams-Yulee* represent just such a "watering down"? Do decisions like *Reed* and *Williams-Yulee* support Justice Breyer's longstanding view that what the Court should do in pretty much all cases is to ask "whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives"? (Justice Breyer adds: "Answering this question requires examining the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so.") How different is that from what the Court actually does?

## C. Campaign Finance

**Page 686:** ***add before the Note:***

### McCutcheon v. Federal Election Commission

*572 S. Ct. ___ (2014)*

CHIEF JUSTICE ROBERTS announced the judgment of the Court and delivered an opinion, in which JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE ALITO joined.

There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign. This case is about the last of those options.

The right to participate in democracy through political contributions is protected by the First Amendment, but that right is not absolute. Our cases have held that Congress may regulate campaign contributions to protect against corruption or the appearance of corruption. *See, e.g.*, *Buckley v. Valeo* (1976) [Casebook p. 666]. At the same time, we have made clear that Congress may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others. *See, e.g.*, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011).

Many people might find those latter objectives attractive: They would be delighted to see fewer television commercials touting a candidate's accomplishments or disparaging an opponent's character. Money in politics may at

times seem repugnant to some, but so too does much of what the First Amendment vigorously protects. If the First Amendment protects flag burning, funeral protests, and Nazi parades — despite the profound offense such spectacles cause — it surely protects political campaign speech despite popular opposition. *See Texas v. Johnson* (1989) [Casebook p. 452]; *Snyder v. Phelps* (2011) [Casebook p. 120]; *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977) (*per curiam*). Indeed, as we have emphasized, the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office."

In a series of cases over the past 40 years, we have spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply to limit political speech. We have said that government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. "Ingratiation and access . . . are not corruption." *Citizens United v. Federal Election Comm'n* (2010) [Casebook p. 695]. They embody a central feature of democracy — that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.

Any regulation must instead target what we have called "*quid pro quo*" corruption or its appearance. *See id.* That Latin phrase captures the notion of a direct exchange of an official act for money. "The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985). Campaign finance restrictions that pursue other objectives, we have explained, impermissibly inject the Government "into the debate over who should govern." And those who govern should be the last people to help decide who *should* govern.

The statute at issue in this case imposes two types of limits on campaign contributions. The first, called base limits, restricts how much money a donor may contribute to a particular candidate or committee. 2 U.S.C. § 441a(a)(1). The second, called aggregate limits, restricts how much money a donor may contribute in total to all candidates or committees. § 441a(a)(3).

This case does not involve any challenge to the base limits, which we have previously upheld as serving the permissible objective of combatting corruption. The Government contends that the aggregate limits also serve that objective, by preventing circumvention of the base limits. We conclude, however, that the aggregate limits do little, if anything, to address that concern, while seriously restricting participation in the democratic process. The aggregate limits are therefore invalid under the First Amendment.

I

A

For the 2013-2014 election cycle, the base limits in the Federal Election Campaign Act of 1971 (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), permit an individual to contribute up to $2,600 per election to a candidate ($5,200 total for the primary and general elections); $32,400 per year to a national party committee; $10,000 per year to a state or local party committee;

and $5,000 per year to a political action committee, or "PAC."[2] A national committee, state or local party committee, or multicandidate PAC may in turn contribute up to $5,000 per election to a candidate. § 441a(a)(2).

The base limits apply with equal force to contributions that are "in any way earmarked or otherwise directed through an intermediary or conduit" to a candidate. If, for example, a donor gives money to a party committee but directs the party committee to pass the contribution along to a particular candidate, then the transaction is treated as a contribution from the original donor to the specified candidate.

For the 2013-2014 election cycle, the aggregate limits in BCRA permit an individual to contribute a total of $48,600 to federal candidates and a total of $74,600 to other political committees. . . . All told, an individual may contribute up to $123,200 to candidate and noncandidate committees during each two-year election cycle.

The base limits thus restrict how much money a donor may contribute to any particular candidate or committee; the aggregate limits have the effect of restricting how many candidates or committees the donor may support, to the extent permitted by the base limits.

B

In the 2011-2012 election cycle, appellant Shaun McCutcheon contributed a total of $33,088 to 16 different federal candidates, in compliance with the base limits applicable to each. He alleges that he wished to contribute $1,776 to each of 12 additional candidates but was prevented from doing so by the aggregate limit on contributions to candidates. McCutcheon also contributed a total of $27,328 to several noncandidate political committees, in compliance with the base limits applicable to each. He alleges that he wished to contribute to various other political committees, including $25,000 to each of the three Republican national party committees, but was prevented from doing so by the aggregate limit on contributions to political committees. McCutcheon further alleges that he plans to make similar contributions in the future. . . .

Appellant Republican National Committee is a national political party committee charged with the general management of the Republican Party. The RNC wishes to receive the contributions that McCutcheon and similarly situated individuals would like to make — contributions otherwise permissible under the base limits for national party committees but foreclosed by the aggregate limit on contributions to political committees.

In June 2012, McCutcheon and the RNC filed a complaint before a three-judge panel of the U.S. District Court for the District of Columbia. McCutcheon and the RNC asserted that the aggregate limits on contributions to candidates and to noncandidate political committees were unconstitutional under the First Amendment. . . .

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[2] A PAC is a business, labor, or interest group that raises or spends money in connection with a federal election, in some cases by contributing to candidates. A so-called "Super PAC" is a PAC that makes only independent expenditures and cannot contribute to candidates. The base and aggregate limits govern contributions to traditional PACs, but not to independent expenditure PACs.

The three-judge District Court denied appellants' motion for a preliminary injunction and granted the Government's motion to dismiss. Assuming that the base limits appropriately served the Government's anticorruption interest, the District Court concluded that the aggregate limits survived First Amendment scrutiny because they prevented evasion of the base limits. . . .

McCutcheon and the RNC appealed directly to this Court, as authorized by law. In such a case, "we ha[ve] no discretion to refuse adjudication of the case on its merits."

II

A

*Buckley v. Valeo* presented this Court with its first opportunity to evaluate the constitutionality of the original contribution and expenditure limits set forth in FECA. . . .

*Buckley* recognized that "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." But it distinguished expenditure limits from contribution limits based on the degree to which each encroaches upon protected First Amendment interests. Expenditure limits, the Court explained, "necessarily reduce the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." The Court thus subjected expenditure limits to "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." Under exacting scrutiny, the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest.

By contrast, the Court concluded that contribution limits impose a lesser restraint on political speech because they "permit the symbolic expression of support evidenced by a contribution but do not in any way infringe the contributor's freedom to discuss candidates and issues." As a result, the Court focused on the effect of the contribution limits on the freedom of political association and applied a lesser but still "rigorous standard of review." Under that standard, "even a ' "significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms."

The primary purpose of FECA was to limit *quid pro quo* corruption and its appearance; that purpose satisfied the requirement of a "sufficiently important" governmental interest. As for the "closely drawn" component, *Buckley* concluded that the $1,000 base limit "focuses precisely on the problem of large campaign contributions . . . while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." The Court therefore upheld the $1,000 base limit under the "closely drawn" test. . . .

Finally, in one paragraph of its 139-page opinion, the Court turned to the $25,000 aggregate limit under FECA. As a preliminary matter, it noted that the constitutionality of the aggregate limit "ha[d] not been separately addressed at length by the parties." Then, in three sentences, the Court disposed of any

constitutional objections to the aggregate limit that the challengers might have had:

> The overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.

B

1

The parties and *amici curiae* spend significant energy debating whether the line that *Buckley* drew between contributions and expenditures should remain the law. Notwithstanding the robust debate, we see no need in this case to revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review. *Buckley* held that the Government's interest in preventing *quid pro quo* corruption or its appearance was "sufficiently important," *id.*; we have elsewhere stated that the same interest may properly be labeled "compelling," see *National Conservative Political Action Comm.*, so that the interest would satisfy even strict scrutiny. Moreover, regardless whether we apply strict scrutiny or *Buckley*'s "closely drawn" test, we must assess the fit between the stated governmental objective and the means selected to achieve that objective. Or to put it another way, if a law that restricts political speech does not "avoid unnecessary abridgement" of First Amendment rights, *Buckley*, it cannot survive "rigorous" review.

Because we find a substantial mismatch between the Government's stated objective and the means selected to achieve it, the aggregate limits fail even under the "closely drawn" test. We therefore need not parse the differences between the two standards in this case.

2

*Buckley* treated the constitutionality of the $25,000 aggregate limit as contingent upon that limit's ability to prevent circumvention of the $1,000 base limit, describing the aggregate limit as "no more than a corollary" of the base limit. The Court determined that circumvention could occur when an individual legally contributes "massive amounts of money to a particular candidate through the use of unearmarked contributions" to entities that are themselves likely to contribute to the candidate. For that reason, the Court upheld the $25,000 aggregate limit.

Although *Buckley* provides some guidance, we think that its ultimate conclusion about the constitutionality of the aggregate limit in place under FECA does not control here. . . .

Most notably, statutory safeguards against circumvention have been considerably strengthened since *Buckley* was decided, through both statutory

additions and the introduction of a comprehensive regulatory scheme. With more targeted anticircumvention measures in place today, the indiscriminate aggregate limits under BCRA appear particularly heavy-handed.

The 1976 FECA Amendments, for example, added another layer of base contribution limits. The 1974 version of FECA had already capped contributions from political committees to candidates, but the 1976 version added limits on contributions to political committees. This change was enacted at least "in part to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*." *California Medical Assn. v. Federal Election Comm'n* (1981) (plurality opinion) [Casebook p. 685 Note]; *see also id.* (Blackmun, J., concurring in part and concurring in judgment). . . . Limits on contributions to political committees consequently create an additional hurdle for a donor who seeks both to channel a large amount of money to a particular candidate and to ensure that he gets the credit for doing so.

The 1976 Amendments also added an antiproliferation rule prohibiting donors from creating or controlling multiple affiliated political committees. . . . It thus blocks a straightforward method of achieving the circumvention that was the underlying concern in *Buckley*.

The intricate regulatory scheme that the Federal Election Commission has enacted since *Buckley* further limits the opportunities for circumvention of the base limits via "unearmarked contributions to political committees likely to contribute" to a particular candidate. . . .

In addition to accounting for statutory and regulatory changes in the campaign finance arena, appellants' challenge raises distinct legal arguments that *Buckley* did not consider. For example, presumably because of its cursory treatment of the $25,000 aggregate limit, *Buckley* did not separately address an overbreadth challenge with respect to that provision. The Court rejected such a challenge to the base limits because of the difficulty of isolating suspect contributions. The propriety of large contributions to individual candidates turned on the subjective intent of donors, and the Court concluded that there was no way to tell which donors sought improper influence over legislators' actions. The aggregate limit, on the other hand, was upheld as an anticircumvention measure, without considering whether it was possible to discern which donations might be used to circumvent the base limits. The Court never addressed overbreadth in the specific context of aggregate limits, where such an argument has far more force.

Given the foregoing, this case cannot be resolved merely by pointing to three sentences in *Buckley* that were written without the benefit of full briefing or argument on the issue. . . .

III

The First Amendment "is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen v. California* (1971) [Casebook p. 181]. As relevant here, the First Amendment safeguards an individual's right to participate in the public debate through political expression and political association. When an individual contributes money to a candidate, he exercises both of those rights: The contribution "serves as a general expression of support for the candidate and his views" and "serves to affiliate a person with a candidate."

Those First Amendment rights are important regardless whether the individual is, on the one hand, a "lone pamphleteer or street corner orator in the Tom Paine mold," or is, on the other, someone who spends "substantial amounts of money in order to communicate his political ideas through sophisticated" means. Either way, he is participating in an electoral debate that we have recognized is "integral to the operation of the system of government established by our Constitution."

*Buckley* acknowledged that aggregate limits at least diminish an individual's right of political association. As the Court explained, the "overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." But the Court characterized that restriction as a "quite modest restraint upon protected political activity." We cannot agree with that characterization. An aggregate limit on *how many* candidates and committees an individual may support through contributions is not a "modest restraint" at all. The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.

To put it in the simplest terms, the aggregate limits prohibit an individual from fully contributing to the primary and general election campaigns of ten or more candidates, even if all contributions fall within the base limits Congress views as adequate to protect against corruption. The individual may give up to $5,200 each to nine candidates, but the aggregate limits constitute an outright ban on further contributions to any other candidate (beyond the additional $1,800 that may be spent before reaching the $48,600 aggregate limit). At that point, the limits deny the individual all ability to exercise his expressive and associational rights by contributing to someone who will advocate for his policy preferences. A donor must limit the number of candidates he supports, and may have to choose which of several policy concerns he will advance — clear First Amendment harms that the dissent never acknowledges.

It is no answer to say that the individual can simply contribute less money to more people. To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process. And as we have recently admonished, the Government may not penalize an individual for "robustly exercising" his First Amendment rights. *Davis v. Federal Election Comm'n*, 554 U.S. 728 (2008).

The First Amendment burden is especially great for individuals who do not have ready access to alternative avenues for supporting their preferred politicians and policies. In the context of base contribution limits, *Buckley* observed that a supporter could vindicate his associational interests by personally volunteering his time and energy on behalf of a candidate. Such personal volunteering is not a realistic alternative for those who wish to support a wide variety of candidates or causes. . . .

The dissent faults this focus on "the individual's right to engage in political speech," saying that it fails to take into account "the public's interest" in "collective speech." This "collective" interest is said to promote "a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects."

But there are compelling reasons not to define the boundaries of the First Amendment by reference to such a generalized conception of the public good. First, the dissent's "collective speech" reflected in laws is of course the will of the majority, and plainly can include laws that restrict free speech. The whole point of the First Amendment is to afford individuals protection against such infringements. The First Amendment does not protect the government, even when the government purports to act through legislation reflecting "collective speech."

Second, the degree to which speech is protected cannot turn on a legislative or judicial determination that particular speech is useful to the democratic process. The First Amendment does not contemplate such "ad hoc balancing of relative social costs and benefits." *United States v. Stevens* (2010) [Casebook p. 254].

Third, our established First Amendment analysis already takes account of any "collective" interest that may justify restrictions on individual speech. Under that accepted analysis, such restrictions are measured against the asserted public interest (usually framed as an important or compelling governmental interest). As explained below, we do not doubt the compelling nature of the "collective" interest in preventing corruption in the electoral process. But we permit Congress to pursue that interest only so long as it does not unnecessarily infringe an individual's right to freedom of speech; we do not truncate this tailoring test at the outset.

IV

A

With the significant First Amendment costs for individual citizens in mind, we turn to the governmental interests asserted in this case. This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption. We have consistently rejected attempts to suppress campaign speech based on other legislative objectives. No matter how desirable it may seem, it is not an acceptable governmental objective to "level the playing field," or to "level electoral opportunities," or to "equalize the financial resources of candidates." The First Amendment prohibits such legislative attempts to "fine-tune" the electoral process, no matter how well intentioned.

As we framed the relevant principle in *Buckley*, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." The dissent's suggestion that *Buckley* supports the opposite proposition simply ignores what *Buckley* actually said on the matter.

Moreover, while preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption — "*quid pro quo*" corruption. As *Buckley* explained, Congress may permissibly seek to rein in "large contributions that are given to secure a political quid pro quo from current and potential office holders." In addition to "actual *quid pro quo* arrangements," Congress may permissibly limit "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions" to particular candidates.

Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption. Nor does the possibility that an

individual who spends large sums may garner "influence over or access to" elected officials or political parties. And because the Government's interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption, the Government may not seek to limit the appearance of mere influence or access. *See Citizens United*.

The dissent advocates a broader conception of corruption, and would apply the label to any individual contributions above limits deemed necessary to protect "collective speech." Thus, under the dissent's view, it is perfectly fine to contribute $5,200 to nine candidates but somehow corrupt to give the same amount to a tenth.

It is fair to say, as Justice Stevens has, "that we have not always spoken about corruption in a clear or consistent voice." The definition of corruption that we apply today, however, has firm roots in *Buckley* itself. The Court in that case upheld base contribution limits because they targeted "the danger of actual *quid pro quo* arrangements" and "the impact of the appearance of corruption stemming from public awareness" of such a system of unchecked direct contributions. *Buckley* simultaneously rejected limits on spending that was less likely to "be given as a *quid pro quo* for improper commitments from the candidate." In any event, this case is not the first in which the debate over the proper breadth of the Government's anticorruption interest has been engaged. Compare *Citizens United* (majority opinion), with *id.* (opinion of Stevens, J.).

The line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights. In addition, "[i]n drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." . . .

B

"When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." Here, the Government seeks to carry that burden by arguing that the aggregate limits further the permissible objective of preventing *quid pro quo* corruption.

The difficulty is that once the aggregate limits kick in, they ban all contributions of any amount. But Congress's selection of a $5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption. If there is no corruption concern in giving nine candidates up to $5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given $1,801, and all others corruptible if given a dime. And if there is no risk that additional candidates will be corrupted by donations of up to $5,200, then the Government must defend the aggregate limits by demonstrating that they prevent circumvention of the base limits.

The problem is that they do not serve that function in any meaningful way. In light of the various statutes and regulations currently in effect, *Buckley*'s fear that an individual might "contribute massive amounts of money to a particular candidate through the use of unearmarked contributions" to entities likely to support the candidate is far too speculative. And — importantly — we "have never accepted mere conjecture as adequate to carry a First Amendment burden." . . .

*Buckley* upheld aggregate limits only on the ground that they prevented channeling money to candidates beyond the base limits. The absence of such a prospect today belies the Government's asserted objective of preventing

corruption or its appearance. The improbability of circumvention indicates that the aggregate limits instead further the impermissible objective of simply limiting the amount of money in political campaigns.

C

Quite apart from the foregoing, the aggregate limits violate the First Amendment because they are not "closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley*. In the First Amendment context, fit matters. . . . Here, because the statute is poorly tailored to the Government's interest in preventing circumvention of the base limits, it impermissibly restricts participation in the political process.

1

The Government argues that the aggregate limits are justified because they prevent an individual from giving to too many initial recipients who might subsequently recontribute a donation. After all, only recontributed funds can conceivably give rise to circumvention of the base limits. Yet all indications are that many types of recipients have scant interest in regifting donations they receive. . . .

Based on what we can discern from experience, the indiscriminate ban on all contributions above the aggregate limits is disproportionate to the Government's interest in preventing circumvention. The Government has not given us any reason to believe that parties or candidates would dramatically shift their priorities if the aggregate limits were lifted. Absent such a showing, we cannot conclude that the sweeping aggregate limits are appropriately tailored to guard against any contributions that might implicate the Government's anticircumvention interest.

A final point: It is worth keeping in mind that the *base limits* themselves are a prophylactic measure. As we have explained, "restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements." *Citizens United*. The aggregate limits are then layered on top, ostensibly to prevent circumvention of the base limits. This "prophylaxis-upon-prophylaxis approach" requires that we be particularly diligent in scrutinizing the law's fit.

2

Importantly, there are multiple alternatives available to Congress that would serve the Government's anticircumvention interest, while avoiding "unnecessary abridgment" of First Amendment rights. *Buckley*.

The most obvious might involve targeted restrictions on transfers among candidates and political committees. . . .

Other alternatives might focus on earmarking. Many of the scenarios that the Government and the dissent hypothesize involve at least implicit agreements to circumvent the base limits — agreements that are already prohibited by the earmarking rules. The FEC might strengthen those rules further . . . .

We do not mean to opine on the validity of any particular proposal. The point is that there are numerous alternative approaches available to Congress to prevent circumvention of the base limits.

D

Finally, disclosure of contributions minimizes the potential for abuse of the campaign finance system. Disclosure requirements are in part "justified based on a governmental interest in 'providing the electorate with information' about the sources of election-related spending." They may also "deter actual corruption and

avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." Disclosure requirements burden speech, but — unlike the aggregate limits — they do not impose a ceiling on speech. For that reason, disclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech.

With modern technology, disclosure now offers a particularly effective means of arming the voting public with information. In 1976, the Court observed that Congress could regard disclosure as "only a partial measure." . . . Today, given the Internet, disclosure offers much more robust protections against corruption. . . .

V

At oral argument, the Government shifted its focus from *Buckley*'s anticircumvention rationale to an argument that the aggregate limits deter corruption regardless of their ability to prevent circumvention of the base limits. The Government argued that there is an opportunity for corruption whenever a large check is given to a legislator, even if the check consists of contributions within the base limits to be appropriately divided among numerous candidates and committees. The aggregate limits, the argument goes, ensure that the check amount does not become too large. That new rationale for the aggregate limits — embraced by the dissent — does not wash. It dangerously broadens the circumscribed definition of *quid pro quo* corruption articulated in our prior cases, and targets as corruption the general, broad-based support of a political party.

In analyzing the base limits, *Buckley* made clear that the risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself. . . .

Of course a candidate would be pleased with a donor who contributed not only to the candidate himself, but also to other candidates from the same party, to party committees, and to PACs supporting the party. But there is a clear, administrable line between money beyond the base limits funneled in an identifiable way to a candidate — for which the candidate feels obligated — and money within the base limits given widely to a candidate's party — for which the candidate, like all other members of the party, feels grateful.

When donors furnish widely distributed support within all applicable base limits, all members of the party or supporters of the cause may benefit, and the leaders of the party or cause may feel particular gratitude. That gratitude stems from the basic nature of the party system, in which party members join together to further common political beliefs, and citizens can choose to support a party because they share some, most, or all of those beliefs. To recast such shared interest, standing alone, as an opportunity for *quid pro quo* corruption would dramatically expand government regulation of the political process. . . .

* * *

For the past 40 years, our campaign finance jurisprudence has focused on the need to preserve authority for the Government to combat corruption, without at the same time compromising the political responsiveness at the heart of the democratic process, or allowing the Government to favor some participants in that process over others. . . . Constituents have the right to support candidates who share their views and concerns. Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns.

Such responsiveness is key to the very concept of self-governance through elected officials.

The Government has a strong interest, no less critical to our democratic system, in combatting corruption and its appearance. We have, however, held that this interest must be limited to a specific kind of corruption — *quid pro quo* corruption — in order to ensure that the Government's efforts do not have the effect of restricting the First Amendment right of citizens to choose who shall govern them. For the reasons set forth, we conclude that the aggregate limits on contributions do not further the only governmental interest this Court accepted as legitimate in *Buckley*. They instead intrude without justification on a citizen's ability to exercise "the most fundamental First Amendment activities." *Buckley*.

The judgment of the District Court is reversed, and the case is remanded for further proceedings.

*It is so ordered.*

JUSTICE THOMAS, concurring in the judgment.

I adhere to the view that this Court's decision in *Buckley* denigrates core First Amendment speech and should be overruled.

Political speech is " 'the primary object of First Amendment protection' " and "the lifeblood of a self-governing people." Contributions to political campaigns, no less than direct expenditures, "generate essential political speech" by fostering discussion of public issues and candidate qualifications. . . . But instead of treating political giving and political spending alike, *Buckley* distinguished the two, embracing a bifurcated standard of review under which contribution limits receive less rigorous scrutiny. . . .

. . . Contributions and expenditures are simply "two sides of the same First Amendment coin," and our efforts to distinguish the two have produced mere "word games" rather than any cognizable principle of constitutional law. *Buckley* (Burger, C.J., concurring in part and dissenting in part). For that reason, I would overrule *Buckley* and subject the aggregate limits in BCRA to strict scrutiny, which they would surely fail. . . .

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

Nearly 40 years ago in *Buckley v. Valeo* (1976) (*per curiam*), this Court considered the constitutionality of laws that imposed limits upon the overall amount a single person can contribute to all federal candidates, political parties, and committees taken together. The Court held that those limits did not violate the Constitution. [Justice Breyer then quoted the same language from *Buckley* that Chief Justice Roberts quoted in the block quote in Part II-A of his plurality opinion.]

Today a majority of the Court overrules this holding. It is wrong to do so. Its conclusion rests upon its own, not a record-based, view of the facts. Its legal analysis is faulty: It misconstrues the nature of the competing constitutional interests at stake. It understates the importance of protecting the political integrity of our governmental institutions. It creates a loophole that will allow a single individual to contribute millions of dollars to a political party or to a candidate's campaign. Taken together with *Citizens United*, today's decision eviscerates our Nation's campaign finance laws, leaving a remnant incapable of

dealing with the grave problems of democratic legitimacy that those laws were intended to resolve.

I

The plurality concludes that the aggregate contribution limits " 'unnecessarily abridge' " First Amendment rights. It notes that some individuals will wish to "spend 'substantial amounts of money in order to communicate [their] political ideas through sophisticated' means." Aggregate contribution ceilings limit an individual's ability to engage in such "broader participation in the democratic process," while insufficiently advancing any legitimate governmental objective. Hence, the plurality finds, they violate the Constitution.

The plurality's conclusion rests upon three separate but related claims. Each is fatally flawed. First, the plurality says that given the base limits on contributions to candidates and political committees, aggregate limits do not further any independent governmental objective worthy of protection. And that is because, given the base limits, "spending large sums of money in connection with elections" does not "give rise to . . . corruption." In making this argument, the plurality relies heavily upon a narrow definition of "corruption" that excludes efforts to obtain " 'influence over or access to' elected officials or political parties."

Second, the plurality assesses the instrumental objective of the aggregate limits, namely, safeguarding the base limits. It finds that they "do not serve that function in any meaningful way." That is because, even without the aggregate limits, the possibilities for circumventing the base limits are "implausible" and "divorced from reality."

Third, the plurality says the aggregate limits are not a " 'reasonable' " policy tool. Rather, they are "poorly tailored to the Government's interest in preventing circumvention of the base limits." The plurality imagines several alternative regulations that it says might just as effectively thwart circumvention. Accordingly, it finds, the aggregate caps are out of " 'proportion to the [anticorruption] interest served.' "

II

The plurality's first claim — that large aggregate contributions do not "give rise" to "corruption" — is plausible only because the plurality defines "corruption" too narrowly. The plurality describes the constitutionally permissible objective of campaign finance regulation as follows: "Congress may target only a specific type of corruption — '*quid pro quo*' corruption." It then defines *quid pro quo* corruption to mean no more than "a direct exchange of an official act for money" — an act akin to bribery. It adds specifically that corruption does *not* include efforts to "garner 'influence over or access to' elected officials or political parties." *Ante* (quoting *Citizens United*). Moreover, the Government's efforts to prevent the "appearance of corruption" are "equally confined to the appearance of *quid pro quo* corruption," as narrowly defined. . . .

This critically important definition of "corruption" is inconsistent with the Court's prior case law (with the possible exception of *Citizens United*, as I will explain below). It is virtually impossible to reconcile with this Court's decision in *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003) [Casebook p. 693 Note], upholding the Bipartisan Campaign Reform Act of 2002 (BCRA). And it misunderstands the constitutional importance of the interests at stake. In fact,

constitutional interests — indeed, First Amendment interests — lie on both sides of the legal equation.

A

In reality, as the history of campaign finance reform shows and as our earlier cases on the subject have recognized, the anticorruption interest that drives Congress to regulate campaign contributions is a far broader, more important interest than the plurality acknowledges. It is an interest in maintaining the integrity of our public governmental institutions. And it is an interest rooted in the Constitution and in the First Amendment itself.

Consider at least one reason why the First Amendment protects political speech. Speech does not exist in a vacuum. Rather, political communication seeks to secure government action. A politically oriented "marketplace of ideas" seeks to form a public opinion that can and will influence elected representatives.

This is not a new idea. Eighty-seven years ago, Justice Brandeis wrote that the First Amendment's protection of speech was "essential to effective democracy." *Whitney v. California* (1927) (concurring opinion) [Casebook p. 27]. . . .

The Framers had good reason to emphasize this same connection between political speech and governmental action. An influential 18th-century continental philosopher had argued that in a representative democracy, the people lose control of their representatives between elections, during which interim periods they were "in chains." J. Rousseau, An Inquiry Into the Nature of the Social Contract 265-266 (transl. 1791).

The Framers responded to this criticism both by requiring frequent elections to federal office, and by enacting a First Amendment that would facilitate a "chain of communication between the people, and those, to whom they have committed the exercise of the powers of government." J. WILSON, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES OF AMERICA 30-31 (1792). . . . Accordingly, the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech *matters*.

What has this to do with corruption? It has everything to do with corruption. Corruption breaks the constitutionally necessary "chain of communication" between the people and their representatives. It derails the essential speech-to-government-action tie. Where enough money calls the tune, the general public will not be heard. Insofar as corruption cuts the link between political thought and political action, a free marketplace of political ideas loses its point. That is one reason why the Court has stressed the constitutional importance of Congress' concern that a few large donations not drown out the voices of the many. *See, e.g.*, *Buckley*.

That is also why the Court has used the phrase "subversion of the political process" to describe circumstances in which "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns."

The "appearance of corruption" can make matters worse. It can lead the public to believe that its efforts to communicate with its representatives or to help sway public opinion have little purpose. And a cynical public can lose interest in political participation altogether. . . .

The upshot is that the interests the Court has long described as preventing "corruption" or the "appearance of corruption" are more than ordinary factors to be weighed against the constitutional right to political speech. Rather, they are interests rooted in the First Amendment itself. They are rooted in the constitutional effort to create a democracy responsive to the people — a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects. Given that end, we can and should understand campaign finance laws as resting upon a broader and more significant constitutional rationale than the plurality's limited definition of "corruption" suggests. We should see these laws as seeking in significant part to strengthen, rather than weaken, the First Amendment. To say this is not to deny the potential for conflict between (1) the need to permit contributions that pay for the diffusion of ideas, and (2) the need to limit payments in order to help maintain the integrity of the electoral process. But that conflict takes place within, not outside, the First Amendment's boundaries.

B

Since the kinds of corruption that can destroy the link between public opinion and governmental action extend well beyond those the plurality describes, the plurality's notion of corruption is flatly inconsistent with the basic constitutional rationale I have just described. Thus, it should surprise no one that this Court's case law (*Citizens United* excepted) insists upon a considerably broader definition.

In *Buckley*, for instance, the Court said explicitly that aggregate limits were constitutional because they helped "prevent evasion . . . [through] huge contributions to the candidate's political party" (the contrary to what the plurality today seems to believe). Moreover, *Buckley* upheld the base limits in significant part because they helped thwart "the appearance of corruption stemming from public awareness of the opportunities for abuse *inherent in a regime of large individual financial contributions*." (emphasis added). . . .

C

Most important, in *McConnell*, this Court considered the constitutionality of the Bipartisan Campaign Reform Act of 2002, an Act that set new limits on "soft money" contributions to political parties. "Soft money" referred to funds that, prior to BCRA, were freely donated to parties for activities other than directly helping elect a federal candidate — activities such as voter registration, "get out the vote" drives, and advertising that did not expressly advocate a federal candidate's election or defeat. BCRA imposed a new ban on soft money contributions to national party committees, and greatly curtailed them in respect to state and local parties.

The Court in *McConnell* upheld these new contribution restrictions under the First Amendment for the very reason the plurality today discounts or ignores. Namely, the Court found they thwarted a significant risk of corruption — understood not as *quid pro quo* bribery, but as privileged access to and pernicious influence upon elected representatives.

In reaching its conclusion in *McConnell*, the Court relied upon a vast record compiled in the District Court. . . . What it showed, in detail, was the web of relationships and understandings among parties, candidates, and large donors that underlies privileged access and influence.

This Court upheld BCRA's limitations on soft money contributions by relying on just the kind of evidence I have described. We wrote:

> The evidence in the record shows that candidates and donors alike have in fact exploited the soft-money loophole, the former to increase their prospects of election and the latter to create debt on the part of officeholders . . . . Plaintiffs argue that without concrete evidence of an instance in which a federal officeholder has actually switched a vote [in exchange for soft money] . . . , Congress has not shown that there exists real or apparent corruption. . . . *Plaintiffs conceive of corruption too narrowly.* Our cases have firmly established that Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing "undue influence on an officeholder's judgment, and the appearance of such influence." (Emphasis added)

We specifically rejected efforts to define "corruption" in ways similar to those the plurality today accepts. We added:

> Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder.

Insofar as today's decision sets forth a significantly narrower definition of "corruption," and hence of the public's interest in political integrity, it is flatly inconsistent with *McConnell*.

D

One case, however, contains language that offers the plurality support. That case is *Citizens United*. There, as the plurality points out, the Court said that "[w]hen *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption." Further, the Court said that *quid pro quo* corruption does not include "influence over or access to elected officials," because " 'generic favoritism or influence theory . . . is at odds with standard First Amendment analyses.' "

How should we treat these statements from *Citizens United* now? They are not essential to the Court's holding in the case . . . . Taken literally, the statements cited simply refer to and characterize still-earlier Court cases. They do not require the more absolute reading that the plurality here gives them. . . .

III

The plurality invalidates the aggregate contribution limits for a second reason. It believes they are no longer needed to prevent contributors from circumventing federal limits on direct contributions to individuals, political parties, and political action committees. Other "campaign finance laws," combined with "experience" and "common sense," foreclose the various circumvention scenarios that the Government hypothesizes. Accordingly, the plurality concludes, the aggregate limits provide no added benefit.

The plurality is wrong. Here, as in *Buckley*, in the absence of limits on aggregate political contributions, donors can and likely will find ways to channel millions of dollars to parties and to individual candidates, producing precisely the

kind of "corruption" or "appearance of corruption" that previously led the Court to hold aggregate limits constitutional. Those opportunities for circumvention will also produce the type of corruption that concerns the plurality today. The methods for using today's opinion to evade the law's individual contribution limits are complex, but they are well known, or will become well known, to party fundraisers. I shall describe three. [Justice Breyer then provided three examples that he argued provided this opportunity. He then took issue with the plurality's objection that these examples either could not or would not take place.]

IV

The plurality concludes that even if circumvention were a threat, the aggregate limits are "poorly tailored" to address it. The First Amendment requires " 'a fit that is . . . reasonable,' " and there is no such "fit" here because there are several alternative ways Congress could prevent evasion of the base limits. . . .

The plurality, however, does not show, or try to show, that these hypothetical alternatives could effectively replace aggregate contribution limits. Indeed, it does not even "opine on the validity of any particular proposal" — presumably because these proposals themselves could be subject to constitutional challenges. For the most part, the alternatives the plurality mentions were similarly available at the time of *Buckley*. Their hypothetical presence did not prevent the Court from upholding aggregate limits in 1976. How can their continued hypothetical presence lead the plurality now to conclude that aggregate limits are "poorly tailored?" How can their continued hypothetical presence lead the Court to overrule *Buckley* now?

In sum, the explanation of why aggregate limits are needed is complicated, as is the explanation of why other methods will not work. But the conclusion is simple: There is no "substantial mismatch" between Congress' legitimate objective and the "means selected to achieve it." The Court, as in *Buckley*, should hold that aggregate contribution limits are constitutional. . . .

## Problem: Too Many Large Contributions?

The state of New Hope allows individuals to contribute particular amounts to candidates for particular state offices. For candidates to the State Senate, state law limits individual contributions to $1,000. The state also has limits governing the composition of any given candidate's pool of contributed money. The relevant statute reads:

> A candidate shall not accept a large contribution as soon as the candidate reaches a point when half or more of the total amount of contributions collected by that candidate derives from large contributions.
>
> A "large contribution" is a contribution that exceeds one-half of the amount any individual may make to that candidate during an election cycle.

Thus, the gist of this provision is that as soon as a candidate's total "take" from contributors is more than half derived from what the statute defines as "large contributions," no other person may make an additional such "large contribution."

The statute's restriction was triggered when Carl Corcoran decided to contribute the full $1,000 limit to Pat Patterson, a candidate for the New Hope Senate. The Patterson campaign notified Corcoran that, due to past large contributions the campaign had received from other donors, it could no longer

receive another "large contribution." Instead, the campaign advised Corcoran that the most he could contribute is $500.

Corcoran sues, claiming that the New Hope law is unconstitutional. Will he succeed? Does the answer turn on facts not presented in this Problem?

**Page 716:** ***add at end of the chapter:***

## Problem: Amending the First Amendment

The Court's recent campaign finance decisions — in particular *Citizens United and McCutcheon* — have been controversial, and have elicited calls for amending the Constitution to overturn them. Drafting language to allow regulation of some campaign finance activities, while leaving others constitutionally protected, has proven challenging. Consider the following two drafts. What would each draft imply for the protected status of political campaign speech?

> Expenditures by corporations on matters relating to elections to public office or referenda campaigns shall not be considered speech protected by the First Amendment.

> Congress and the States shall have the power to regulate the expenditure of money by any person, natural or artificial, in order to ensure that all American citizens have an equal voice in choosing their elected representatives.

# Chapter 12
# Beyond Regulation: The Government as Employer and Educator

## A. First Amendment Rights of Government Employees

**Page 742:** ***insert before the Problem:***

### Lane v. Franks
*134 S. Ct. 2369 (2014)*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Almost 50 years ago, this Court declared that citizens do not surrender their First Amendment rights by accepting public employment. Rather, the First Amendment protection of a public employee's speech depends on a careful balance "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968). In *Pickering*, the Court struck the balance in favor of the public employee, extending First Amendment protection to a teacher who was fired after writing a letter to the editor of a local newspaper criticizing the school board that employed him. Today, we consider whether the First Amendment similarly protects a public employee who provided truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities. We hold that it does.

I

In 2006, Central Alabama Community College (CACC) hired petitioner Edward Lane to be the Director of Community Intensive Training for Youth (CITY), a statewide program for underprivileged youth. CACC hired Lane on a probationary basis. In his capacity as Director, Lane was responsible for overseeing CITY's day-to-day operations, hiring and firing employees, and making decisions with respect to the program's finances.

At the time of Lane's appointment, CITY faced significant financial difficulties. That prompted Lane to conduct a comprehensive audit of the program's expenses. The audit revealed that Suzanne Schmitz, an Alabama State Representative on CITY's payroll, had not been reporting to her CITY office. After unfruitful discussions with Schmitz, Lane shared his finding with CACC's president and its attorney. They warned him that firing Schmitz could have negative repercussions for him and CACC.

Lane nonetheless contacted Schmitz again and instructed her to show up to the Huntsville office to serve as a counselor. Schmitz refused . . . . Lane fired her shortly thereafter. Schmitz told another CITY employee, Charles Foley, that she intended to "get [Lane] back" for firing her. She also said that if Lane ever requested money from the state legislature for the program, she would tell him, "[y]ou're fired."

Schmitz' termination drew the attention of many, including agents of the Federal Bureau of Investigation, which initiated an investigation into Schmitz' employment with CITY. In November 2006, Lane testified before a federal grand jury about his reasons for firing Schmitz. In January 2008, the grand jury indicted

Schmitz on four counts of mail fraud and four counts of theft concerning a program receiving federal funds. The indictment alleged that Schmitz had collected $177,251.82 in federal funds even though she performed "virtually no services," "generated virtually no work product," and "rarely even appeared for work at the CITY Program offices." It further alleged that Schmitz had submitted false statements concerning the hours she worked and the nature of the services she performed.

Schmitz' trial, which garnered extensive press coverage, commenced in August 2008. Lane testified, under subpoena, regarding the events that led to his terminating Schmitz. The jury failed to reach a verdict. Roughly six months later, federal prosecutors retried Schmitz, and Lane testified once again. This time, the jury convicted Schmitz on three counts of mail fraud and four counts of theft concerning a program receiving federal funds. The District Court sentenced her to 30 months in prison and ordered her to pay $177,251.82 in restitution and forfeiture.

Meanwhile, CITY continued to experience considerable budget shortfalls. In November 2008, Lane began reporting to respondent Steve Franks, who had become president of CACC in January 2008. Lane recommended that Franks consider layoffs to address the financial difficulties. [In January 2009, Franks fired Lane. In September 2009, CACC eliminated the CITY program and terminated the program's remaining employees.]

In January 2011, Lane sued Franks in his individual and official capacities under 42 U.S.C. § 1983, alleging that Franks had violated the First Amendment by firing him in retaliation for his testimony against Schmitz. Lane sought damages from Franks in his individual capacity . . . .

The District Court granted Franks' motion for summary judgment. Although the court concluded that the record raised "genuine issues of material fact . . . concerning [Franks'] true motivation for terminating [Lane's] employment," it held that Franks was entitled to qualified immunity as to the damages claims because "a reasonable government official in [Franks']position would not have had reason to believe that the Constitution protected [Lane's] testimony." The District Court relied on *Garcetti v. Ceballos* (2006) [Casebook p. 730], which held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." The court found no violation of clearly established law because Lane had "learned of the information that he testified about while working as Director at [CITY]," such that his "speech [could] still be considered as part of his official job duties and not made as a citizen on a matter of public concern."

The Eleventh Circuit affirmed. Like the District Court, it relied extensively on *Garcetti*. It reasoned that, "[e]ven if an employee was not required to make the speech as part of his official duties, he enjoys no First Amendment protection if his speech 'owes its existence to [the] employee's professional responsibilities' and is 'a product that the employer himself has commissioned or created.' " The court concluded that Lane spoke as an employee and not as a citizen because he was acting pursuant to his official duties when he investigated Schmitz' employment, spoke with Schmitz and CACC officials regarding the issue, and terminated Schmitz. "That Lane testified about his official activities pursuant to a subpoena and in the litigation context," the court continued, "does not bring Lane's speech within the protection of the First Amendment." The Eleventh Circuit also

concluded that, "even if . . . a constitutional violation of Lane's First Amendment rights occurred in these circumstances, Franks would be entitled to qualified immunity in his personal capacity" because the right at issue had not been clearly established.

We granted certiorari to resolve discord among the Courts of Appeals as to whether public employees may be fired — or suffer other adverse employment consequences — for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities.

II

Speech by citizens on matters of public concern lies at the heart of the First Amendment . . . . This remains true when speech concerns information related to or learned through public employment. After all, public employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights. There is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees. For "[g]overnment employees are often in the best position to know what ails the agencies for which they work." "The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *San Diego v. Roe*, 543 U.S. 77 (2004) (*per curiam*).

Our precedents have also acknowledged the government's countervailing interest in controlling the operation of its workplaces. *See, e.g.*, *Pickering*. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*.

*Pickering* provides the framework for analyzing whether the employee's interest or the government's interest should prevail in cases where the government seeks to curtail the speech of its employees. It requires "balanc[ing] . . . the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." . . .

In *Garcetti*, we described a two-step inquiry into whether a public employee's speech is entitled to protection . . . [The Court here summarized *Garcetti*, including its holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."]

III

Against this backdrop, we turn to the question presented: whether the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities.[4] We hold that it does.

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[4] It is undisputed that Lane's ordinary job responsibilities did not include testifying in court proceedings. For that reason, Lane asked the Court to decide only whether truthful sworn testimony that is not a part of an employee's ordinary job responsibilities is citizen speech on a matter of public concern. We accordingly need not address in this case whether truthful

A

The first inquiry is whether the speech in question — Lane's testimony at Schmitz' trials — is speech as a citizen on a matter of public concern. It clearly is.

1

Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment.

In rejecting Lane's argument that his testimony was speech as a citizen, the Eleventh Circuit gave short shrift to the nature of sworn judicial statements and ignored the obligation borne by all witnesses testifying under oath. Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth. When the person testifying is a public employee, he may bear separate obligations to his employer — for example, an obligation not to show up to court dressed in an unprofessional manner. But any such obligations as an employee are distinct and independent from the obligation, as a citizen, to speak the truth. That independent obligation renders sworn testimony speech as a citizen and sets it apart from speech made purely in the capacity of an employee.

In holding that Lane did not speak as a citizen when he testified, the Eleventh Circuit read *Garcetti* far too broadly. It reasoned that, because Lane learned of the subject matter of his testimony in the course of his employment with CITY, *Garcetti* requires that his testimony be treated as the speech of an employee rather than that of a citizen. It does not.

The sworn testimony in this case is far removed from the speech at issue in *Garcetti* — an internal memorandum prepared by a deputy district attorney for his supervisors recommending dismissal of a particular prosecution. The *Garcetti* Court held that such speech was made pursuant to the employee's "official responsibilities" because "when [the employee] went to work and performed the tasks he was paid to perform, [he] acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean that his supervisors were prohibited from evaluating his performance."

But *Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment. The *Garcetti* Court made explicit that its holding did not turn on the fact that the memo at issue "concerned the subject matter of [the prosecutor's] employment," because "[t]he First Amendment protects some expressions related to the speaker's job." In other words, the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee — rather than citizen — speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.

It bears emphasis that our precedents dating back to *Pickering* have recognized that speech by public employees on subject matter related to their

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sworn testimony would constitute citizen speech under *Garcetti* when given as part of a public employee's ordinary job duties, and express no opinion on the matter today.

employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment. . . .

The importance of public employee speech is especially evident in the context of this case: a public corruption scandal. The United States, for example, represents that because "[t]he more than 1000 prosecutions for federal corruption offenses that are brought in a typical year . . . often depend on evidence about activities that government officials undertook while in office," those prosecutions often "require testimony from other government employees." It would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials — speech by public employees regarding information learned through their employment — may never form the basis for a First Amendment retaliation claim. Such a rule would place public employees who witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs.

Applying these principles, it is clear that Lane's sworn testimony is speech as a citizen.

2

Lane's testimony is also speech on a matter of public concern. Speech involves matters of public concern "when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.' " *Snyder v. Phelps* (2011) [Casebook p. 120]. The inquiry turns on the "content, form, and context" of the speech. *Connick*.

The content of Lane's testimony — corruption in a public program and misuse of state funds — obviously involves a matter of significant public concern. And the form and context of the speech — sworn testimony in a judicial proceeding — fortify that conclusion. "Unlike speech in other contexts, testimony under oath has the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action, action that often affects the rights and liberties of others." *United States v. Alvarez* (2012) [Casebook p. 270].

* * *

We hold, then, that Lane's truthful sworn testimony at Schmitz' criminal trials is speech as a citizen on a matter of public concern.

B

This does not settle the matter, however. A public employee's sworn testimony is not categorically entitled to First Amendment protection simply because it is speech as a citizen on a matter of public concern. Under *Pickering*, if an employee speaks as a citizen on a matter of public concern, the next question is whether the government had "an adequate justification for treating the employee differently from any other member of the public" based on the government's needs as an employer. . . .

Here, the employer's side of the *Pickering* scale is entirely empty: Respondents do not assert, and cannot demonstrate, any government interest that tips the balance in their favor. There is no evidence, for example, that Lane's testimony at Schmitz' trials was false or erroneous or that Lane unnecessarily disclosed any sensitive, confidential, or privileged information while testifying. In these circumstances, we conclude that Lane's speech is entitled to protection under

the First Amendment. The Eleventh Circuit erred in holding otherwise and dismissing Lane's claim of retaliation on that basis.

IV

Respondent Franks argues that even if Lane's testimony is protected under the First Amendment, the claims against him in his individual capacity should be dismissed on the basis of qualified immunity. We agree.

Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." Under this doctrine, courts may not award damages against a government official in his personal capacity unless "the official violated a statutory or constitutional right," and "the right was 'clearly established' at the time of the challenged conduct."

The relevant question for qualified immunity purposes is this: Could Franks reasonably have believed, at the time he fired Lane, that a government employer could fire an employee on account of testimony the employee gave, under oath and outside the scope of his ordinary job responsibilities? Eleventh Circuit precedent did not preclude Franks from reasonably holding that belief. And no decision of this Court was sufficiently clear to cast doubt on the controlling Eleventh Circuit precedent.

[The Court's detailed analysis of Eleventh Circuit decisions is omitted.]

V

Lane's speech is entitled to First Amendment protection, but because respondent Franks is entitled to qualified immunity, we affirm the judgment of the Eleventh Circuit as to the claims against Franks in his individual capacity. . . .

* * *

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

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

This case presents the discrete question whether a public employee speaks "as a citizen on a matter of public concern," *Garcetti*, when the employee gives "truthful testimony under oath . . . outside the scope of his ordinary job duties." Answering that question requires little more than a straightforward application of *Garcetti*. There, we held that when a public employee speaks "pursuant to" his official duties, he is not speaking "as a citizen," and First Amendment protection is unavailable. The petitioner in this case did not speak "pursuant to" his ordinary job duties because his responsibilities did not include testifying in court proceedings, and no party has suggested that he was subpoenaed as a representative of his employer. Because petitioner did not testify to "fulfill a [work] responsibility," *Garcetti*, he spoke "as a citizen," not as an employee.

We accordingly have no occasion to address the quite different question whether a public employee speaks "as a citizen" when he testifies in the course of his ordinary job responsibilities. See [the Court's footnote 4]. For some public employees — such as police officers, crime scene technicians, and laboratory analysts — testifying is a routine and critical part of their employment duties. Others may be called to testify in the context of particular litigation as the

designated representatives of their employers. The Court properly leaves the constitutional questions raised by these scenarios for another day.

## Note: A Return to *Pickering*?

**1.** In *Connick* (1983), *San Diego v. Roe* (2004), and *Garcetti* (2006), the Court successively cut back on the First Amendment protection of government employee speech announced in *Pickering* (1968). In *Lane*, the Court unanimously moves in the opposite direction and gives *Pickering* a renewed prominence. But how far does *Lane* carry? Does it change your analysis of the Problems in the Casebook (pp. 742-43)?

**2.** Three Justices join a concurring opinion emphasizing that the Court does not decide whether a public employee speaks "as a citizen" when he testifies in the course of his ordinary job responsibilities. How should that question be resolved?

**3.** Does *Lane* provide guidance for First Amendment claims by government employees that do not involve testimony? Consider the Problem that follows.

## Problem: The Police Chief Versus the Mayor

After deciding *Lane v. Franks*, the Supreme Court entered a "GVR" order directing the Fifth Circuit to reconsider its decision in *Gibson v. Kilpatrick*, 734 F.3d 395 (5th Cir. 2013), in light of *Lane*.

*Gibson* arose out of the following facts. While serving as the Chief of Police in Drew, Mississippi, Anthony Gibson reported Mayor Jeffrey Kilpatrick to outside law enforcement agencies for misuse of the city gasoline card. The outside agencies included the Federal Bureau of Investigation (FBI), the federal Drug Enforcement Agency (DEA), and the Mississippi Office of State Auditor (OSA). The OSA initiated an investigation. It found that Kilpatrick had misused the city gasoline card and ordered him to repay approximately $3,000 to the City for his unauthorized use.

About nine months after the conclusion of the investigation, Kilpatrick began issuing written reprimands to Gibson for a panoply of alleged deficiencies. Gibson filed a lawsuit alleging unconstitutional retaliation. Kilpatrick moved for qualified immunity, but the district court denied the motion. The district court concluded that Gibson's reports constituted citizen speech and that Kilpatrick violated Gibson's First Amendment rights.

In holding that Gibson's reports constituted citizen speech, the district court emphasized the following facts: (1) Gibson reported his suspicions to agencies outside of his chain of command; (2) there was no evidence to show that Gibson's duties included making reports to the FBI or the DEA; and (3) there was a lack of evidence regarding the context in which Gibson reported his suspicions other than that the reports were confidential.

On interlocutory appeal, the court of appeals reversed. In rejecting the district court's conclusion, the court emphasized four circumstances.

> First, Kilpatrick's use of the city gasoline card was brought to Gibson's attention through a subordinate. The fact that the complaint came to him in a professional capacity and through the chain of command reveals that managing and responding to allegations of the misuse of civic funds was likely within the scope of his employment. . . .

> Second, Gibson's decision to report to agencies outside of his chain of command does not necessarily show that he spoke as a citizen. Given his position, there was arguably no one else to whom Gibson could confidentially report the information. . . . [The] only entities to which he could have reported within the chain of command were Kilpatrick and the [city's Board of Aldermen]. Reporting to Kilpatrick — the suspected perpetrator — clearly was undesirable, while reporting to the Board might have required public disclosure of Gibson's suspicions, perhaps endangering the subsequent investigation.
>
> Third, it appears that Gibson was able to monitor Kilpatrick's use of the gasoline card only because Kilpatrick was required to come to the police department to collect it. Gibson fully took advantage of the authority afforded to him as Chief of Police, and he instructed his police officers to participate in the investigation by monitoring Kilpatrick's activities; he even sent a copy of the official police logs to the OSA. [This involvement] supports our conclusion that Gibson was acting as a law enforcement officer doing his job, not as a private citizen fulfilling his civic duty.
>
> Finally, Mississippi law reinforces what the facts surrounding the investigation show — that [Gibson's] "primary responsibility [was] the prevention and detection of crime . . . [and] the apprehension of criminals." Gibson, as Chief of Police, was the City of Drew's "chief law enforcement officer" and had "control and supervision of all police officers employed by" the city. . . . Gibson's argument that reporting illegal activity is the duty of all citizens, and therefore must constitute protected citizen speech, does not alter our conclusion.

The Fifth Circuit therefore held that the district court had erred in denying Kilpatrick's motion for summary judgment based on qualified immunity. Gibson filed a petition for certiorari. As noted, the Supreme Court directed the Fifth Circuit to reconsider its decision in light of *Lane*. Does *Lane* require a different result?

# Chapter 13
# Beyond Regulation: Whose Message Is It?

## B. When Is the Government the Speaker?

**Page 802:** ***insert following the Note:***

### Walker v. Texas Division, Sons of Confederate Veterans, Inc.
*135 S. Ct. 2239 (2015)*

JUSTICE BREYER delivered the opinion of the Court.

Texas offers automobile owners a choice between ordinary and specialty license plates. Those who want the State to issue a particular specialty plate may propose a plate design, comprising a slogan, a graphic, or (most commonly) both. If the Texas Department of Motor Vehicles Board approves the design, the State will make it available for display on vehicles registered in Texas.

In this case, the Texas Division of the Sons of Confederate Veterans proposed a specialty license plate design featuring a Confederate battle flag. The Board rejected the proposal. We must decide whether that rejection violated the Constitution's free speech guarantees. We conclude that it did not.

I

A

Texas law requires all motor vehicles operating on the State's roads to display valid license plates. And Texas makes available several kinds of plates. Drivers may choose to display the State's general-issue license plates. Each of these plates contains the word "Texas," a license plate number, a silhouette of the State, a graphic of the Lone Star, and the slogan "The Lone Star State." In the alternative, drivers may choose from an assortment of specialty license plates. Each of these plates contains the word "Texas," a license plate number, and one of a selection of designs prepared by the State. Finally, Texas law provides for personalized plates (also known as vanity plates). Pursuant to the personalization program, a vehicle owner may request a particular alphanumeric pattern for use as a plate number, such as "BOB" or "TEXPL8."

Here we are concerned only with the second category of plates, namely specialty license plates, not with the personalization program. Texas offers vehicle owners a variety of specialty plates, generally for an annual fee. And Texas selects the designs for specialty plates through three distinct processes.

First, the state legislature may specifically call for the development of a specialty license plate. The legislature has enacted statutes authorizing, for example, plates that say "Keep Texas Beautiful" and "Mothers Against Drunk Driving," plates that "honor" the Texas citrus industry, and plates that feature an image of the World Trade Center towers and the words "Fight Terrorism."

Second, the Board may approve a specialty plate design proposal that a state-designated private vendor has created at the request of an individual or organization. Among the plates created through the private-vendor process are plates promoting the "Keller Indians" and plates with the slogan "Get it Sold with RE/MAX."

Third, the Board "may create new specialty license plates on its own initiative or on receipt of an application from a" nonprofit entity seeking to sponsor

a specialty plate. A non-profit must include in its application "a draft design of the specialty license plate." And Texas law vests in the Board authority to approve or to disapprove an application. The relevant statute says that the Board "may refuse to create a new specialty license plate" for a number of reasons, for example "if the design might be offensive to any member of the public . . . or for any other reason established by rule." Specialty plates that the Board has sanctioned through this process include plates featuring the words "The Gator Nation," together with the Florida Gators logo, and plates featuring the logo of Rotary International and the words "SERVICE ABOVE SELF."

B

In 2009, the Sons of Confederate Veterans, Texas Division (a nonprofit entity), applied to sponsor a specialty license plate through this last-mentioned process. SCV's application included a draft plate design. *See* Appendix, *infra*. At the bottom of the proposed plate were the words "SONS OF CONFEDERATE VETERANS." At the side was the organization's logo, a square Confederate battle flag framed by the words "Sons of Confederate Veterans 1896." A faint Confederate battle flag appeared in the background on the lower portion of the plate. Additionally, in the middle of the plate was the license plate number, and at the top was the State's name and silhouette. . . .

The Board invited public comment on its website and at an open meeting. After considering the responses, including a number of letters sent by elected officials who opposed the proposal, the Board voted unanimously against issuing the plate. The Board explained that it had found "it necessary to deny th[e] plate design application, specifically the confederate flag portion of the design, because public comments ha[d] shown that many members of the general public find the design offensive, and because such comments are reasonable." The Board added "that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups."

In 2012, SCV and two of its officers (collectively SCV) brought this lawsuit against the chairman and members of the Board (collectively Board). [The Fifth Circuit held that Texas's specialty license plate designs are private speech and that the Board, in refusing to approve SCV's design, engaged in constitutionally forbidden viewpoint discrimination.]

We granted the Board's petition for certiorari, and we now reverse.

II

When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. *Pleasant Grove City v. Summum* (2009) [Chapter 13]. That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech. Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas. *See Johanns v. Livestock Marketing Assn.* (2005) [Chapter 5 Note]. Instead, the Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate.

Were the Free Speech Clause interpreted otherwise, government would not work. How could a city government create a successful recycling program if

officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary? How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization? . . .

We have therefore refused "to hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals." *Rust v. Sullivan* (1991) [Chapter 13]. We have pointed out that a contrary holding "would render numerous Government programs constitutionally suspect."

That is not to say that a government's ability to express itself is without restriction. Constitutional and statutory provisions outside of the Free Speech Clause may limit government speech. *Summum*. And the Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech. But, as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf.

III

In our view, specialty license plates issued pursuant to Texas's statutory scheme convey government speech. Our reasoning rests primarily on our analysis in *Summum*, a recent case that presented a similar problem. We conclude here, as we did there, that our precedents regarding government speech (and not our precedents regarding forums for private speech) provide the appropriate framework through which to approach the case.

A

In *Summum*, we considered a religious organization's request to erect in a 2.5-acre city park a monument setting forth the organization's religious tenets. In the park were 15 other permanent displays. At least 11 of these — including a wishing well, a September 11 monument, a historic granary, the city's first fire station, and a Ten Commandments monument — had been donated to the city by private entities. The religious organization argued that the Free Speech Clause required the city to display the organization's proposed monument because, by accepting a broad range of permanent exhibitions at the park, the city had created a forum for private speech in the form of monuments.

This Court rejected the organization's argument. We held that the city had not "provided a forum for private speech" with respect to monuments. Rather, the city, even when "accepting a privately donated monument and placing it on city property," had "engaged in expressive conduct." The speech at issue, this Court decided, was "best viewed as a form of government speech" and "therefore [was] not subject to scrutiny under the Free Speech Clause."

We based our conclusion on several factors. First, history shows that "[g]overnments have long used monuments to speak to the public." Thus, we observed that "[w]hen a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure."

Second, we noted that it "is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated." As a result, "persons who observe donated monuments routinely — and reasonably — interpret them as conveying some message on the property owner's behalf." And "observers" of such monuments, as a consequence, ordinarily "appreciate the identity of the speaker."

Third, we found relevant the fact that the city maintained control over the selection of monuments. We thought it "fair to say that throughout our Nation's history, the general government practice with respect to donated monuments has been one of selective receptivity." And we observed that the city government in *Summum* " 'effectively controlled' the messages sent by the monuments in the [p]ark by exercising 'final approval authority' over their selection."

In light of these and a few other relevant considerations, the Court concluded that the expression at issue was government speech. And, in reaching that conclusion, the Court rejected the premise that the involvement of private parties in designing the monuments was sufficient to prevent the government from controlling which monuments it placed in its own public park. Cf. *Rust* (upholding a federal regulation limiting speech in a Government-funded program where the program was established and administered by private parties).

B

Our analysis in *Summum* leads us to the conclusion that here, too, government speech is at issue. First, the history of license plates shows that, insofar as license plates have conveyed more than state names and vehicle identification numbers, they long have communicated messages from the States. In 1917, Arizona became the first State to display a graphic on its plates. . . .

In 1928, Idaho became the first State to include a slogan on its plates. . . . States have used license plate slogans to urge action, to promote tourism, and to tout local industries.

Texas, too, has selected various messages to communicate through its license plate designs. . . . [The] Texas Legislature has specifically authorized specialty plate designs stating, among other things, "Read to Succeed," "Houston Livestock Show and Rodeo," "Texans Conquer Cancer," and "Girl Scouts." This kind of state speech has appeared on Texas plates for decades.

Second, Texas license plate designs "are often closely identified in the public mind with the [State]." *Summum*. Each Texas license plate is a government article serving the governmental purposes of vehicle registration and identification. The governmental nature of the plates is clear from their faces: The State places the name "TEXAS" in large letters at the top of every plate. Moreover, the State requires Texas vehicle owners to display license plates, and every Texas license plate is issued by the State. Texas also owns the designs on its license plates, including the designs that Texas adopts on the basis of proposals made by private individuals and organizations. And Texas dictates the manner in which drivers may dispose of unused plates.

Texas license plates are, essentially, government IDs. And issuers of ID "typically do not permit" the placement on their IDs of "message[s] with which they do not wish to be associated." *Summum*. Consequently, "persons who observe" designs on IDs "routinely — and reasonably — interpret them as conveying some message on the [issuer's] behalf." *Ibid.*

Indeed, a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message. If not, the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate. But the individual prefers a license plate design to the purely private speech expressed through bumper stickers. That may well be because Texas's license plate designs convey government agreement with the message displayed.

Third, Texas maintains direct control over the messages conveyed on its specialty plates. Texas law provides that the State "has sole control over the design, typeface, color, and alphanumeric pattern for all license plates." The Board must approve every specialty plate design proposal before the design can appear on a Texas plate. And the Board and its predecessor have actively exercised this authority. Texas asserts, and SCV concedes, that the State has rejected at least a dozen proposed designs. Accordingly, like the city government in *Summum*, Texas "has 'effectively controlled' the messages [conveyed] by exercising 'final approval authority' over their selection."

This final approval authority allows Texas to choose how to present itself and its constituency. Thus, Texas offers plates celebrating the many educational institutions attended by its citizens. But it need not issue plates deriding schooling. Texas offers plates that pay tribute to the Texas citrus industry. But it need not issue plates praising Florida's oranges as far better. And Texas offers plates that say "Fight Terrorism." But it need not issue plates promoting al Qaeda.

These considerations, taken together, convince us that the specialty plates here in question are similar enough to the monuments in *Summum* to call for the same result. That is not to say that every element of our discussion in *Summum* is relevant here. For instance, in *Summum* we emphasized that monuments were "permanent" and we observed that "public parks can accommodate only a limited number of permanent monuments." . . . Here, a State could theoretically offer a much larger number of license plate designs, and those designs need not be available for time immemorial.

But those characteristics of the speech at issue in Summum were particularly important because the government speech at issue occurred in public parks, which are traditional public forums for "the delivery of speeches and the holding of marches and demonstrations" by private citizens. By contrast, license plates are not traditional public forums for private speech.

And other features of the designs on Texas's specialty license plates indicate that the message conveyed by those designs is conveyed on behalf of the government. Texas, through its Board, selects each design featured on the State's specialty license plates. Texas presents these designs on government-mandated, government-controlled, and government-issued IDs that have traditionally been used as a medium for government speech. And it places the designs directly below the large letters identifying "TEXAS" as the issuer of the IDs. "The [designs] that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech."

C

SCV believes that Texas's specialty license plate designs are not government speech, at least with respect to the designs (comprising slogans and graphics) that were initially proposed by private parties. According to SCV, the State does not engage in expressive activity through such slogans and graphics, but rather

provides a forum for private speech by making license plates available to display the private parties' designs. We cannot agree.

We have previously used what we have called "forum analysis" to evaluate government restrictions on purely private speech that occurs on government property. *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.* (1985) [Chapter 9]. But forum analysis is misplaced here. Because the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply.

The parties agree that Texas's specialty license plates are not a "traditional public forum," such as a street or a park, "which has immemorially been held in trust for the use of the public and, time out of mind, has been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Ed. Assn. v. Perry Local Educators' Assn.* (1983) [Chapter 9 Note]. . . .

It is equally clear that Texas's specialty plates are neither a "designated public forum," which exists where "government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose," *Summum*, nor a "limited public forum," which exists where a government has "reserv[ed a forum] for certain groups or for the discussion of certain topics," *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) [Chapter 18]. A government "does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*. And in order "to ascertain whether [a government] intended to designate a place not traditionally open to assembly and debate as a public forum," this Court "has looked to the policy and practice of the government" and to "the nature of the property and its compatibility with expressive activity." *Ibid.*

Texas's policies and the nature of its license plates indicate that the State did not intend its specialty license plates to serve as either a designated public forum or a limited public forum. First, the State exercises final authority over each specialty license plate design. This authority militates against a determination that Texas has created a public forum. *See Cornelius* (explaining that [the school mail system in *Perry*] was not a public forum because "the practice was to require permission from the individual school principal before access to the system to communicate with teachers was granted"). Second, Texas takes ownership of each specialty plate design, making it particularly untenable that the State intended specialty plates to serve as a forum for public discourse. Finally, Texas license plates have traditionally been used for government speech, are primarily used as a form of government ID, and bear the State's name. These features of Texas license plates indicate that Texas explicitly associates itself with the speech on its plates.

For similar reasons, we conclude that Texas's specialty license plates are not a "nonpublic for[um]," which exists "[w]here the government is acting as a proprietor, managing its internal operations." *International Soc. for Krishna Consciousness, Inc. v. Lee* (1992) [Chapter 9]. With respect to specialty license plate designs, Texas is not simply managing government property, but instead is engaging in expressive conduct. As we have described, we reach this conclusion based on the historical context, observers' reasonable interpretation of the messages conveyed by Texas specialty plates, and the effective control that the State exerts over the design selection process. Texas's specialty license plate

designs "are meant to convey and have the effect of conveying a government message." *Summum*. They "constitute government speech." *Ibid.*

The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum-provider. In *Summum*, private entities "financed and donated monuments that the government accept[ed] and display[ed] to the public." Here, similarly, private parties propose designs that Texas may accept and display on its license plates. In this case, as in *Summum*, the "government entity may exercise [its] freedom to express its views" even "when it receives assistance from private sources for the purpose of delivering a government-controlled message." And in this case, as in *Summum*, forum analysis is inapposite.

Of course, Texas allows many more license plate designs than the city in *Summum* allowed monuments. But our holding in *Summum* was not dependent on the precise number of monuments found within the park. Indeed, we indicated that the permanent displays in New York City's Central Park also constitute government speech. And an *amicus* brief had informed us that there were, at the time, 52 such displays. Further, there may well be many more messages that Texas wishes to convey through its license plates than there were messages that the city in *Summum* wished to convey through its monuments. Texas's desire to communicate numerous messages does not mean that the messages conveyed are not Texas's own.

Additionally, the fact that Texas vehicle owners pay annual fees in order to display specialty license plates does not imply that the plate designs are merely a forum for private speech. While some nonpublic forums provide governments the opportunity to profit from speech, *see, e.g.*, *Lehman v. Shaker Heights* (1974) [Chapter 9], the existence of government profit alone is insufficient to trigger forum analysis. Thus, if the city in *Summum* had established a rule that organizations wishing to donate monuments must also pay fees to assist in park maintenance, we do not believe that the result in that case would have been any different. Here, too, we think it sufficiently clear that Texas is speaking through its specialty license plate designs, such that the existence of annual fees does not convince us that the specialty plates are a nonpublic forum.

Finally, we note that this case does not resemble other cases in which we have identified a nonpublic forum. This case is not like *Perry Ed. Assn.*, where we found a school district's internal mail system to be a nonpublic forum for private speech. There, it was undisputed that a number of private organizations, including a teachers' union, had access to the mail system. It was therefore clear that private parties, and not only the government, used the system to communicate. Here, by contrast, each specialty license plate design is formally approved by and stamped with the imprimatur of Texas.

Nor is this case like *Lehman*, where we found the advertising space on city buses to be a nonpublic forum. There, the messages were located in a context (advertising space) that is traditionally available for private speech. And the advertising space, in contrast to license plates, bore no indicia that the speech was owned or conveyed by the government.

Nor is this case like *Cornelius*, where we determined that a charitable fundraising program directed at federal employees constituted a nonpublic forum. That forum lacked the kind of history present here. The fundraising drive had

never been a medium for government speech. Instead, it was established "to bring order to [a] solicitation process" which had previously consisted of ad hoc solicitation by individual charitable organizations. The drive "was designed to minimize . . . disruption to the [federal] workplace," not to communicate messages from the government. Further, the charitable solicitations did not appear on a government ID under the government's name. In contrast to the instant case, there was no reason for employees to "interpret [the solicitation] as conveying some message on the [government's] behalf." *Summum*.

IV

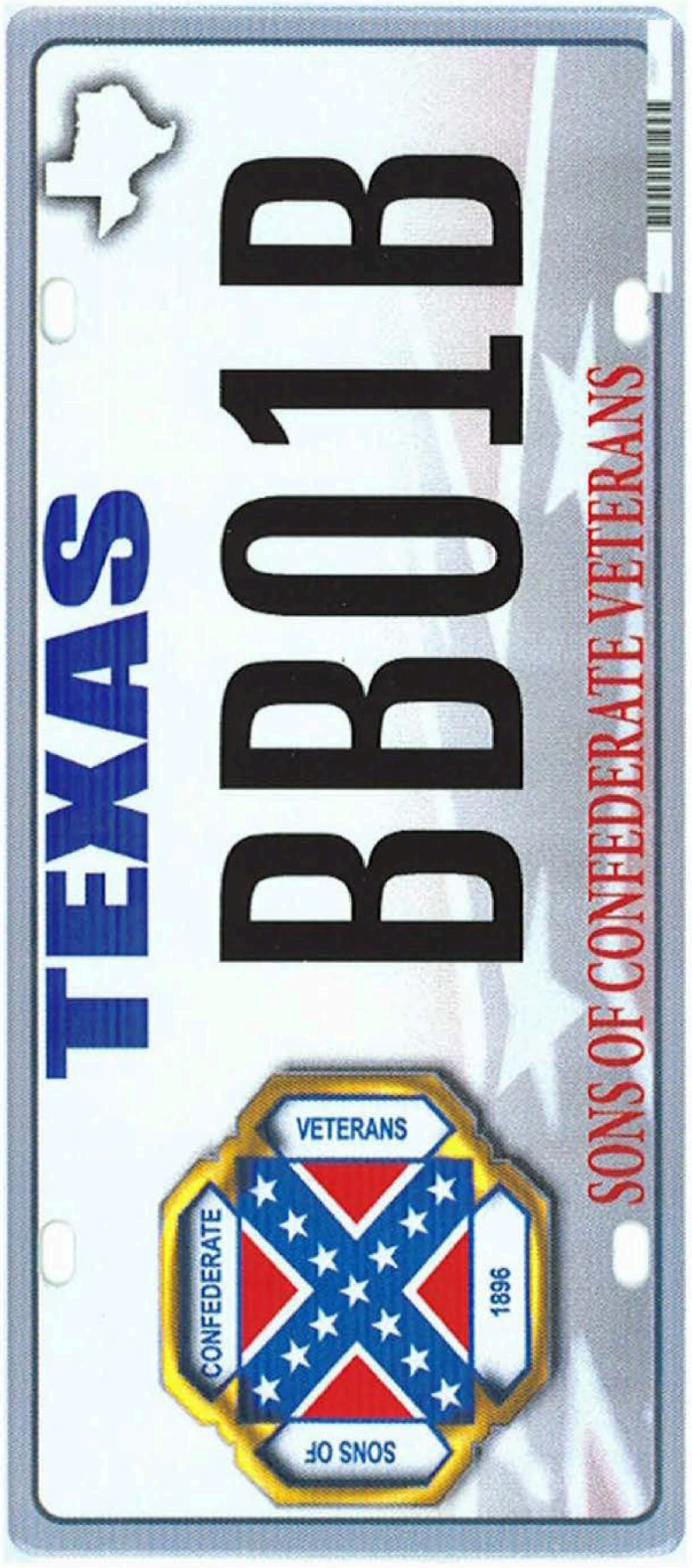
Our determination that Texas's specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons. We have acknowledged that drivers who display a State's selected license plate designs convey the messages communicated through those designs. *See Wooley v. Maynard* (1977) [Chapter 5] (observing that a vehicle "is readily associated with its operator" and that drivers displaying license plates "use their private property as a 'mobile billboard' for the State's ideological message"). And we have recognized that the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees. But here, compelled private speech is not at issue. And 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.

* * *

For the reasons stated, we hold that Texas's specialty license plate designs constitute government speech and that Texas was consequently entitled to refuse to issue plates featuring SCV's proposed design. Accordingly, the judgment of the United States Court of Appeals for the Fifth Circuit is

Reversed.

APPENDIX




Proposed License Plate Design. App. to Pet. for Cert. 191a.

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

The Court's decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing. Under our First Amendment cases, the distinction between government speech and private speech is critical. The First Amendment "does not regulate government speech," and therefore when government speaks, it is free "to select the views that it wants to express." *Pleasant Grove City v. Summum* (2009) [Chapter 13]. By contrast, "in the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) [Chapter 18].

Unfortunately, the Court's decision categorizes private speech as government speech and thus strips it of all First Amendment protection. The Court holds that all the privately created messages on the many specialty plates issued by the State of Texas convey a government message rather than the message of the motorist displaying the plate. Can this possibly be correct?

Here is a test. Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. You would see, in addition to the standard Texas plates, an impressive array of specialty plates. (There are now more than 350 varieties.) You would likely observe plates that honor numerous colleges and universities. You might see plates bearing the name of a high school, a fraternity or sorority, the Masons, the Knights of Columbus, the Daughters of the American Revolution, a realty company, a favorite soft drink, a favorite burger restaurant, and a favorite NASCAR driver.

As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars? If a car with a plate that says "Rather Be Golfing" passed by at 8:30 a.m. on a Monday morning, would you think: "This is the official policy of the State — better to golf than to work?" If you did your viewing at the start of the college football season and you saw Texas plates with the names of the University of Texas's out-of-state competitors in upcoming games — Notre Dame, Oklahoma State, the University of Oklahoma, Kansas State, Iowa State — would you assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns' opponents? And when a car zipped by with a plate that reads "NASCAR — 24 Jeff Gordon," would you think that Gordon (born in California, raised in Indiana, resides in North Carolina) is the official favorite of the State government?

The Court says that all of these messages are government speech. It is essential that government be able to express its own viewpoint, the Court reminds us, because otherwise, how would it promote its programs, like recycling and vaccinations? So when Texas issues a "Rather Be Golfing" plate, but not a "Rather Be Playing Tennis" or "Rather Be Bowling" plate, it is furthering a state policy to promote golf but not tennis or bowling. And when Texas allows motorists to obtain a Notre Dame license plate but not a University of Southern California plate, it is taking sides in that long-time rivalry.

This capacious understanding of government speech takes a large and painful bite out of the First Amendment. Specialty plates may seem innocuous. They make motorists happy, and they put money in a State's coffers. But the precedent this case sets is dangerous. While all license plates unquestionably

contain *some* government speech (*e.g.*, the name of the State and the numbers and/or letters identifying the vehicle), the State of Texas has converted the remaining space on its specialty plates into little mobile billboards on which motorists can display their own messages. And what Texas did here was to reject one of the messages that members of a private group wanted to post on some of these little billboards because the State thought that many of its citizens would find the message offensive. That is blatant viewpoint discrimination.

If the State can do this with its little mobile billboards, could it do the same with big, stationary billboards? Suppose that a State erected electronic billboards along its highways. Suppose that the State posted some government messages on these billboards and then, to raise money, allowed private entities and individuals to purchase the right to post their own messages. And suppose that the State allowed only those messages that it liked or found not too controversial. Would that be constitutional?

What if a state college or university did the same thing with a similar billboard or a campus bulletin board or dorm list serve? What if it allowed private messages that are consistent with prevailing views on campus but banned those that disturbed some students or faculty?

Can there be any doubt that these examples of viewpoint discrimination would violate the First Amendment? I hope not, but the future uses of today's precedent remain to be seen.

I

A

Specialty plates like those involved in this case are a recent development. License plates originated solely as a means of identifying vehicles. . . . It was not until 1989 that anything that might be considered a message was featured regularly on Texas plates. The words "The Lone Star State" were added "as a means of bringing favorable recognition to Texas."

Finally, in the late 1990's, license plates containing a small variety of messages, selected by the State, became available for the first time. . . . Once the idea of specialty plates took hold, the number of varieties quickly multiplied, and today, we are told, Texas motorists can choose from more than 350 messages, including many designs proposed by nonprofit groups or by individuals and for-profit businesses through the State's third-party vendor.

Drivers can select plates advertising organizations and causes like 4-H, the Boy Scouts, the American Legion, Be a Blood Donor, the Girl Scouts, Insure Texas Kids, Mothers Against Drunk Driving, Marine Mammal Recovery, Save Texas Ocelots, Share the Road, Texas Reads, Texas Realtors ("I am a Texas Realtor"), the Texas State Rifle Association ("WWW.TSRA.COM"), the Texas Trophy Hunters Association, the World Wildlife Fund, the YMCA, and Young Lawyers.

There are plates for fraternities and sororities and for in-state schools, both public (like Texas A & M and Texas Tech) and private (like Trinity University and Baylor). An even larger number of schools from out-of-state are honored: Arizona State, Brigham Young, Florida State, Michigan State, Alabama, and South Carolina, to name only a few.

There are political slogans, like "Come and Take It" and "Don't Tread on Me," and plates promoting the citrus industry and the "Cotton Boll." Commercial businesses can have specialty plates, too. There are plates advertising Remax

("Get It Sold with Remax"), Dr. Pepper ("Always One of a Kind"), and Mighty Fine Burgers.

B

[When the Motor Vehicles Board met to consider SCV's application,] many opponents of the plate turned out to voice objections. The Board then voted unanimously against approval and issued an order stating:

> The Board has considered the information and finds it necessary to deny this plate design application, specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable. The Board finds that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups.

The Board also saw "a compelling public interest in protecting a conspicuous mechanism for identification, such as a license plate, from degrading into a possible public safety issue." And it thought that the public interest required rejection of the plate design because the controversy surrounding the plate was so great that "the design could distract or disturb some drivers to the point of being unreasonably dangerous."

At the same meeting, the Board approved a Buffalo Soldiers plate design by a 5-to-3 vote. Proceeds from fees paid by motorists who select that plate benefit the Buffalo Soldier National Museum in Houston, which is "dedicated primarily to preserving the legacy and honor of the African American soldier." "Buffalo Soldiers" is a nickname that was originally given to black soldiers in the Army's 10th Cavalry Regiment, which was formed after the Civil War, and the name was later used to describe other black soldiers. The original Buffalo Soldiers fought with distinction in the Indian Wars, but the "Buffalo Soldiers" plate was opposed by some Native Americans. One leader commented that he felt " 'the same way about the Buffalo Soldiers' " as African-Americans felt about the Confederate flag. "When we see the U.S. Cavalry uniform," he explained, "we are forced to relive an American holocaust."

II

A

Relying almost entirely on one precedent — *Pleasant Grove City v. Summum* — the Court holds that messages that private groups succeed in placing on Texas license plates are government messages. The Court badly misunderstands *Summum*.

In *Summum*, [we] held that the monuments represented government speech, and we identified several important factors that led to this conclusion. . . . These characteristics, which rendered public monuments government speech in *Summum*, are not present in Texas's specialty plate program.

B

1

I begin with history. As we said in *Summum*, governments have used monuments since time immemorial to express important government messages, and there is no history of governments giving equal space to those wishing to

express dissenting views. [For example, when] the United States accepted the Third French Republic's gift of the Statue of Liberty in 1877, Congress, it seems safe to say, would not have welcomed a gift of a Statue of Authoritarianism if one had been offered by another country. . . . Governments have always used public monuments to express a government message, and members of the public understand this.

The history of messages on license plates is quite different. After the beginning of motor vehicle registration in 1917, more than 70 years passed before the proliferation of specialty plates in Texas. It was not until the 1990's that motorists were allowed to choose from among 10 messages, such as "Read to Succeed" and "Keep Texas Beautiful."

Up to this point, the words on the Texas plates can be considered government speech. The messages were created by the State, and they plausibly promoted state programs. But when, at some point within the last 20 years or so, the State began to allow private entities to secure plates conveying their own messages, Texas crossed the line.

The contrast between the history of public monuments, which have been used to convey government messages for centuries, and the Texas license plate program could not be starker. . . .

The words and symbols on plates of this sort were and are government speech, but plates that are essentially commissioned by private entities (at a cost that exceeds $8,000) and that express a message chosen by those entities are very different — and quite new. Unlike in *Summum*, history here does not suggest that the messages at issue are government speech.

2

The Texas specialty plate program also does not exhibit the "selective receptivity" present in *Summum*. To the contrary, Texas's program is not selective by design. The Board's chairman, who is charged with approving designs, explained that the program's purpose is "to encourage private plates" in order to "generate additional revenue for the state." And most of the time, the Board "base[s] [its] decisions on rules that primarily deal with reflectivity and readability." . . .

. . . [The] picture here is different from that in *Summum*. Texas does not take care to approve only those proposed plates that convey messages that the State supports. Instead, it proclaims that it is open to all private messages — except those, like the SCV plate, that would offend some who viewed them.

The Court believes that messages on privately created plates are government speech because motorists want a seal of state approval for their messages and therefore prefer plates over bumper stickers. This is dangerous reasoning. 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. Many private speakers in a forum would welcome a sign of government approval. But in the realm of private speech, government regulation may not favor one viewpoint over another. *Rosenberger*.

3

A final factor that was important in *Summum* was space. A park can accommodate only so many permanent monuments. Often large and made of stone, monuments can last for centuries and are difficult to move. License plates, on the

other hand, are small, light, mobile, and designed to last for only a relatively brief time. The only absolute limit on the number of specialty plates that a State could issue is the number of registered vehicles. The variety of available plates is limitless, too. Today Texas offers more than 350 varieties. In 10 years, might it be 3,500?

In sum, the Texas specialty plate program has none of the factors that were critical in *Summum*, and the Texas program exhibits a very important characteristic that was missing in that case: Individuals who want to display a Texas specialty plate, instead of the standard plate, must pay an increased annual registration fee. How many groups or individuals would clamor to pay $8,000 (the cost of the deposit required to create a new plate) in order to broadcast the government's message as opposed to their own? . . . The fees Texas collects pay for much more than merely the administration of the program.

States have not adopted specialty license plate programs like Texas's because they are now bursting with things they want to say on their license plates. Those programs were adopted because they bring in money. Texas makes public the revenue totals generated by its specialty plate program, and it is apparent that the program brings in many millions of dollars every year.

Texas has space available on millions of little mobile billboards. And Texas, in effect, sells that space to those who wish to use it to express a personal message — provided only that the message does not express a viewpoint that the State finds unacceptable. That is not government speech; it is the regulation of private speech.

III

What Texas has done by selling space on its license plates is to create what we have called a limited public forum. It has allowed state property (*i.e.*, motor vehicle license plates) to be used by private speakers according to rules that the State prescribes. Under the First Amendment, however, those rules cannot discriminate on the basis of viewpoint. *See Rosenberger* (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.* (1985)) [Chapter 9]. But that is exactly what Texas did here. The Board rejected Texas SCV's design, "specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable." These statements indisputably demonstrate that the Board denied Texas SCV's design because of its viewpoint.

The Confederate battle flag is a controversial symbol. To the Texas Sons of Confederate Veterans, it is said to evoke the memory of their ancestors and other soldiers who fought for the South in the Civil War. To others, it symbolizes slavery, segregation, and hatred. Whatever it means to motorists who display that symbol and to those who see it, the flag expresses a viewpoint. The Board rejected the plate design because it concluded that many Texans would find the flag symbol offensive. That was pure viewpoint discrimination.

If the Board's candid explanation of its reason for rejecting the SCV plate were not alone sufficient to establish this point, the Board's approval of the Buffalo Soldiers plate at the same meeting dispels any doubt. The proponents of both the SCV and Buffalo Soldiers plates saw them as honoring soldiers who served with bravery and honor in the past. To the opponents of both plates, the images on the plates evoked painful memories. The Board rejected one plate and approved the other.

Like these two plates, many other specialty plates have the potential to irritate and perhaps even infuriate those who see them. Texas allows a plate with the words "Choose Life," but the State of New York rejected such a plate because the message "'[is] so incredibly divisive,'" and the Second Circuit recently sustained that decision. Texas allows a specialty plate honoring the Boy Scouts, but the group's refusal to accept gay leaders angers some. Virginia, another State with a proliferation of specialty plates, issues plates for controversial organizations like the National Rifle Association, controversial commercial enterprises (raising tobacco and mining coal), controversial sports (fox hunting), and a professional sports team with a controversial name (the Washington Redskins). Allowing States to reject specialty plates based on their potential to offend is viewpoint discrimination.

The Board's decision cannot be saved by its suggestion that the plate, if allowed, "could distract or disturb some drivers to the point of being unreasonably dangerous." This rationale cannot withstand strict scrutiny. Other States allow specialty plates with the Confederate Battle Flag, and Texas has not pointed to evidence that these plates have led to incidents of road rage or accidents. Texas does not ban bumper stickers bearing the image of the Confederate battle flag. Nor does it ban any of the many other bumper stickers that convey political messages and other messages that are capable of exciting the ire of those who loathe the ideas they express.

* * *

Messages that are proposed by private parties and placed on Texas specialty plates are private speech, not government speech. Texas cannot forbid private speech based on its viewpoint. That is what it did here. Because the Court approves this violation of the First Amendment, I respectfully dissent.

## Note: Expanding the Government Speech Doctrine

**1.** In *Summum*, Justice Stevens and Justice Souter characterized the government speech doctrine as "recently minted," and Justice Souter said "it would do well for us to go slow in setting its bounds." Does the Court in *Walker* heed that counsel?

**2.** The Court does not respond to Justice Alito's "test": sitting by the side of a Texas highway and studying the license plates on the vehicles passing by, would the observer think that the sentiments expressed on the special plates are the views of the state of Texas? Does this mean that the Court rejects the "reasonable observer" approach suggested by Justice Souter in *Summum*?

**3.** Consider the hypotheticals posed by Justice Alito:

> Suppose that a State erected electronic billboards along its highways. Suppose that the State posted some government messages on these billboards and then, to raise money, allowed private entities and individuals to purchase the right to post their own messages. And suppose that the State allowed only those messages that it liked or found not too controversial.
>
> What if a state college or university did the same thing with a similar billboard or a campus bulletin board or dorm list serve? What if it allowed private messages that are consistent with prevailing views on campus but banned those that disturbed some students or faculty?

Can these hypotheticals be distinguished from *Walker*? Or would the Court say that in these instances also the First Amendment would not be violated?

**4.** The Court takes pains to distinguish three precedents (*Perry*, *Lehman*, and *Cornelius*, all set forth or summarized in Chapter 9) in which the Court rejected a First Amendment claim of access to government property or program. Why was it necessary to distinguish those decisions?

**5.** Consider the Problems at pp. 802-05 of the Casebook. How would these be analyzed under *Walker*?

**6.** The Court says that "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." Is the Court saying that Texas has a First Amendment right not to speak? If so, where does the right come from?

## Matal v. Tam

*582 U.S. ___ (2017)*

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

This case concerns a dance-rock band's application for federal trademark registration of the band's name, "The Slants." "Slants" is a derogatory term for persons of Asian descent, and members of the band are Asian-Americans. But the band members believe that by taking that slur as the name of their group, they will help to "reclaim" the term and drain its denigrating force.

The Patent and Trademark Office (PTO) denied the application based on a provision of federal law prohibiting the registration of trademarks that may "disparage . . . or bring . . . into contemp[t] or disrepute" any "persons, living or dead." 15 U.S.C. § 1052(a). We now hold that this provision violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.

I

A

"The principle underlying trademark protection is that distinctive marks — words, names, symbols, and the like — can help distinguish a particular artisan's goods from those of others." A trademark "designate[s] the goods as the product of a particular trader" and "protect[s] his good will against the sale of another's product as his." It helps consumers identify goods and services that they wish to purchase, as well as those they want to avoid.

"[F]ederal law does not create trademarks." Trademarks and their precursors have ancient origins, and trademarks were protected at common law and in equity at the time of the founding of our country. For most of the 19th century, trademark protection was the province of the States. Eventually, Congress stepped in to provide a degree of national uniformity, passing the first federal legislation protecting trademarks in 1870. The foundation of current federal trademark law is the Lanham Act, enacted in 1946. By that time, trademark had expanded far beyond phrases that do no more than identify a good

or service. Then, as now, trademarks often consisted of catchy phrases that convey a message.

Under the Lanham Act, trademarks that are "used in commerce" may be placed on the "principal register," that is, they may be federally registered . . . . There are now more than two million marks that have active federal certificates of registration . . . .

B

Without federal registration, a valid trademark may still be used in commerce. And an unregistered trademark can be enforced against would-be infringers in several ways . . . . Federal registration, however, "confers important legal rights and benefits on trademark owners who register their marks." . . .

C

The Lanham Act contains provisions that bar certain trademarks from the principal register. For example, a trademark cannot be registered if it is "merely descriptive or deceptively misdescriptive" of goods, or if it is so similar to an already registered trademark or trade name that it is "likely . . . to cause confusion, or to cause mistake, or to deceive."

At issue in this case is one such provision, which we will call "the disparagement clause." This provision prohibits the registration of a trademark "which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." This clause appeared in the original Lanham Act and has remained the same to this day.

When deciding whether a trademark is disparaging, an examiner at the PTO generally applies a "two-part test." The examiner first considers "the likely meaning of the matter in question, taking into account not only dictionary definitions, but also the relationship of the matter to the other elements in the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods or services." "If that meaning is found to refer to identifiable persons, institutions, beliefs or national symbols," the examiner moves to the second step, asking "whether that meaning may be disparaging to a substantial composite of the referenced group." If the examiner finds that a "substantial composite, although not necessarily a majority, of the referenced group would find the proposed mark . . . to be disparaging in the context of contemporary attitudes," a prima facie case of disparagement is made out, and the burden shifts to the applicant to prove that the trademark is not disparaging. What is more, the PTO has specified that "[t]he fact that an applicant may be a member of that group or has good intentions underlying its use of a term does not obviate the fact that a substantial composite of the referenced group would find the term objectionable."

D

Simon Tam is the lead singer of "The Slants." He chose this moniker in order to "reclaim" and "take ownership" of stereotypes about people of Asian ethnicity. The group "draws inspiration for its lyrics from childhood slurs and mocking nursery rhymes" and has given its albums names such as "The Yellow Album" and "Slanted Eyes, Slanted Hearts."

Tam sought federal registration of "THE SLANTS," on the principal register, but an examining attorney at the PTO rejected the request, applying the PTO's two-part framework and finding that "there is . . . a substantial composite of

persons who find the term in the applied-for mark offensive." The examining attorney relied in part on the fact that "numerous dictionaries define 'slants' or 'slant-eyes' as a derogatory or offensive term." The examining attorney also relied on a finding that "the band's name has been found offensive numerous times" — citing a performance that was canceled because of the band's moniker and the fact that "several bloggers and commenters to articles on the band have indicated that they find the term and the applied-for mark offensive."

Tam contested the denial of registration before the examining attorney and before the PTO's Trademark Trial and Appeal Board (TTAB) but to no avail. Eventually, he took the case to federal court, where the en banc Federal Circuit ultimately found the disparagement clause facially unconstitutional under the First Amendment's Free Speech Clause. . . .

The Government filed a petition for certiorari, which we granted in order to decide whether the disparagement clause "is facially invalid under the Free Speech Clause of the First Amendment."

II

Before reaching the question whether the disparagement clause violates the First Amendment, we consider Tam's argument that the clause does not reach marks that disparage racial or ethnic groups. The clause prohibits the registration of marks that disparage "persons," and Tam claims that the term "persons" "includes only natural and juristic persons," not "non-juristic entities such as racial and ethnic groups." [The Court rejected this argument.]

III

Because the disparagement clause applies to marks that disparage the members of a racial or ethnic group, we must decide whether the clause violates the Free Speech Clause of the First Amendment. And at the outset, we must consider three arguments that would either eliminate any First Amendment protection or result in highly permissive rational-basis review. Specifically, the Government contends (1) that trademarks are government speech, not private speech, (2) that trademarks are a form of government subsidy, and (3) that the constitutionality of the disparagement clause should be tested under a new "government-program" doctrine. We address each of these arguments below.

A

The First Amendment prohibits Congress and other government entities and actors from "abridging the freedom of speech"; the First Amendment does not say that Congress and other government entities must abridge their own ability to speak freely. And our cases recognize that "[t]he Free Speech Clause . . . does not regulate government speech." *Pleasant Grove City v. Summum* (2009) [*Supra* this Chapter]; *see Johanns v. Livestock Marketing Assn.*, 544 U.S. 550 (2005) [Note *supra* Chapter 5] ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny").

As we have said, "it is not easy to imagine how government could function" if it were subject to the restrictions that the First Amendment imposes on private speech. *Summum*; *see Walker v. Texas Div., Sons of Confederate Veterans, Inc.* (2015) [*Supra* supplement this Chapter]. " '[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others,' " but imposing a requirement of viewpoint-neutrality on government speech would be paralyzing. When a government entity embarks on a

course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture.

Here is a simple example. During the Second World War, the Federal Government produced and distributed millions of posters to promote the war effort. There were posters urging enlistment, the purchase of war bonds, and the conservation of scarce resources. These posters expressed a viewpoint, but the First Amendment did not demand that the Government balance the message of these posters by producing and distributing posters encouraging Americans to refrain from engaging in these activities.

But while the government-speech doctrine is important — indeed, essential — it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents.

At issue here is the content of trademarks that are registered by the PTO, an arm of the Federal Government. The Federal Government does not dream up these marks, and it does not edit marks submitted for registration. Except as required by the statute involved here, an examiner may not reject a mark based on the viewpoint that it appears to express. Thus, unless that section is thought to apply, an examiner does not inquire whether any viewpoint conveyed by a mark is consistent with Government policy or whether any such viewpoint is consistent with that expressed by other marks already on the principal register. Instead, if the mark meets the Lanham Act's viewpoint-neutral requirements, registration is mandatory. . . .

In light of all this, it is far-fetched to suggest that the content of a registered mark is government speech. If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently. It is saying many unseemly things. It is expressing contradictory views.[9] It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public. . . .

The PTO has made it clear that registration does not constitute approval of a mark. *See In re Old Glory Condom Corp.*, 26 USPQ 2d 1216 (TTAB 1993) ("[I]ssuance of a trademark registration . . . is not a government imprimatur"). And it is unlikely that more than a tiny fraction of the public has any idea what federal registration of a trademark means.

None of our government speech cases even remotely supports the idea that registered trademarks are government speech. In *Johanns,* we considered advertisements promoting the sale of beef products. A federal statute called for the creation of a program of paid advertising " 'to advance the image and desirability of

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[9] Compare "Abolish Abortion," Registration No. 4,935,774 (Apr. 12, 2016), with "I Stand With Planned Parenthood," Registration No. 5,073,573 (Nov. 1, 2016); compare "Capitalism Is Not Moral, Not Fair, Not Freedom," Registration No. 4,696,419 (Mar. 3, 2015), with "Capitalism Ensuring Innovation," Registration No. 3,966,092 (May 24, 2011); compare "Global Warming Is Good," Registration No. 4,776,235 (July 21, 2015), with "A Solution to Global Warming," Registration No. 3,875,271 (Nov. 10, 2010).

beef and beef products.' " Congress and the Secretary of Agriculture provided guidelines for the content of the ads, Department of Agriculture officials attended the meetings at which the content of specific ads was discussed, and the Secretary could edit or reject any proposed ad. Noting that "[t]he message set out in the beef promotions [was] from beginning to end the message established by the Federal Government," we held that the ads were government speech. The Government's involvement in the creation of these beef ads bears no resemblance to anything that occurs when a trademark is registered.

Our decision in *Summum* is similarly far afield. A small city park contained 15 monuments. Eleven had been donated by private groups, and one of these displayed the Ten Commandments. A religious group claimed that the city, by accepting donated monuments, had created a limited public forum for private speech and was therefore obligated to place in the park a monument expressing the group's religious beliefs.

Holding that the monuments in the park represented government speech, we cited many factors. Governments have used monuments to speak to the public since ancient times; parks have traditionally been selective in accepting and displaying donated monuments; parks would be overrun if they were obligated to accept all monuments offered by private groups; "[p]ublic parks are often closely identified in the public mind with the government unit that owns the land"; and "[t]he monuments that are accepted . . . are meant to convey and have the effect of conveying a government message."

Trademarks share none of these characteristics. Trademarks have not traditionally been used to convey a Government message. With the exception of the enforcement of 15 U.S.C. § 1052(a), the viewpoint expressed by a mark has not played a role in the decision whether to place it on the principal register. And there is no evidence that the public associates the contents of trademarks with the Federal Government.

This brings us to the case on which the Government relies most heavily, *Walker*, which likely marks the outer bounds of the government-speech doctrine. Holding that the messages on Texas specialty license plates are government speech, the *Walker* Court cited three factors distilled from *Summum*. First, license plates have long been used by the States to convey state messages. Second, license plates "are often closely identified in the public mind" with the State, since they are manufactured and owned by the State, generally designed by the State, and serve as a form of "government ID." Third, Texas "maintain[ed] direct control over the messages conveyed on its specialty plates." As explained above, none of these factors are present in this case.

In sum, the federal registration of trademarks is vastly different from the beef ads in *Johanns*, the monuments in *Summum*, and even the specialty license plates in *Walker*. Holding that the registration of a trademark converts the mark into government speech would constitute a huge and dangerous extension of the government-speech doctrine. For if the registration of trademarks constituted government speech, other systems of government registration could easily be characterized in the same way. . . .

Trademarks are private, not government, speech.

B

We next address the Government's argument that this case is governed by cases in which this Court has upheld the constitutionality of government programs that subsidized speech expressing a particular viewpoint. These cases implicate a notoriously tricky question of constitutional law. "[W]e have held that the Government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.' " *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.* (2013) [*Supra* this Chapter]. But at the same time, government is not required to subsidize activities that it does not wish to promote. Determining which of these principles applies in a particular case "is not always self-evident," *id.*, but no difficult question is presented here.

Unlike the present case, the decisions on which the Government relies all involved cash subsidies or their equivalent. In *Rust v. Sullivan* (1991) [*Supra* this Chapter], a federal law provided funds to private parties for family planning services. In *National Endowment for Arts v. Finley*, 524 U.S. 569 (1998) [Note *supra* this Chapter], cash grants were awarded to artists. And federal funding for public libraries was at issue in *United States v. American Library Assn., Inc.*, 539 U.S. 194 (2003). In other cases, we have regarded tax benefits as comparable to cash subsidies.

The federal registration of a trademark is nothing like the programs at issue in these cases. The PTO does not pay money to parties seeking registration of a mark. Quite the contrary is true: An applicant for registration must pay the PTO a filing fee of $225-$600. . . .

The Government responds that registration provides valuable non-monetary benefits that "are directly traceable to the resources devoted by the federal government to examining, publishing, and issuing certificates of registration for those marks." But just about every government service requires the expenditure of government funds. This is true of services that benefit everyone, like police and fire protection, as well as services that are utilized by only some, *e.g.*, the adjudication of private lawsuits and the use of public parks and highways. . . .

Cases like *Rust* and *Finley* are not instructive in analyzing the constitutionality of restrictions on speech imposed in connection with such services.

C

Finally, the Government urges us to sustain the disparagement clause under a new doctrine that would apply to "government-program" cases. For the most part, this argument simply merges our government-speech cases and the previously discussed subsidy cases in an attempt to construct a broader doctrine that can be applied to the registration of trademarks. The only new element in this construct consists of two cases involving a public employer's collection of union dues from its employees. But those cases occupy a special area of First Amendment case law, and they are far removed from the registration of trademarks. . . .

Potentially more analogous are cases in which a unit of government creates a limited public forum for private speech. *See, e.g.*, *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995) [Note *supra* Chapter 9]. When government creates such a forum, in either a literal or "metaphysical" sense, *see Rosenberger*, some content- and speaker-based restrictions may be allowed.

However, even in such cases, what we have termed "viewpoint discrimination" is forbidden.

Our cases use the term "viewpoint" discrimination in a broad sense, *see ibid.*, and in that sense, the disparagement clause discriminates on the bases of "viewpoint." To be sure, the clause evenhandedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue. It denies registration to any mark that is offensive to a substantial percentage of the members of any group. But in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint.

We have said time and again that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."

For this reason, the disparagement clause cannot be saved by analyzing it as a type of government program in which some content- and speaker-based restrictions are permitted.

IV

Having concluded that the disparagement clause cannot be sustained under our government-speech or subsidy cases or under the Government's proposed "government-program" doctrine, we must confront a dispute between the parties on the question whether trademarks are commercial speech and are thus subject to the relaxed scrutiny outlined in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.* (1980) [*Supra* Chapter 3]. The Government and *amici* supporting its position argue that all trademarks are commercial speech. They note that the central purposes of trademarks are commercial and that federal law regulates trademarks to promote fair and orderly interstate commerce. Tam and his *amici*, on the other hand, contend that many, if not all, trademarks have an expressive component. In other words, these trademarks do not simply identify the source of a product or service but go on to say something more, either about the product or service or some broader issue. The trademark in this case illustrates this point. The name "The Slants" not only identifies the band but expresses a view about social issues.

We need not resolve this debate between the parties because the disparagement clause cannot withstand even *Central Hudson* review. Under *Central Hudson*, a restriction of speech must serve "a substantial interest," and it must be "narrowly drawn." This means, among other things, that "[t]he regulatory technique may extend only as far as the interest it serves." The disparagement clause fails this requirement.

It is claimed that the disparagement clause serves two interests. The first is phrased in a variety of ways in the briefs. Echoing language in one of the opinions below, the Government asserts an interest in preventing " 'underrepresented groups' " from being " 'bombarded with demeaning messages in commercial advertising.' " An *amicus* supporting the Government refers to "encouraging racial tolerance and protecting the privacy and welfare of individuals." But no matter how the point is phrased, its unmistakable thrust is this: The Government has an interest in preventing speech expressing ideas that offend. And, as we have explained, that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech

jurisprudence is that we protect the freedom to express "the thought that we hate." *United States v. Schwimmer* (1929) (Holmes, J., dissenting) [*Supra* Chapter 1].

The second interest asserted is protecting the orderly flow of commerce. Commerce, we are told, is disrupted by trademarks that "involv[e] disparagement of race, gender, ethnicity, national origin, religion, sexual orientation, and similar demographic classification." Such trademarks are analogized to discriminatory conduct, which has been recognized to have an adverse effect on commerce.

A simple answer to this argument is that the disparagement clause is not "narrowly drawn" to drive out trademarks that support invidious discrimination. The clause reaches any trademark that disparages *any person, group, or institution*. It applies to trademarks like the following: "Down with racists," "Down with sexists," "Down with homophobes." It is not an anti-discrimination clause; it is a happy-talk clause. In this way, it goes much further than is necessary to serve the interest asserted.

The clause is far too broad in other ways as well. The clause protects every person living or dead as well as every institution. Is it conceivable that commerce would be disrupted by a trademark saying: "James Buchanan was a disastrous president" or "Slavery is an evil institution"?

There is also a deeper problem with the argument that commercial speech may be cleansed of any expression likely to cause offense. The commercial market is well stocked with merchandise that disparages prominent figures and groups, and the line between commercial and non-commercial speech is not always clear, as this case illustrates. If affixing the commercial label permits the suppression of any speech that may lead to political or social "volatility," free speech would be endangered.

* * *

For these reasons, we hold that the disparagement clause violates the Free Speech Clause of the First Amendment. The judgment of the Federal Circuit is affirmed.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

JUSTICE KENNEDY, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, concurring in part and concurring in the judgment.

The Patent and Trademark Office (PTO) has denied the substantial benefits of federal trademark registration to the mark THE SLANTS. The PTO did so under the mandate of the disparagement clause in 15 U.S.C. § 1052(a), which prohibits the registration of marks that may "disparage . . . or bring . . . into contemp[t] or disrepute" any "persons, living or dead, institutions, beliefs, or national symbols."

As the Court is correct to hold, § 1052(a) constitutes viewpoint discrimination — a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny. The Government's action and the statute on which it is based cannot survive this scrutiny.

The Court is correct in its judgment, and I join Parts I, II, and III-A of its opinion. This separate writing explains in greater detail why the First Amendment's protections against viewpoint discrimination apply to the trademark here. It submits further that the viewpoint discrimination rationale renders unnecessary any extended treatment of other questions raised by the parties.

I

Those few categories of speech that the government can regulate or punish — for instance, fraud, defamation, or incitement — are well established within our constitutional tradition. *See United States v. Stevens* (2010) [*Supra* Chapter 3]. Aside from these and a few other narrow exceptions, it is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys. *See Rosenberger*.

The First Amendment guards against laws "targeted at specific subject matter," a form of speech suppression known as content based discrimination. *Reed v. Town of Gilbert* (2015) [*Supra* this supplement Chapter 8]. This category includes a subtype of laws that go further, aimed at the suppression of "particular views . . . on a subject." *Rosenberger*. A law found to discriminate based on viewpoint is an "egregious form of content discrimination," which is "presumptively unconstitutional." *Id.*

At its most basic, the test for viewpoint discrimination is whether — within the relevant subject category — the government has singled out a subset of messages for disfavor based on the views expressed. In the instant case, the disparagement clause the Government now seeks to implement and enforce identifies the relevant subject as "persons, living or dead, institutions, beliefs, or national symbols." 15 U.S.C. § 1052(a). Within that category, an applicant may register a positive or benign mark but not a derogatory one. The law thus reflects the Government's disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination.

The Government disputes this conclusion. It argues, to begin with, that the law is viewpoint neutral because it applies in equal measure to any trademark that demeans or offends. This misses the point. A subject that is first defined by content and then regulated or censored by mandating only one sort of comment is not viewpoint neutral. To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so. The logic of the Government's rule is that a law would be viewpoint neutral even if it provided that public officials could be praised but not condemned. The First Amendment's viewpoint neutrality principle protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses. By mandating positivity, the law here might silence dissent and distort the marketplace of ideas.

The Government next suggests that the statute is viewpoint neutral because the disparagement clause applies to trademarks regardless of the applicant's personal views or reasons for using the mark. Instead, registration is denied based on the expected reaction of the applicant's audience. In this way, the argument goes, it cannot be said that Government is acting with hostility toward a particular point of view. For example, the Government does not dispute that respondent seeks to use his mark in a positive way. Indeed, respondent endeavors to use The Slants to supplant a racial epithet, using new insights, musical talents, and wry humor to make it a badge of pride. Respondent's application was denied not because the Government thought his object was to demean or offend but because the Government thought his trademark would have that effect on at least some Asian-Americans.

The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience. The Court has suggested that viewpoint discrimination occurs when the government intends to suppress a speaker's beliefs, *Reed*, but viewpoint discrimination need not take that form in every instance. The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. That danger is all the greater if the ideas or perspectives are ones a particular audience might think offensive, at least at first hearing. An initial reaction may prompt further reflection, leading to a more reasoned, more tolerant position.

Indeed, a speech burden based on audience reactions is simply government hostility and intervention in a different guise. The speech is targeted, after all, based on the government's disapproval of the speaker's choice of message. And it is the government itself that is attempting in this case to decide whether the relevant audience would find the speech offensive. For reasons like these, the Court's cases have long prohibited the government from justifying a First Amendment burden by pointing to the offensiveness of the speech to be suppressed.

The Government's argument in defense of the statute assumes that respondent's mark is a negative comment. In addressing that argument on its own terms, this opinion is not intended to imply that the Government's interpretation is accurate. From respondent's submissions, it is evident he would disagree that his mark means what the Government says it does. The trademark will have the effect, respondent urges, of reclaiming an offensive term for the positive purpose of celebrating all that Asian-Americans can and do contribute to our diverse Nation. While thoughtful persons can agree or disagree with this approach, the dissonance between the trademark's potential to teach and the Government's insistence on its own, opposite, and negative interpretation confirms the constitutional vice of the statute.

II

The parties dispute whether trademarks are commercial speech and whether trademark registration should be considered a federal subsidy. The former issue may turn on whether certain commercial concerns for the protection of trademarks might, as a general matter, be the basis for regulation. However that issue is resolved, the viewpoint based discrimination at issue here necessarily invokes heightened scrutiny.

"Commercial speech is no exception," the Court has explained, to the principle that the First Amendment "requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys." *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) [Note *supra* Chapter 3]. Unlike content based discrimination, discrimination based on viewpoint, including a regulation that targets speech for its offensiveness, remains of serious concern in the commercial context.

To the extent trademarks qualify as commercial speech, they are an example of why that term or category does not serve as a blanket exemption from the First Amendment's requirement of viewpoint neutrality. Justice Holmes' reference to the "free trade in ideas" and the "power of . . . thought to get itself accepted in the competition of the market," *Abrams v. United States* (1919) (dissenting opinion) [*Supra* Chapter 1], was a metaphor. In the realm of trademarks, the metaphorical marketplace of ideas becomes a tangible, powerful reality. Here that real

marketplace exists as a matter of state law and our common-law tradition, quite without regard to the Federal Government. These marks make up part of the expression of everyday life, as with the names of entertainment groups, broadcast networks, designer clothing, newspapers, automobiles, candy bars, toys, and so on. . . . To permit viewpoint discrimination in this context is to permit Government censorship. . . .

It is telling that the Court's precedents have recognized just one narrow situation in which viewpoint discrimination is permissible: where the government itself is speaking or recruiting others to communicate a message on its behalf. The exception is necessary to allow the government to stake out positions and pursue policies. But it is also narrow, to prevent the government from claiming that every government program is exempt from the First Amendment. These cases have identified a number of factors that, if present, suggest the government is speaking on its own behalf; but none are present here.

There may be situations where private speakers are selected for a government program to assist the government in advancing a particular message. That is not this case either. The central purpose of trademark registration is to facilitate source identification. To serve that broad purpose, the Government has provided the benefits of federal registration to millions of marks identifying every type of product and cause. Registered trademarks do so by means of a wide diversity of words, symbols, and messages. Whether a mark is disparaging bears no plausible relation to that goal. While defining the purpose and scope of a federal program for these purposes can be complex, *see, e.g.*, *Agency for Int'l Development*, our cases are clear that viewpoint discrimination is not permitted where, as here, the Government "expends funds to encourage a diversity of views from private speakers."

* * *

A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.

For these reasons, I join the Court's opinion in part and concur in the judgment.

JUSTICE THOMAS, concurring in part and concurring in the judgment. [Omitted.]

## Note: The Implications of *Matal*

**1.** *Matal* illustrates an important fact: government action — here, the registering of trademarks under federal trademark law — can be understood in vastly different ways, with different implications for First Amendment analysis. As *Matal* vividly demonstrates, First Amendment problems — like legal problems more generally — often do not come wrapped in doctrinally-neat packages.

**2.** Consider the Court's government speech analysis. The Court strongly suggests that *Walker v. Sons of Confederate Veterans* marks the outer boundary of the government speech doctrine. On the one hand, this suggestion might not be surprising, since it was written by Justice Alito, who wrote the dissent in *Walker*. But note also that this part of the opinion was unanimous (except for Justice Gorsuch, who had not yet joined the Court when the case was argued). What does *Matal* suggest about the current state of the government speech doctrine?

**3.** Recall Chapter 9's discussion of the Court's analysis of content- and viewpoint-based laws. Does either of the excerpted *Matal* opinions add to the law governing the definition of viewpoint-neutrality?

**4.** The plurality states: "Giving offense is a viewpoint" and that the disparagement clause "is a happy-talk clause." But the plurality makes no mention of *R.A.V. v. City of St. Paul* (Chapter 11). Was that case relevant? The concurring opinion cites *Reed v. Town of Gilbert* (Chapter 8 Supplement), but the plurality does not. Do those cases shed light on the issue raised by *Matal*?

# Chapter 15
# The History and Purposes of the Religion Clauses

## B. History and Tradition

**Page 881:** ***insert new Note after the Note:***

### Note: What Are the Values Underlying the Religion Clauses?

What are the theoretical and philosophical justifications for the Religion Clauses? What First Amendment values are protected by the Establishment Clause and the Free Exercise Clause? The following checklist is excerpted from William P. Marshall, *Truth and the Religion Clauses*, 43 DEPAUL L. REV. 243, 244-56 & 260-68 (1994) (footnotes omitted).[*] Professor Marshall identifies several alternative, sometimes competing values and makes a connection with the "marketplace of ideas" or "discovery of truth" justification for the First Amendment introduced in Chapter 1. As you read and reflect on the cases in these last four chapters on Freedom of Religion, keep in mind these values and consider whether the Justices are advancing these purposes in their opinions. In Chapter 18, we will return to the explicit question of how to define religion, the constitutional object of the two clauses.

> *Pluralism.* Both the free exercise and nonestablishment mandates have been justified as instrumental in promoting religious pluralism. The value of pluralism in turn has been posited as serving a variety of interests. First, pluralism provides a set of mediating institutions that "act as a critical buffer between the individual and the power of the state" and serve to aid individuals in reaching a balance between protecting their individual interests and promoting the public good. In this manner pluralism works as a check on government. In the presence of a multiplicity of divergent groups with constantly shifting alliances, the government will not be beholden to any one prominent interest and is therefore less likely to threaten any one group. Second, pluralism arguably promotes civic virtue. It imbues a sense of community obligation and virtue into the mind of the citizen-believer that is necessary to maintain a system of self-government. Third, pluralism reinforces a diversity within the fabric of society that enriches the lives of all citizens.
>
> *Equal Protection.* The Religion Clauses have also been explained as codifying a concern for the protection of minority rights similar to that provided by the Equal Protection Clause. It has been argued that religious minorities require special protections from majoritarian discrimination and illegitimate government regulation because of their relative political powerlessness and their histories of persecution. The establishment prohibition against the dominance of one religious group, and the free exercise prohibition against laws which single

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out religious practice or belief for adverse treatment, potentially further this equal protection concern.

*Lessening Divisiveness*. Lessening divisiveness is another of the values advanced as underlying the Establishment Clause. History and current events have established all too well that political divisions along religious lines can be particularly acrimonious and tumultuous. Removing the government from religious issues and removing religious issues from the government have been posited as necessary to avoid conflicts between religious groups and between church and state.

*Promoting Self-Identity*. The protection of religious liberty through the mandates of the Religion Clauses has also been justified as critical to promoting self-identity. According to this theory, religious affiliation reflects a fundamental bonding between the religious adherent and her religious beliefs and religious community. As one commentator has written, "Religious beliefs form a central part of a person's belief structure, his inner self. They define a person's very being — his sense of who he is, why he exists, and how he should relate to the world around him. A person's religious beliefs cannot meaningfully be separated from the person himself; they are who he is." Therefore, allowing the government to interfere with an adherent's religious beliefs would be impermissible because it would attack the individual's fundamental self.

*Protecting Conscience*. Concern with the rights of conscience is another justification offered for protecting religious liberty. The liberal state, it is argued, may take no position on what is right and good but, rather, must respect the moral and ethical principles of the individual. It is the individual's conscience and not the state that serves as the "moral sovereign" over the individual. The individual's conscience must therefore be protected from government interference which can question or destroy the perceived integrity and validity of the creed or faith to which a person adheres.

*Reducing the Risk of Civil Disobedience*. Another value offered as underlying the constitutional commitment to religious liberty, particularly through the creation of free exercise exemptions from neutral laws, is the reduction of the risk of civil disobedience. When the laws of the state conflict with religious duties, the believer must choose between obeying her government's laws or following her religious obligations. In the absence of an accommodation for the religious belief, the believer may be forced to violate the government's law for the sake of maintaining the integrity of her beliefs.

*Eliminating Special Suffering*. Related to the civil disobedience rationale is the value of eliminating special suffering. A believer who chooses not to disobey the civil law may experience special suffering if forced to violate her religious principles. A free exercise exemption from a civil law alleviates the special suffering

the adherent might feel if forced to choose between her religious beliefs and legal norms.

*The Nonalienation of Citizens*. A concern with the nonalienation of citizens has also been suggested as a justification underlying the Establishment Clause. This justification focuses on the supposed harms suffered by those who perceive that the government has been captured by opposing religious interests. Unlike the civil disobedience or special suffering justifications, however, the nonalienation rationale is concerned with an alienated or offended individual's potential withdrawal from political participation.

*Voluntarism*. Still another proffered justification for the Religion Clauses is religious voluntarism. Religious voluntarism asserts "that both religion and society will be strengthened if spiritual and ideological claims seek recognition on the basis of their intrinsic merit." Voluntarism presumes that the value in protecting religious liberty lies in the protection of the individual's right to choose her belief rather than the individual's right to be bound by her belief. As the Court stated in *Wallace v. Jaffree* [Chapter 16], "Religious beliefs worthy of respect are the product of free and voluntary choice by the faithful. . . ."

*The "Religious Justification."* [In a recent article a commentator] suggested that there is a "religious justification" which underlies the constitutional commitment to religious freedom. [The] religious justification has two components. The first, the priority claim, asserts the precedence of religious obligations over temporal concerns. The second, the voluntariness claim, contends that "religious goods or duties by their nature entail freedom of choice." However, unlike the voluntarism value just discussed, which is based on the value of freedom of choice, this voluntariness claim is based upon the assertion that compelled religion is impossible. . . .

[*The Search for Truth as an Additional Justification for the Religion Clauses*.] As even a superficial perusal of this list indicates, the values posited as justifications for the Religion Clauses are disparate and wide-ranging. Nevertheless, there is consistency in at least one respect. With the exception of voluntarism, all of the purported values present a similar conception of religion; religion is seen as seminal, authoritative, and absolutist both in the mind of the individual and in the definition of her religious community. It is viewed as a product of external obligation rather than as a product of individual choice. For example, the pluralism and antidivisiveness rationales depend upon the existence of religious communities of settled definition. It is only because a religious community has definable boundaries that — on the positive side — it is able to serve as a mediating structure (in furtherance of the pluralism value), or — on the negative side — that it has sufficient identity and allegiance over its members to allow it to become a politically divisive force.

Similarly, the self-identity rationale emphasizes religion as a deeply-rooted, authoritative, and fixed structure in the mind of the believer. It is for this reason, after all, that religion is so central to the believer's sense of self. Indeed, to reference a number of the proffered values, it is only because her religious beliefs are fixed and authoritative that: (1) the religious believer's conscience might be compromised; (2) her risk of civil disobedience might be increased; (3) her suffering might be made acute; or (4) her alienation might be effectuated by offending governmental action.

To be fair, the preceding analysis suffers from some over-generalization. The value of pluralism, for example, does not totally depend upon the existence of static religious communities. It acknowledges that the religious believer may at times freely choose her religious community rather than be bound to a particular community solely on account of a religious obligation. The pluralism model also recognizes that religious communities may themselves be dynamic and may change their specific ideology and doctrine. Similarly, the self-identity value does not wholly depend upon a bonding of the believer to her religious belief. It acknowledges a positive value in the promotion of self-identity through the individual's freedom to choose her religious belief and religious identity.

Nevertheless, there is no question that the literature discussing these justifications (again excepting voluntarism) views religion more as a source of obligation and authority than as a source of freedom. Indeed, many of the writings explicitly contend that religion is entitled to special constitutional concern precisely because of the purported authority that it holds over its adherents.

Of course, depicting religion as inveterate and absolutist does not mean that it is unworthy of constitutional attention. To the contrary, many of the values previously discussed are persuasive in demonstrating the need for both establishment and free exercise protections. But there are substantial difficulties in maintaining a jurisprudence which primarily emphasizes this side of religion. First, reliance on the absolutist side of religion makes it susceptible to the criticism that it is undemocratic or unduly authoritarian. As such, this view of religion plays into the argument that religion should be properly excluded from the public debate.

Moreover, in a broader sense, the absolutist conception highlights those aspects of religion that have historically proved troublesome. By emphasizing authority, intransigence, and allegiance to a particular doctrine, this conception of religion focuses on those aspects of religion which have worked to divide humanity rather than those that have brought it together. While there may be value in maintaining a society with competing religious communities, as some theorists have argued, there is,

assuredly, also value in the realization that there is a universal religious concern common to the human condition.

Similarly, the absolutist model works to undercut principles of tolerance. By protecting that aspect of religion which lays claim to "Truth" or "Right," these theories promote the sort of religious fervor that leads to intolerance. As has been noted, the logical conclusion of the belief that one has discovered truth is an attempt to impose that truth on others. The quieting of the absolutist claim, on the other hand, reinforces tolerance for competing ideas (even if one does not accept them on their merits) because it suggests to the believer that her own certainty is not something beyond question.

There is also a historical objection to the absolutist model. I do not want to overstate the historical case, but it is at least interesting to note that predicating the value of the Religion Clauses on an absolutist conception of religion runs counter to at least one strain of constitutional history. While the views of the Framers regarding religion were diverse, those who were influenced by natural law or Deism, such as Thomas Jefferson, found absolutist forms of religion repugnant. To these thinkers, religion was not valuable because of its affixation to dogma. Instead, the natural law philosophers and Deists encouraged people to move beyond the dogmatic preachings of their chosen religion and to ask questions in pursuit of transcendental truth. Merely accepting the teachings of any sect did not accomplish this goal. Thomas Jefferson's comment in this regard, therefore, is especially revealing: "I have never allowed myself to meditate a specific creed."

Still another problem with the absolutist view is that it makes for a troubled jurisprudence. Constitutional law is rights-based and premised on notions of individual freedom and choice. It is difficult, if not impossible, to meaningfully integrate absolutist theories into a liberal constitutional model.

Finally, and perhaps most importantly, viewing religion only as inveterate and absolutist is incomplete. It omits another aspect of religion — the focus of religion on the individual's search for beliefs rather than the believer's adherence to set groups or principles. Religion may be searching, self-challenging, and not rigidly tied to prefixed dogma or mores. In this type of religious belief, religious meaning does not stem from adherence to one set of beliefs or mores; rather it stems from the search for religious meaning and investigation into the seminal questions of "What is meaning?" and "What is truth?" . . .

Although it has long been associated with freedom of speech, the search for truth has not been thought of as a value underlying freedom of religion. The claim that the truth justification applies to both freedoms, however, has substantial support. After all, the constitutional commitment to freedom of religion is contained alongside the commitment to freedom of speech in a single

amendment. Moreover, freedom of religion and freedom of speech have similar goals and purposes and share a common history. . . .

But there is an even more fundamental argument than history or text which supports why truth is properly thought of as a value underlying the Religion Clauses. Religion is more than a form of community bonding or an element of self-definition. At its center, it asks if there is a spiritual reality which defines human existence and if there are metaphysical principles which provide insight into what is meaning, what is purpose, and what is good. Indeed, the question of God is very much a question of metaphysical truth. Structuring a Religion Clause jurisprudence without concern for these most fundamental religious inquiries seems at best shallow and non-persuasive. . . .

The existing jurisprudence regarding the values underlying the Religion Clauses is one-sided. It focuses only on an absolutist model that views religion more as a source of human obligation than as a source of human freedom. At the same time, this jurisprudence fails to account for the relationship that exists between speech and religious freedoms, and the common questions which those freedoms pursue. The search for truth may not be the only value underlying the Religion Clauses, but it is one that helps make sense out of a troubled jurisprudence, one that creates a unifying understanding of the First Amendment, and one that provides an understanding of the meaning of freedom of religion.

# Chapter 16
# The Establishment Clause

**Page 1001:** ***insert new Section after the Problem:***

## E. Legislative Prayer

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court upheld a state legislature's practice of employing a religious chaplain whose primary responsibility was to open each legislative day with a prayer. A Presbyterian minister held the position for sixteen years and was paid from state funds. The prayers were characterized as "nonsectarian" and "Judeo-Christian." Chief Justice Burger wrote for the majority that included Justices White, Blackmun, Powell, Rehnquist, and O'Connor; Justices Brennan, Marshall, and Stevens dissented. The majority opinion did not even mention the *Lemon* test. *See supra* this Chapter, Note: The *Lemon* Test: Three-Part Disharmony. Instead, the majority based its holding on the "unambiguous and unbroken history of more than two hundred years . . . [of] the practice of opening legislative sessions with a prayer." The majority made much of the historical fact that in 1789 both houses of the First Congress — which drafted the First Amendment — began the continuing practice of employing a chaplain to begin their sessions with a prayer. The majority concluded "their actions reveal their intent," that is, "the First Amendment draftsmen . . . saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged."

In the next case, the Court revisited the issue of legislative prayer. All nine of the Justices approved of *Marsh v. Chambers* in principle, but they divided 5 to 4 whether the particular practices of the town's board violated the incorporated Establishment Clause.

### Town of Greece v. Galloway
*134 S. Ct. 1811 (2014)*

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part II-B.[*]

The Court must decide whether the town of Greece, New York, imposes an impermissible establishment of religion by opening its monthly board meetings with a prayer. It must be concluded, consistent with the Court's opinion in *Marsh v. Chambers*, 463 U.S. 783 (1983), that no violation of the Constitution has been shown.

I

Greece, a town with a population of 94,000, is in upstate New York. For some years, it began its monthly town board meetings with a moment of silence. In 1999, the newly elected town supervisor . . . decided to replicate the prayer practice he had found meaningful while serving in the county legislature. Following the roll call and recitation of the Pledge of Allegiance, [the supervisor] would invite a local clergyman to the front of the room to deliver an invocation. After the prayer, [the supervisor] would thank the minister for serving as the board's "chaplain for the month" and present him with a commemorative plaque. The prayer was intended

[*] THE CHIEF JUSTICE and JUSTICE ALITO join this opinion in full. JUSTICE SCALIA and JUSTICE THOMAS join this opinion except as to Part II-B.

to place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures.

The town followed an informal method for selecting prayer givers, all of whom were unpaid volunteers. A town employee would call the congregations listed in a local directory until she found a minister available for that month's meeting. The town eventually compiled a list of willing "board chaplains" who had accepted invitations and agreed to return in the future. The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation. But nearly all of the congregations in town were Christian; and from 1999 to 2007, all of the participating ministers were too.

Greece neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content, in the belief that exercising any degree of control over the prayers would infringe both the free exercise and speech rights of the ministers. The town instead left the guest clergy free to compose their own devotions. The resulting prayers often sounded both civic and religious themes. Typical were invocations that asked the divinity to abide at the meeting and bestow blessings on the community:

> Lord we ask you to send your spirit of servanthood upon all of us gathered here this evening to do your work for the benefit of all in our community. We ask you to bless our elected and appointed officials so they may deliberate with wisdom and act with courage. Bless the members of our community who come here to speak before the board so they may state their cause with honesty and humility. . . . Lord we ask you to bless us all, that everything we do here tonight will move you to welcome us one day into your kingdom as good and faithful servants. We ask this in the name of our brother Jesus. Amen.

Some of the ministers spoke in a distinctly Christian idiom; and a minority invoked religious holidays, scripture, or doctrine, as in the following prayer:

> Lord, God of all creation, we give you thanks and praise for your presence and action in the world. We look with anticipation to the celebration of Holy Week and Easter. It is in the solemn events of next week that we find the very heart and center of our Christian faith. We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength, vitality, and confidence from his resurrection at Easter. . . . We pray for peace in the world, an end to terrorism, violence, conflict, and war. We pray for stability, democracy, and good government in those countries in which our armed forces are now serving, especially in Iraq and Afghanistan. . . . Praise and glory be yours, O Lord, now and forever more. Amen.

Respondents Susan Galloway and Linda Stephens attended town board meetings to speak about issues of local concern, and they objected that the prayers violated their religious or philosophical views. At one meeting, Galloway admonished board members that she found the prayers "offensive," "intolerable," and an affront to a "diverse community." After respondents complained that Christian themes pervaded the prayers, to the exclusion of citizens who did not

share those beliefs, the town invited a Jewish layman and the chairman of the local Baha'i temple to deliver prayers. A Wiccan priestess who had read press reports about the prayer controversy requested, and was granted, an opportunity to give the invocation.

Galloway and Stephens brought suit in the United States District Court for the Western District of New York. They alleged that the town violated the First Amendment's Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayers, such as those given "in Jesus' name." They did not seek an end to the prayer practice, but rather requested an injunction that would limit the town to "inclusive and ecumenical" prayers that referred only to a "generic God" and would not associate the government with any one faith or belief.

The District Court on summary judgment upheld the prayer practice as consistent with the First Amendment. . . . The District Court also rejected the theory that legislative prayer must be nonsectarian. . . . The Court of Appeals for the Second Circuit reversed. It held that some aspects of the prayer program, viewed in their totality by a reasonable observer, conveyed the message that Greece was endorsing Christianity. . . . Having granted certiorari to decide whether the town's prayer practice violates the Establishment Clause, the Court now reverses the judgment of the Court of Appeals.

II

In *Marsh v. Chambers*, the Court found no First Amendment violation in the Nebraska Legislature's practice of opening its sessions with a prayer delivered by a chaplain paid from state funds. The decision concluded that legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. 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. The Court [considered] this symbolic expression to be a "tolerable acknowledgement of beliefs widely held," rather than a first, treacherous step towards establishment of a state church.

*Marsh* . . . sustained legislative prayer without subjecting the practice to "any of the formal 'tests' that have traditionally structured" this inquiry. *Id.* (Brennan, J., dissenting). The Court in *Marsh* found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause. The First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time. When *Marsh* was decided, in 1983, legislative prayer had persisted in the Nebraska Legislature for more than a century, and the majority of the other States also had the same, consistent practice. Although no information has been cited by the parties to indicate how many local legislative bodies open their meetings with prayer, this practice too has historical precedent. "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society." *Marsh*.

Yet *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted "by reference

to historical practices and understandings." *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter* (Kennedy, J., concurring in part and dissenting in part) [Casebook p. 963]. That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society. . . . *Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change. *County of Allegheny* (Kennedy, J.); *see also School Dist. of Abington Township v. Schempp* (Brennan, J., concurring) [Casebook p. 936]. A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent. *See Van Orden v. Perry* (Breyer, J., concurring) [Casebook p. 986].

The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures. Respondents assert that the town's prayer exercise falls outside that tradition and transgresses the Establishment Clause . . . .

A

Respondents maintain that prayer must be nonsectarian, or not identifiable with any one religion; and they fault the town for permitting guest chaplains to deliver prayers that "use overtly Christian terms" or "invoke specifics of Christian theology." A prayer is fitting for the public sphere, in their view, only if it contains the "most general, nonsectarian reference to God," and eschews mention of doctrines associated with any one faith. . . .

An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases. The Court found the prayers in *Marsh* consistent with the First Amendment not because they espoused only a generic theism but because our history and tradition have shown that prayer in this limited context could "coexist with the principles of disestablishment and religious freedom." The Congress that drafted the First Amendment would have been accustomed to invocations containing explicitly religious themes of the sort respondents find objectionable. . . . The decidedly Christian nature of these prayers must not be dismissed as the relic of a time when our Nation was less pluralistic than it is today. Congress continues to permit its appointed and visiting chaplains to express themselves in a religious idiom. It acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds. *See*, *e.g.*, [quoting the *Congressional Record* from 2012-14]: (Dalai Lama: "I am a Buddhist monk — a simple Buddhist monk — so we pray to Buddha and all other Gods"); (Rabbi Joshua Gruenberg: "Our God and God of our ancestors, Everlasting Spirit of the Universe . . ."); (Satguru Bodhinatha Veylanswami: "Hindu scripture declares, without equivocation, that the highest of high ideals is to never knowingly harm anyone"); (Imam Nayyar Imam: "The final prophet of God, Muhammad, peace be upon him, stated: 'The leaders of a people are a representation of their deeds' ").

The contention that legislative prayer must be generic or nonsectarian derives from *dictum* in *County of Allegheny* that was disputed when written and

has been repudiated by later cases. There the Court held that a crèche placed on the steps of a county courthouse to celebrate the Christmas season violated the Establishment Clause because it had "the effect of endorsing a patently Christian message." Four dissenting Justices disputed that endorsement could be the proper test, as it likely would condemn a host of traditional practices that recognize the role religion plays in our society, among them legislative prayer. . . . The [majority] sought to counter this criticism [in a footnote] by recasting *Marsh* to permit only prayer that contained no overtly Christian references:

> However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed. . . . The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had "removed all references to Christ."

*Id.* (quoting *Marsh*). This proposition is irreconcilable with the facts of *Marsh* and with its holding and reasoning. *Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content. . . . Nor did the Court imply the rule that prayer violates the Establishment Clause any time it is given in the name of a figure deified by only one faith or creed. To the contrary, the [*Marsh* opinion explicitly] instructed that the "content of the prayer is not of concern to judges," provided "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."

To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact. . . .

Respondents argue, in effect, that legislative prayer may be addressed only to a generic God. The law and the Court could not draw this line for each specific prayer or seek to require ministers to set aside their nuanced and deeply personal beliefs for vague and artificial ones. There is doubt, in any event, that consensus might be reached as to what qualifies as generic or nonsectarian. . . . [Even] seemingly general references to God or the Father might alienate nonbelievers or polytheists. *McCreary County v. American Civil Liberties Union of Ky.* (2005) (Scalia, J., dissenting) [Casebook p. 976]. Because it is unlikely that prayer will be inclusive beyond dispute, it would be unwise to adopt what respondents think is the next-best option: permitting those religious words, and only those words, that are acceptable to the majority, even if they will exclude some. The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian.

In rejecting the suggestion that legislative prayer must be nonsectarian, the Court does not imply that no constraints remain on its content. . . . If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion

and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.

The tradition reflected in *Marsh* permits chaplains to ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths. That a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines, does not remove it from that tradition. . . . Prayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion, so long as the practice over time is not "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*.

It [is] possible to discern in the prayers offered to Congress a commonality of theme and tone. While these prayers vary in their degree of religiosity, they often seek peace for the Nation, wisdom for its lawmakers, and justice for its people, values that count as universal and that are embodied not only in religious traditions, but in our founding documents and laws. . . . Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith.

The prayers delivered in the town of Greece do not fall outside the tradition this Court has recognized. A number of the prayers did invoke the name of Jesus, the Heavenly Father, or the Holy Spirit, but they also invoked universal themes, as by celebrating the changing of the seasons or calling for a "spirit of cooperation" among town leaders. . . . Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation. *Marsh*, indeed, requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer.

Finally, the Court disagrees with the view taken by the Court of Appeals that the town of Greece contravened the Establishment Clause by inviting a predominantly Christian set of ministers to lead the prayer. The town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one. That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. The quest to promote "a 'diversity' of religious views" would require the town "to make wholly inappropriate judgments about the number of religions it should sponsor and the relative frequency with which it should sponsor each," *Lee v. Weisman* (Souter, J., concurring) [Casebook p. 945], a form of government entanglement with religion that is far more troublesome than the current approach.

B

Respondents further seek to distinguish the town's prayer practice from the tradition upheld in *Marsh* on the ground that it coerces participation by nonadherents. They and some *amici* contend that prayer conducted in the intimate setting of a town board meeting differs in fundamental ways from the invocations delivered in Congress and state legislatures, where the public remains segregated from legislative activity and may not address the body except by occasional invitation. Citizens attend town meetings, on the other hand, to accept awards; speak on matters of local importance; and petition the board for action that may

affect their economic interests, such as the granting of permits, business licenses, and zoning variances. Respondents argue that the public may feel subtle pressure to participate in prayers that violate their beliefs. . . .

It is an elemental First Amendment principle that government may not coerce its citizens "to support or participate in any religion or its exercise." *County of Allegheny* (Kennedy, J.). On the record in this case the Court is not persuaded that the town of Greece, through the act of offering a brief, solemn, and respectful prayer to open its monthly meetings, compelled its citizens to engage in a religious observance. The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.

[As] a practice that has long endured, legislative prayer has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of "God save the United States and this honorable Court" at the opening of this Court's sessions. *See Lynch v. Donnelly* (1984) (O'Connor, J., concurring). It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews. . . .

The principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing. . . . [Their] purpose is largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers. For members of town boards and commissions, who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens. . . .

The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. No such thing occurred in the town of Greece. Although board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by the public. Respondents point to several occasions where audience members were asked to rise for the prayer. These requests, however, came not from town leaders but from the guest ministers, who presumably are accustomed to directing their congregations in this way and might have done so thinking the action was inclusive, not coercive. ("Would you bow your heads with me as we invite the Lord's presence here tonight?"; "Would you join me in a moment of prayer?") Respondents suggest that constituents might feel pressure to join the prayers to avoid irritating the officials who would be ruling on their petitions, but this argument has no evidentiary support. . . .

In their declarations in the trial court, respondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions. If circumstances arise in which the pattern and practice of ceremonial, legislative

prayer is alleged to be a means to coerce or intimidate others, the objection can be addressed in the regular course. But the showing has not been made here, where the prayers neither chastised dissenters nor attempted lengthy disquisition on religious dogma. Courts remain free to review the pattern of prayers over time to determine whether they comport with the tradition of solemn, respectful prayer approved in *Marsh*, or whether coercion is a real and substantial likelihood. But in the general course legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate. *See County of Allegheny* (Kennedy, J.).

This case can be distinguished from the conclusions and holding of *Lee v. Weisman* [Casebook p. 945]. There the Court found that, in the context of a graduation where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony, a religious invocation was coercive as to an objecting student. [The] circumstances the Court confronted there are not present in this case and do not control its outcome. Nothing in the record suggests that members of the public are dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest. [Board] members and constituents are "free to enter and leave with little comment and for any number of reasons." Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy. And should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed. Neither choice represents an unconstitutional imposition as to mature adults, who "presumably" are "not readily susceptible to religious indoctrination or peer pressure." *Marsh*.

In the town of Greece, the prayer is delivered during the ceremonial portion of the town's meeting. Board members are not engaged in policymaking at this time, but in more general functions, such as swearing in new police officers, inducting high school athletes into the town hall of fame, and presenting proclamations to volunteers, civic groups, and senior citizens. . . . By inviting ministers to serve as chaplain for the month, and welcoming them to the front of the room alongside civic leaders, the town is acknowledging the central place that religion, and religious institutions, hold in the lives of those present. . . . The inclusion of a brief, ceremonial prayer as part of a larger exercise in civic recognition suggests that its purpose and effect are to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers.

Ceremonial prayer is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs. The prayer in this case has a permissible ceremonial purpose. It is not an unconstitutional establishment of religion.

* * *

The town of Greece does not violate the First Amendment by opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents. The judgment of the U.S. Court of Appeals for the Second Circuit is reversed.

*It is so ordered.*

JUSTICE ALITO, with whom JUSTICE SCALIA joins, concurring.

I write separately to respond to the principal dissent, which really consists of two very different but intertwined opinions. One is quite narrow; the other is sweeping. I will address both.

I

First, however, since [Justice Kagan's] principal dissent accuses the Court of being blind to the facts of this case, I recount facts that I find particularly salient. [Here Justice Alito gave his own detailed summary of the facts and record.]

II

I turn now to the narrow aspect of the principal dissent, and what we find here is that the principal dissent's objection, in the end, is really quite niggling. According to the principal dissent, the town could have avoided any constitutional problem in either of two ways.

A

First, the principal dissent writes, "if the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint." . . .

Both Houses of Congress now advise guest chaplains that they should keep in mind that they are addressing members from a variety of faith traditions, and as a matter of policy, this advice has much to recommend it. But any argument that nonsectarian prayer is constitutionally required runs headlong into a long history of contrary congressional practice. From the beginning, as the Court notes, many Christian prayers were offered in the House and Senate, and when rabbis and other non-Christian clergy have served as guest chaplains, their prayers have often been couched in terms particular to their faith traditions.

Not only is there no historical support for the proposition that only generic prayer is allowed, but as our country has become more diverse, composing a prayer that is acceptable to all members of the community who hold religious beliefs has become harder and harder. It was one thing to compose a prayer that is acceptable to both Christians and Jews; it is much harder to compose a prayer that is also acceptable to followers of Eastern religions that are now well represented in this country. Many local clergy may find the project daunting, if not impossible, and some may feel that they cannot in good faith deliver such a vague prayer.

In addition, if a town attempts to go beyond simply *recommending* that a guest chaplain deliver a prayer that is broadly acceptable to all members of a particular community (and the groups represented in different communities will vary), the town will inevitably encounter sensitive problems. Must a town screen and, if necessary, edit prayers before they are given? If prescreening is not required, must the town review prayers after they are delivered in order to determine if they were sufficiently generic? And if a guest chaplain crosses the line, what must the town do? Must the chaplain be corrected on the spot? Must the town strike this chaplain (and perhaps his or her house of worship) from the approved list?

B

If a town wants to avoid the problems associated with this first option, the principal dissent argues, it has another choice: It may "invite clergy of many faiths." . . .

If, as the principal dissent appears to concede, such a rotating system would obviate any constitutional problems, then despite all its high rhetoric, the principal dissent's quarrel with the town of Greece really boils down to this: The town's clerical employees did a bad job in compiling the list of potential guest chaplains. For that is really the only difference between what the town did and what the principal dissent is willing to accept. . . .

The informal, imprecise way in which the town lined up guest chaplains is typical of the way in which many things are done in small and medium-sized units of local government. . . . When a municipality like the town of Greece seeks in good faith to emulate the congressional practice on which our holding in *Marsh v. Chambers* was largely based, that municipality should not be held to have violated the Constitution simply because its method of recruiting guest chaplains lacks the demographic exactitude that might be regarded as optimal.

The effect of requiring such exactitude would be to pressure towns to forswear altogether the practice of having a prayer before meetings of the town council. Many local officials, puzzled by our often puzzling Establishment Clause jurisprudence and terrified of the legal fees that may result from a lawsuit claiming a constitutional violation, already think that the safest course is to ensure that local government is a religion-free zone. Indeed, the Court of Appeals' opinion in this case advised towns that constitutional difficulties "may well prompt municipalities to pause and think carefully before adopting legislative prayer." But if, as precedent and historic practice make clear (and the principal dissent concedes), prayer before a legislative session is not inherently inconsistent with the First Amendment, then a unit of local government should not be held to have violated the First Amendment simply because its procedure for lining up guest chaplains does not comply in all respects with what might be termed a "best practices" standard.

III

While the principal dissent, in the end, would demand no more than a small modification in the procedure that the town of Greece initially followed, much of the rhetoric in that opinion sweeps more broadly. Indeed, the logical thrust of many of its arguments is that prayer is *never* permissible prior to meetings of local government legislative bodies. At Greece Town Board meetings, the principal dissent pointedly notes, ordinary citizens (and even children!) are often present. The guest chaplains stand in front of the room facing the public. "The setting is intimate," and ordinary citizens are permitted to speak and to ask the board to address problems that have a direct effect on their lives. The meetings are "occasions for ordinary citizens to engage with and petition their government, often on highly individualized matters." Before a session of this sort, the principal dissent argues, any prayer that is not acceptable to all in attendance is out of bounds.

The features of Greece meetings that the principal dissent highlights are by no means unusual. . . . [I] see nothing out of the ordinary about any of the features that the principal dissent notes. Therefore, if prayer is not allowed at meetings with those characteristics, local government legislative bodies, unlike their national and state counterparts, cannot begin their meetings with a prayer. I see no sound basis for drawing such a distinction.

IV

The principal dissent claims to accept the Court's decision in *Marsh v. Chambers*, which upheld the constitutionality of the Nebraska Legislature's practice of prayer at the beginning of legislative sessions, but the principal dissent's acceptance of *Marsh* appears to be predicated on the view that the prayer at issue in that case was little more than a formality to which the legislators paid scant attention. . . . This sort of perfunctory and hidden-away prayer, the principal dissent implies, is all that *Marsh* and the First Amendment can tolerate.

It is questionable whether the principal dissent accurately describes the Nebraska practice at issue in *Marsh*, but what is important is not so much what happened in Nebraska in the years prior to *Marsh*, but what happened before congressional sessions during the period leading up to the adoption of the First Amendment. By that time, prayer before legislative sessions already had an impressive pedigree, and it is important to recall that history and the events that led to the adoption of the practice. . . .

This Court has often noted that actions taken by the First Congress are presumptively consistent with the Bill of Rights, and this principle has special force when it comes to the interpretation of the Establishment Clause. This Court has always purported to base its Establishment Clause decisions on the original meaning of that provision. Thus, in *Marsh*, when the Court was called upon to decide whether prayer prior to sessions of a state legislature was consistent with the Establishment Clause, we relied heavily on the history of prayer before sessions of Congress and held that a state legislature may follow a similar practice.

There can be little doubt that the decision in *Marsh* reflected the original understanding of the First Amendment. It is virtually inconceivable that the First Congress, having appointed chaplains whose responsibilities prominently included the delivery of prayers at the beginning of each daily session, thought that this practice was inconsistent with the Establishment Clause. And since this practice was well established and undoubtedly well known, it seems equally clear that the state legislatures that ratified the First Amendment had the same understanding. In the case before us, the Court of Appeals appeared to base its decision on one of the Establishment Clause "tests" set out in the opinions of this Court, but if there is any inconsistency between any of those tests and the historic practice of legislative prayer, the inconsistency calls into question the validity of the test, not the historic practice.

V

This brings me to my final point. I am troubled by the message that some readers may take from the principal dissent's rhetoric and its highly imaginative hypotheticals. . . . Although I do not suggest that the implication is intentional, I am concerned that at least some readers will take these hypotheticals as a warning that [today's decision will lead] to a country in which religious minorities are denied the equal benefits of citizenship. Nothing could be further from the truth. All that the Court does today is to allow a town to follow a practice that we have previously held is permissible for Congress and state legislatures. In seeming to suggest otherwise, the principal dissent goes far astray.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins as to Part II, concurring in part and concurring in the judgment.

Except for Part II-B, I join the opinion of the Court, which faithfully applies *Marsh v. Chambers*. I write separately to reiterate my view that the Establishment Clause is "best understood as a federalism provision," *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring), and to state my understanding of the proper "coercion" analysis.

I

[Here Justice Thomas reiterated his position that the Establishment Clause ought not be incorporated and applied to the States through the Fourteenth Amendment. *See* Note: The Incorporation Doctrine (Casebook p. 880).]

II

Even if the Establishment Clause were properly incorporated against the States, the municipal prayers at issue in this case bear no resemblance to the coercive state establishments that existed at the founding. "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty." *Lee v. Weisman* (1992) (Scalia, J., dissenting). In a typical case, attendance at the established church was mandatory, and taxes were levied to generate church revenue. Dissenting ministers were barred from preaching, and political participation was limited to members of the established church. . . . [Both] state and local forms of establishment involved "actual legal coercion" — government power [was exercised] in order to exact financial support of the church, compel religious observance, or control religious doctrine.

None of these founding-era state establishments remained at the time of Reconstruction. But even assuming that the framers of the Fourteenth Amendment reconceived the nature of the Establishment Clause as a constraint on the States, nothing in the history of the intervening period suggests a fundamental transformation in their understanding of what constituted an establishment. At a minimum, there is no support for the proposition that the framers of the Fourteenth Amendment embraced wholly modern notions that the Establishment Clause is violated whenever the "reasonable observer" feels "subtle pressure," or perceives governmental "endorsement." . . . Moreover, the state constitutional provisions that prohibited religious "compulsion" made clear that the relevant sort of compulsion was legal in nature, of the same type that had characterized founding-era establishments. These provisions strongly suggest that, whatever nonestablishment principles existed in 1868, they included no concern for the finer sensibilities of the "reasonable observer."

Thus, to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts — not the "subtle coercive pressures" allegedly felt by respondents in this case. The majority properly concludes that "offense . . . does not equate to coercion," since "adults often encounter speech they find disagreeable, and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum." I would simply add, in light of the foregoing history of the Establishment Clause, that "peer pressure, unpleasant as it may be, is not coercion" either. *Elk Grove Unified School Dist. v. Newdow* (Thomas, J. concurring).

JUSTICE BREYER, dissenting.

In my view, the Court of Appeals' conclusion and its reasoning are convincing. Justice Kagan's dissent is consistent with that view, and I join it. I also here emphasize several factors that I believe underlie the conclusion that, on the particular facts of this case, the town's prayer practice violated the Establishment Clause.

First, Greece is a predominantly Christian town, but it is not exclusively so. . . . Yet during the more than 120 monthly meetings at which prayers were delivered during the record period (from 1999 to 2010), only four prayers were delivered by non-Christians. And all of these occurred in 2008, shortly after the plaintiffs began complaining about the town's Christian prayer practice and nearly a decade after that practice had commenced. . . .

Second, the town made no significant effort to inform the area's non-Christian houses of worship about the possibility of delivering an opening prayer. . . .

Third, in this context, the fact that nearly all of the prayers given reflected a single denomination takes on significance. That significance would have been the same had all the prayers been Jewish, or Hindu, or Buddhist, or of any other denomination. The significance is that, in a context where religious minorities exist and where more could easily have been done to include their participation, the town chose to do nothing. . . .

Fourth, the fact that the board meeting audience included citizens with business to conduct also contributes to the importance of making more of an effort to include members of other denominations. It does not, however, automatically change the nature of the meeting from one where an opening prayer is permissible under the Establishment Clause to one where it is not.

Fifth, [the] Constitution does not forbid opening prayers [but] neither does the Constitution forbid efforts to explain to those who give the prayers the nature of the occasion and the audience. The U.S. House of Representatives, for example, provides its guest chaplains with the following guidelines, which are designed to encourage the sorts of prayer that are consistent with the purpose of an invocation for a government body in a religiously pluralistic Nation:

> The guest chaplain should keep in mind that the House of Representatives is comprised of Members of many different faith traditions. The length of the prayer should not exceed 150 words. The prayer must be free from personal political views or partisan politics, from sectarian controversies, and from any intimations pertaining to foreign or domestic policy.

The town made no effort to promote a similarly inclusive prayer practice here.

[The] question in this case is whether the prayer practice of the town of Greece, by doing too little to reflect the religious diversity of its citizens, did too much, even if unintentionally, to promote the "political division along religious lines" that "was one of the principal evils against which the First Amendment was intended to protect." *Lemon v. Kurtzman* (1971) [Casebook p. 888].

In seeking an answer to that fact-sensitive question, "I see no test-related substitute for the exercise of legal judgment." *Van Orden v. Perry* (2005) (Breyer, J., concurring in judgment) [Casebook p. 986]. Having applied my legal judgment to the relevant facts, I conclude, like Justice Kagan, that the town of Greece failed

to make reasonable efforts to include prayer givers of minority faiths, with the result that, although it is a community of several faiths, its prayer givers were almost exclusively persons of a single faith. Under these circumstances, I would affirm the judgment of the Court of Appeals that Greece's prayer practice violated the Establishment Clause. I dissent from the Court's decision to the contrary.

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting.

[I] respectfully dissent from the Court's opinion because I think the Town of Greece's prayer practices violate [the] norm of religious equality — the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian. I do not contend that principle translates here into a bright separationist line. To the contrary, I agree with the Court's decision in *Marsh v. Chambers* (1983), upholding the Nebraska Legislature's tradition of beginning each session with a chaplain's prayer. And I believe that pluralism and inclusion in a town hall can satisfy the constitutional requirement of neutrality; such a forum need not become a religion-free zone. But still, the Town of Greece should lose this case. The practice at issue here differs from the one sustained in *Marsh*. . . . [Month] in and month out for over a decade, prayers steeped in only one faith, addressed toward members of the public, commenced [official town board] meetings to discuss local affairs and distribute government benefits. In my view, that practice does not square with the First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in her government.

I

. . . . "The clearest command of the Establishment Clause," this Court has held, "is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). . . .

> Our constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington . . . down to the present day, has . . . ruled out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).

*Lee v. Weisman* (Scalia, J., dissenting) [Casebook p. 945]. *See also County of Allegheny* [Casebook p. 963]. . . .

[When] a citizen stands before her government, whether to perform a service or request a benefit, her religious beliefs do not enter into the picture. *See* Thomas Jefferson, *Virginia Act for Establishing Religious Freedom* (Oct. 31, 1785) ("Opinions in matters of religion . . . shall in no wise diminish, enlarge, or affect our civil capacities"). The government she faces favors no particular religion, either by word or by deed. And that government, in its various processes and proceedings, imposes no religious tests on its citizens, sorts none of them by faith, and permits no exclusion based on belief.

When a person goes to court, a polling place, or an immigration proceeding — I could go on: to a zoning agency, a parole board hearing, or the DMV — government officials do not engage in sectarian worship, nor do they ask

her to do likewise. They all participate in the business of government not as Christians, Jews, Muslims (and more), but only as Americans — none of them different from any other for that civic purpose. Why not, then, at a town meeting?

II

In both Greece's and the majority's view, everything I have discussed is irrelevant here because this case involves "the tradition of legislative prayer outlined" in *Marsh v. Chambers*. And before I dispute the Town and Court, I want to give them their due: They are right that, under *Marsh*, legislative prayer has a distinctive constitutional warrant by virtue of tradition. . . . Relying on that "unbroken" national tradition, *Marsh* upheld (I think correctly) the Nebraska Legislature's practice of opening each day with a chaplain's prayer . . . And so I agree with the majority that the issue here is "whether the prayer practice in the Town of Greece fits within the tradition long followed in Congress and the state legislatures."

Where I depart from the majority is in my reply to that question. The town hall here is a kind of hybrid. Greece's Board indeed has legislative functions, as Congress and state assemblies do — and that means some opening prayers are allowed there. But [the] Board's meetings are also occasions for ordinary citizens to engage with and petition their government, often on highly individualized matters. That feature calls for Board members to exercise special care to ensure that the prayers offered are inclusive — that they respect each and every member of the community as an equal citizen.[2] But the Board, and the clergy members it selected, made no such effort. Instead, the prayers given in Greece, addressed directly to the Town's citizenry, were *more* sectarian, and *less* inclusive, than anything this Court sustained in *Marsh*. For those reasons, the prayer in Greece departs from the legislative tradition that the majority takes as its benchmark.

A

Start by comparing two pictures, drawn precisely from reality. The first is of Nebraska's (unicameral) Legislature, as this Court and the state senators themselves described it. The second is of town council meetings in Greece, as revealed in this case's record. [Here Justice Kagan gave her own detailed summary of the facts in the two cases.]

B

Let's count the ways in which these pictures diverge. First, the governmental proceedings at which the prayers occur differ significantly in nature and purpose. The Nebraska Legislature's floor sessions — like those of the U.S. Congress and other state assemblies — are of, by, and for elected lawmakers. Members of the public take no part in those proceedings; any few who attend are spectators only, watching from a high-up visitors' gallery. . . . Greece's town meetings, by contrast, revolve around ordinary members of the community. Each and every aspect of those sessions provides opportunities for Town residents to interact with public

[2] Because Justice Alito questions this point, it bears repeating. I do not remotely contend that "prayer is not allowed" at participatory meetings of "local government legislative bodies"; nor is that the "logical thrust" of any argument I make. Rather, what I say throughout this opinion is that in this citizen-centered venue, government officials must take steps to ensure — as none of Greece's Board members ever did — that opening prayers are inclusive of different faiths, rather than always identified with a single religion.

officials. And the most important parts enable those citizens to petition their government. [During] the Public Forum, they urge (or oppose) changes in the Board's policies and priorities; and then, in what are essentially adjudicatory hearings they request the Board to grant (or deny) applications for various permits, licenses, and zoning variances. So the meetings, both by design and in operation, allow citizens to actively participate in the Town's governance. . . .

Second (and following from what I just said), the prayers in these two settings have different audiences. In the Nebraska Legislature, the chaplain spoke to, and only to, the elected representatives. . . . As several Justices later noted (and the majority today agrees),[3] *Marsh* involved "government officials invoking spiritual inspiration entirely for their own benefit without directing any religious message at the citizens they lead." *Lee v. Weisman* (Souter, J., concurring) [Casebook p. 945].

The very opposite is true in Greece: [the] prayers there are directed squarely at the citizens. Remember that the chaplain of the month stands with his back to the Town Board; his real audience is the group he is facing — the 10 or so members of the public, perhaps including children. And he typically addresses those people . . . as though he is "directing his congregation." . . . Often, he calls on everyone to stand and bow their heads, and he may ask them to recite a common prayer with him. . . . In essence, the chaplain leads, as the first part of a town meeting, a highly intimate (albeit relatively brief) prayer service, with the public serving as his congregation.

And third, the prayers themselves differ in their content and character. *Marsh* characterized the prayers in the Nebraska Legislature as "in the Judeo-Christian tradition." . . . But no one can fairly read the prayers from Greece's Town meetings as anything other than explicitly Christian — constantly and exclusively so. From the time Greece established its prayer practice in 1999 until litigation loomed nine years later, all of its monthly chaplains were Christian clergy. And after a brief spell surrounding the filing of this suit (when a Jewish layman, a Wiccan priestess, and a Baha'i minister appeared at meetings), the Town resumed its practice of inviting only clergy from neighboring Protestant and Catholic churches. 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. Many prayers contained elaborations of Christian doctrine or recitations of scripture. And the prayers usually close with phrases like "in the name of Jesus Christ" or "in the name of Your son."

[The] monthly chaplains appear almost always to assume that everyone in the room is Christian (and of a kind who has no objection to government-sponsored worship).[4] The Town itself has never urged its chaplains to reach out to members of other faiths, or even to recall that they might be present. And accordingly, few

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[3] For ease of reference and to avoid confusion, I refer to Justice Kennedy's opinion as "the majority." But the language I cite that appears in Part II-B of that opinion is, in fact, only attributable to a plurality of the Court.

[4] Leaders of several Baptist and other Christian congregations have explained to the Court that "many Christians believe . . . that their freedom of conscience is violated when they are pressured to participate in government prayer, because such acts of worship should only be performed voluntarily." *Amicus Curiae Brief for Baptist Joint Committee for Religious Liberty*.

chaplains have made any effort to be inclusive; none has thought even to assure attending members of the public that they need not participate in the prayer session. . . .

C

Those three differences, taken together, remove this case from the protective ambit of *Marsh* and the history on which it relied. . . . And so, contra the majority, Greece's prayers cannot simply ride on the constitutional coattails of the legislative tradition *Marsh* described. The Board's practice must, in its own particulars, meet constitutional requirements.

And the guideposts for addressing that inquiry include [constitutional] principles of religious neutrality. . . . The government (whether federal, state, or local) may not favor, or align itself with, any particular creed. And that is nowhere more true than when officials and citizens come face to face in their shared institutions of governance. In performing civic functions and seeking civic benefits, each person of this nation must experience a government that belongs to one and all, irrespective of belief. And for its part, each government must ensure that its participatory processes will not classify those citizens by faith, or make relevant their religious differences.

To decide how Greece fares on that score, think again about how its prayer practice works, meeting after meeting. . . . Let's say that a Muslim citizen of Greece goes before the Board to share her views on policy or request some permit. Maybe she wants the Board to put up a traffic light at a dangerous intersection; or maybe she needs a zoning variance to build an addition on her home. But just before she gets to say her piece, a minister deputized by the Town asks her to pray "in the name of God's only son Jesus Christ." She must think — it is hardly paranoia, but only the truth — that Christian worship has become entwined with local governance. And now she faces a choice — to pray alongside the majority as one of that group or somehow to register her deeply felt difference. She is a strong person, but that is no easy call — especially given that the room is small and her every action (or inaction) will be noticed. She does not wish to be rude to her neighbors, nor does she wish to aggravate the Board members whom she will soon be trying to persuade. And yet she does not want to acknowledge Christ's divinity, any more than many of her neighbors would want to deny that tenet. So assume she declines to participate with the others in the first act of the meeting — or even, as the majority proposes, that she stands up and leaves the room altogether. At the least, she becomes a different kind of citizen, one who will not join in the religious practice that the Town Board has chosen as reflecting its own and the community's most cherished beliefs. And she thus stands at a remove, based solely on religion, from her fellow citizens and her elected representatives.

Everything about that situation, I think, infringes the First Amendment. (And of course, [it] would do so no less if the Town's clergy always used the liturgy of some other religion.) That the Town Board selects, month after month and year after year, prayer givers who will reliably speak in the voice of Christianity, and so places itself behind a single creed. That in offering those sectarian prayers, the Board's chosen clergy members repeatedly call on individuals, prior to participating in local governance, to join in a form of worship that may be at odds with their own beliefs. That the clergy thus put some residents to the unenviable choice of either pretending to pray like the majority or declining to join its communal activity, at the very moment of petitioning their elected leaders. That

the practice thus divides the citizenry, creating one class that shares the Board's own evident religious beliefs and another (far smaller) class that does not. And that the practice also alters a dissenting citizen's relationship with her government, making her religious difference salient when she seeks only to engage her elected representatives as would any other citizen.

None of this means that Greece's town hall must be religion- or prayer-free. . . . What the circumstances here demand is the recognition that we are a pluralistic people too. When citizens of all faiths come to speak to each other and their elected representatives in a legislative session, the government must take especial care to ensure that the prayers they hear will seek to include, rather than serve to divide. No more is required — but that much is crucial — to treat every citizen, of whatever religion, as an equal participant in her government.

And contrary to the majority's (and Justice Alito's) view, that is not difficult to do. If the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint. Priests and ministers, rabbis and imams give such invocations all the time; there is no great mystery to the project. (And providing that guidance would hardly have caused the Board to run afoul of the idea that "the First Amendment is not a majority rule," as the Court (headspinningly) suggests; what does that is the Board's refusal to reach out to members of minority religious groups.) Or if the Board preferred, it might have invited clergy of many faiths to serve as chaplains, as the majority notes that Congress does. When one month a clergy member refers to Jesus, and the next to Allah or Jehovah — as the majority hopefully though counterfactually suggests happened here — the government does not identify itself with one religion or align itself with that faith's citizens, and the effect of even sectarian prayer is transformed. So Greece had multiple ways of incorporating prayer into its town meetings — reflecting all the ways that prayer (as most of us know from daily life) can forge common bonds, rather than divide.

But Greece could not do what it did: infuse a participatory government body with one (and only one) faith, so that month in and month out, the citizens appearing before it become partly defined by their creed — as those who share, and those who do not, the community's majority religious belief. In this country, when citizens go before the government, they go not as Christians or Muslims or Jews (or what have you), but just as Americans (or here, as Grecians). That is what it means to be an equal citizen, irrespective of religion. And that is what the Town of Greece precluded by so identifying itself with a single faith.

III

How, then, does the majority go so far astray, allowing the Town of Greece to turn its assemblies for citizens into a forum for Christian prayer? The answer does not lie in first principles: I have no doubt that every member of this Court believes as firmly as I that our institutions of government belong equally to all, regardless of faith. Rather, the error reflects two kinds of blindness. First, the majority misapprehends the facts of this case, as distinct from those characterizing traditional legislative prayer. And second, the majority misjudges the essential meaning of the religious worship in Greece's town hall, along with its capacity to exclude and divide.

The facts here matter to the constitutional issue; indeed, the majority itself acknowledges that the requisite inquiry — a "fact-sensitive" one — turns on "the setting in which the prayer arises and the audience to whom it is directed." . . . The

majority thus gives short shrift to the gap — more like, the chasm — between a legislative floor session involving only elected officials and a town hall revolving around ordinary citizens. And similarly the majority neglects to consider how the prayers in Greece are mostly addressed to members of the public, rather than (as in the forums it discusses) to the lawmakers. . . .

And of course — as the majority sidesteps as well — [the chaplain calls on them] to pray in the name of Jesus Christ. . . . [In] Greece only Christian clergy members speak, and then mostly in the voice of their own religion; no Allah or Jehovah ever is mentioned. . . . The majority thus errs in assimilating the Board's prayer practice to that of Congress or the Nebraska Legislature. Unlike those models, the Board is determinedly — and relentlessly — noninclusive.

And the month in, month out sectarianism the Board chose for its meetings belies the majority's refrain that the prayers in Greece were "ceremonial" in nature. Ceremonial references to the divine surely abound: The majority is right that "the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court' " each fits the bill. But prayers evoking [for example] "the saving sacrifice of Jesus Christ on the cross" [or] "the life and death, resurrection and ascension of the Savior Jesus Christ"? No. These are statements of profound belief and deep meaning, subscribed to by many, denied by some. They "speak of the depths of one's life, of the source of one's being, of one's ultimate concern, of what one takes seriously without any reservation." PAUL TILLICH, THE SHAKING OF THE FOUNDATIONS 57 (1948). If they (and the central tenets of other religions) ever become mere ceremony, this country will be a fundamentally different — and, I think, poorer — place to live.

But just for that reason, the not-so-implicit message of the majority's opinion — "What's the big deal, anyway?" — is mistaken. The content of Greece's prayers *is* a big deal, to Christians and non-Christians alike. A person's response to the doctrine, language, and imagery contained in those invocations reveals a core aspect of identity — who that person is and how she faces the world. And the responses of different individuals, in Greece and across this country, of course vary. Contrary to the majority's apparent view, such sectarian prayers are not "part of our expressive idiom" or "part of our heritage and tradition," assuming the word "our" refers to all Americans. They express beliefs that are fundamental to some, foreign to others — and because that is so they carry the ever-present potential to both exclude and divide. The majority, I think, assesses too lightly the significance of these religious differences, and so fears too little the "religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden v. Perry* (Breyer, J., concurring) [Casebook p. 986]. I would treat more seriously the multiplicity of Americans' religious commitments, along with the challenge they can pose to the project — the distinctively American project — of creating one from the many, and governing all as united.

IV

[America's] promise in the First Amendment [is] full and equal membership in the polity for members of every religious group. . . . For me, that remarkable guarantee means at least this much: When the citizens of this country approach their government, they do so only as Americans, not as members of one faith or another. And that means that even in a partly legislative body, they should not confront government-sponsored worship that divides them along religious lines. I

believe, for all the reasons I have given, that the Town of Greece betrayed that promise. I therefore respectfully dissent from the Court's decision.

## Note: Past and Present Precedent

**1.** When the majority in *Marsh v. Chambers* (1983) resolutely ignored the *Lemon* test, Justice Brennan complained in his dissent, "I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional." Do you agree?

**2.** In their complaint, the plaintiff-respondents did not seek an end to the prayer giving, but rather asked the district court for an injunction ordering that the town board allow only "inclusive and ecumenical prayers" that referred only to a "generic God" and that did not invoke any one faith or belief system. Would it be constitutional for the town board to impose those requirements on prayer givers in the future?

**3.** In her dissent, Justice Kagan posed several hypotheticals adapting actual prayers from the record in *Town of Greece* and then asked rhetorically: "When a person goes to court, a polling place, or an immigration proceeding . . . government officials do not engage in sectarian worship, nor do they ask her to do likewise. They all participate in the business of government not as Christians, Jews, Muslims (and more), but only as Americans — none of them different from any other for that civic purpose. *Why not, then, at a town meeting?*" (emphasis added). What reasons do the majority and the concurring opinions give for making a constitutional distinction for a town meeting? Reconcile their distinction for legislative prayers with the values underlying the Establishment Clause. Here are some of Justice Kagan's hypothetical comparisons:

- You are a party in a case going to trial; let's say you have filed suit against the government for violating one of your legal rights. The judge bangs his gavel to call the court to order, asks a minister to come to the front of the room, and instructs the 10 or so individuals present to rise for an opening prayer. The clergyman faces those in attendance and says: "Lord, God of all creation . . . . We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength . . . from his resurrection at Easter. Jesus Christ, who took away the sins of the world, destroyed our death, through his dying and in his rising, he has restored our life. Blessed are you, who has raised up the Lord Jesus, you who will raise us, in our turn, and put us by His side. . . . Amen." The judge then asks your lawyer to begin the trial.
- It's Election Day, and you head over to your local polling place to vote. As you and others wait to give your names and receive your ballots, an election official asks everyone there to join him in prayer. He says: "We pray this day for the guidance of the Holy Spirit as [we vote]. . . . Let's just say the Our Father together. 'Our Father, who art in Heaven, hallowed be thy name; thy Kingdom come, thy will be done, on earth as it is in Heaven. . . .' " And after he concludes, he makes the sign of the cross, and appears to wait expectantly for you and the other prospective voters to do so too.
- You are an immigrant attending a naturalization ceremony to finally become a citizen. The presiding official tells you and your fellow

> applicants that before administering the oath of allegiance, he would like a minister to pray for you and with you. The pastor steps to the front of the room, asks everyone to bow their heads, and recites: "Father, son, and Holy Spirit — it is with a due sense of reverence and awe that we come before you today seeking your blessing. . . . You are . . . a wise God, oh Lord, . . . as evidenced even in the plan of redemption that is fulfilled in Jesus Christ. We ask that you would give freely and abundantly wisdom to one and to all . . . in the name of the Lord and Savior Jesus Christ, who lives with you and the Holy Spirit, one God for ever and ever. Amen."

**4.** There is "coercion" and there is "coercion." Part II-B of Justice Kennedy's opinion is joined only by the Chief Justice and Justice Alito. Why do you suppose Justices Thomas and Scalia defected from that part of the opinion? The three-justice plurality applies a relatively lower threshold of the unconstitutional coercion test than does Part II of the separate concurring opinion by Justice Thomas. However, those five justices agree that the prayers at the Town board meeting did not amount to untoward religious coercion of those in attendance. Justice Kagan's primary dissent applies a third standard of unconstitutional coercion that she deems was violated in this case. Apply those three different standards to the facts of *School District of Abington Township v. Schempp* (Casebook p. 936), involving public school prayer and the facts of *Lee v. Weisman* (Casebook p. 945), involving invocations and benedictions at middle school and high school graduations.

**5.** The town board had previously followed the practice of having a moment of silence, instead of an oral prayer. Was that practice constitutional? *See Wallace v. Jaffree* (Casebook p. 941), involving meditation or voluntary prayer in the public schools.

## Problem: "Please Rise and Bow Your Heads!"

The Erewhon County Board of Commissioners has nine elected members. The Board holds a monthly public meeting. Each meeting begins with a "call to order," after which the Chair directs those in attendance to "rise" and "assume a reverent posture." Then one of the Commissioners delivers a prayer, after which the Chair invites a resident being honored or a group of residents, sometimes a social group from the community or a class of students from one of the local schools, to come forward and lead the assembly in the Pledge of Allegiance. The Chair then announces that "everyone should be seated" and proceeds through the published agenda for the meeting.

The Commissioners take turns reciting the opening prayer. They adopted this practice to avoid having to select prayer-givers and then having to monitor the content of their prayers. They were worried that some clergy and some self-ordained ministers might possibly deliver inappropriate prayers or awkwardly sectarian prayers that would be controversial. The Commissioners agreed upon this internal guideline for themselves:

> The prayer-giver should be mindful that citizens of our County are members of many different faith traditions. Each prayer should not exceed 150 words and should avoid excessive sectarian references and personal or partisan political beliefs. Appropriate themes include: citizenship, community, tolerance, respect, values,

> and the importance of responsible and wise government for the common good.

The denominational make-up of the current Commission includes five Catholics, three Jews, and one Episcopalian and their individual prayers somewhat reflect their personal faiths. Thus, the Commissioners claim to be adhering to the Judeo-Christian tradition. Here is an example of a prayer, composed by one of the Catholic commissioners, which she has delivered each time it is has been her turn to pray:

> Please stand and bow your heads. Our heavenly Father we thank you for allowing us to gather here in your presence tonight. We ask that you watch over us and keep your guiding hand on our shoulder as we deliberate tonight. Please protect and watch over the men and women serving this great nation in our military, whether at home or abroad, as well as our police officers and firefighters. In this we pray, in Jesus's name, Amen.

When the president of the local chapter of Americans United for the Separation of Church and State ("AUSCS") appeared at a recent Commission meeting to object to this prayer practice, one of the Commissioners responded: "With all due respect, I will continue to pray in the Lord's name. I am human. I need inspiration and grace. I am asking for guidance to make good decisions for the best of the whole community — for all our citizens whatever they believe." It was moved and seconded to continue the policy and practice; the motion passed unanimously. Now, AUSCS has brought suit on behalf of its organization and some individual members, alleging that the Commissioners' prayer practice is unconstitutionally sectarian and exclusionary, as well as unduly coercive, and therefore violates the First and Fourteenth Amendments. How should the district court rule and why?

## Problem: "Thinking Like a Justice" . . . About Religion

Elle Wood High School is a public high school that, for more than a decade, has held its graduation ceremonies in the main sanctuary of the nearby First Christian Church, which can be described as a non-denominational evangelical Christian church. The impetus to move the graduation to the Church came from the student officers of the senior class of 2000, who believed that the school's gymnasium — the previous venue — was too hot, cramped and uncomfortable. Those attending complained that they were packed in and there was not adequate seating; they had to sit on hard wooden bleachers or folding chairs; and there was no air conditioning. Seeking a better alternative, the student government officers decided upon the Church, which was much larger than the gymnasium and had more comfortable seats, air conditioning and ample free parking. They presented their idea to the principal and the superintendent of schools. That year the students in the senior class conducted an advisory vote to choose the venue. The alternatives included the school gymnasium, the football field, and the Church. A large majority of that year's senior class voted for the Church location. Many of the students at the High School are members of the Church and familiar with the facility. After the senior class voted in favor of the idea, the school's principal made the recommendation to move the graduation to the Church and the superintendent approved. The Church charges a standard rental fee to the School District between $2,000 and $2,200 for each graduation. Money raised by the senior class covered

approximately half of the rental fee, and the School District funded the rest through its general revenues, which come from property taxes.

The First Christian Church is a "mega-church," one of the 100-largest churches in the United States. Weekly attendance averages more than 7,000. The Church building has a modern architecture and is decorated in an emphatically Protestant Christian style, both inside and outside the sanctuary. Crosses and other religious symbols abound on the Church grounds and the exterior of the Church building, and visitors encounter these symbols as they drive to the parking lot and walk into the building. Many of these symbols — including a twenty-foot cross on the Church roof and a large lighted sign with a cross and the words "First Christian Church" — are visible from the intersection outside the Church. To reach the sanctuary, visitors must pass through the Church atrium, which also has served as a natural congregation place for graduates and their guests after past graduation ceremonies. The atrium contains tables and displays filled with evangelical literature, much of which addresses children and teens and their families; religious banners, symbols and posters decorate the walls. In some previous years, Church members manned information booths that distributed religious literature to interested attendees before and after the graduation ceremony.

Some examples of images visible in the commemorative DVDs of past graduation ceremonies included banners hanging on the atrium walls bearing the messages: "JESUS" and "LORD OF LORDS" and "PRAYER." On one of the columns there was a poster labeled "Summer God Squad" directed at school-age children. On one wall, a large carved wooden plaque was permanently installed that proclaimed " '. . . go and make disciples of all nations . . .' Matthew 28:19."

The graduation ceremonies take place on the dais at the front of the Church sanctuary, where school officials and students with roles in the ceremony are seated facing the audience. A 10 by 20 foot Latin cross, fixed to the wall, hangs over the dais and visually dominates the proceedings and serves as a background on the big-screen display. During the ceremonies, graduating seniors sit down in the front, center rows of pews of the sanctuary's main level. Family and guests sit in the remaining pews. There are Bibles and hymnal books in all the pews, as well as donation envelopes. There is no evidence that any of these materials were placed in the pews specifically for the graduation ceremonies.

Complaints about the School District's use of the Church arose soon after the practice began. Last year, the father of a graduating student asked the District to stop holding graduation ceremonies at the Church because the father, a non-Christian, did not want his child exposed to the Church's religious teachings about those who do not share its faith. Specifically, the father took exception to the "intensely hateful belief that people like me and my child are going to Hell — a place of awful endless torments." Several concerned groups voiced their objections to the graduation site and asserted that it violated the Constitution, including: the Freedom from Religion Foundation; the American Civil Liberties Union; the Anti-Defamation League; and Americans United for Separation of Church and State. In a series of exchanges between attorneys for these groups and the School District, the superintendent listed the ameliorative measures the School District had implemented: (1) no references to religion or to the Church have ever been permitted during the graduation ceremony or in the official printed program; (2) in the future no religious literature would be distributed; and (3) the School District

had requested and the Church had agreed to remove any and all non-permanent religious artifacts and banners. He further explained, however, that the Church had refused the request by the School District to physically cover the permanent religious iconography, including the large cross hanging over the dais in the sanctuary. Finally, the superintendent noted that the School District had plans to build a new field house at the High School that would accommodate graduations but that facility would not be built for another three years. In the meantime, the annual rental of the Church would continue.

Some current and former students at the high school and their parents brought suit alleging a violation of the incorporated Establishment Clause. Students and parents objected to the graduation ceremony being held in First Christian Church; parents also objected that their property taxes were being used to pay the rental fee. All the anonymous plaintiffs have in common that they are not Christians. Some subscribe to different religious faiths, including Judaism, Islam and Jainism; others identify themselves as non-theistic humanists or atheists. Those plaintiffs who have attended past graduation ceremonies variously allege that they felt uncomfortable, upset, offended, unwelcome, or angry because of the religious interior decoration of the Church. Some did not attend their graduation for those reasons. Other plaintiffs anticipate similar feelings and do not want to be coerced into choosing between experiencing those feelings of alienation and missing their future graduation.

Suppose the plaintiffs' attorneys make good on the clichéd threat to "take their case all the way to the Supreme Court." Justice Holmes famously observed, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897). Based on your close reading of the five separate opinions in the preceding principal case, predict how the writing Justices would apply the Establishment Clause to these facts, *i.e.*, outline an opinion for each of the following: Justice Kennedy, Justice Alito, Justice Thomas, Justice Breyer, and Justice Kagan.

# Chapter 17
# The Free Exercise Clause

## B. Modern Cases

**Page 1038:** ***add new Notes after the Note:***

### Note: RFRA and the Contraceptive Mandate

A recent case illustrates the significance of bringing a challenge under the statute instead of the Constitution. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), involved Department of Health and Human Services (HHS) regulations under the Affordable Care Act of 2010 (ACA) which required specified employers' group health plans to provide coverage for all the contraceptive methods approved by the Food and Drug Administration (FDA), including some methods that have the effect of preventing an already fertilized egg from attaching to the uterus and developing any further. Religious employers, such as churches, were exempted from this contraceptive mandate, as were religious nonprofit organizations with religious objections to providing contraceptive services and employers with fewer than 50 employees.

The owners of three closely-held for-profit corporations challenged the regulations because their Christian beliefs were that life begins at conception and that their faith prohibited them from facilitating the contraceptive methods that operated after fertilization/conception. The sincerity of their beliefs was not questioned by anyone. The three family-owned companies were of considerable size: Hobby Lobby has 500 stores and 13,000 employees; Conestoga Wood Specialties has 950 employees; Mardel operates 35 Christian bookstores and employs 400 people. In both lawsuits, the two district courts denied a preliminary injunction. On separate appeals, the Third Circuit affirmed but the Tenth Circuit reversed and struck down the regulations. The Supreme Court divided 5 to 4 to hold that the HHS regulations violated RFRA. That statutory holding made it unnecessary to reach the First Amendment claims.

Justice Alito wrote the majority opinion joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas. The majority rehearsed the legislative history of RFRA and then tracked the text of the statute. First, RFRA applies to a "person's" exercise of religion. The majority concluded that Congress intended to protect religious liberty broadly to include the religious liberty of for-profit corporations in order to protect religious liberty for their shareholders, officers, and employees. The majority believed this conclusion followed indisputably from the concession by HHS (and the dissent) that RFRA applied to nonprofit corporations, as prior Supreme Court cases had ruled. The majority cited: *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* (Casebook p. 1035); *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC* (Casebook p. 1062); and *Church of the Lukumi Babalu Aye, Inc. v. Hialeah* (Casebook p. 1038). Second, RFRA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." The majority understood RFRA to protect more religious liberty than does the First Amendment, although the majority did not explain just how much more or specifically what else the statute covers. The owners of the plaintiff corporations had a lawful right to pursue profits in conformity with their sincere individual religious beliefs. Third, the majority had "little trouble" concluding that the HHS contraceptive mandate was a "substantial

burden," in the wording of the statute, on the exercise of religion. The mandate required the owners to engage in conduct that seriously violated their sincere religious beliefs under the threatened penalty of severe economic consequences, i.e., millions of dollars in fines. The majority explained that the case involved the "difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person [the owners] to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another [the employees]." Fourth, the majority applied the statutory two-pronged standard quoted above in Note: Statutory Strict Scrutiny — RFRA & RLUIPA (Casebook p. 1034) — the "compelling government interest" and "least restrictive means" analysis. The majority finessed the issue whether the government's interest in guaranteeing cost-free access to the four challenged contraceptive methods was "compelling within the meaning of RFRA" by assuming that it was. The "least restrictive means" analysis was outcome determinative:

> The least-restrictive-means standard is exceptionally demanding, and it is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases. . . .
>
> The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections. This would certainly be less restrictive of the plaintiffs' religious liberty, and HHS has not shown that this is not a viable alternative. . . . If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal. . . .
>
> In the end, however, we need not rely on the option of a new, government-funded program in order to conclude that the HHS regulations fail the least-restrictive-means test. HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs. As we [have] explained, HHS has already established an accommodation for nonprofit organizations with religious objections. Under that accommodation, the organization can self-certify that it opposes providing coverage for particular contraceptive services. If the organization makes such a certification, the organization's insurance issuer or third-party administrator must "expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan" and "provide separate payments for any contraceptive services required to be covered" without imposing "any cost-sharing

> requirements . . . on the eligible organization, the group health plan, or plan participants or beneficiaries."
>
> We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims. At a minimum, however, it does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well.

The majority refuted the dissent's concern that invidious discrimination in hiring could be robed in religious practice with the observation that "[the] Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." Ultimately, the majority suspected that the dissenters' "fundamental objection" was that the federal courts will be obliged to consider "a host of claims by litigants seeking a religious exemption from generally applicable laws" — a role the dissent believed is at odds with the Religion Clauses — but the majority countered that Congress enacted RFRA and Congress thus assigned that statutory role to the Third Branch.

Justice Kennedy wrote a concurring opinion that endorsed the majority's interpretation and application of RFRA statutory strict scrutiny. He emphasized religious liberty:

> In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community. But in a complex society and an era of pervasive governmental regulation, defining the proper realm for free exercise can be difficult. In these cases the plaintiffs deem it necessary to exercise their religious beliefs within the context of their own closely held, for-profit corporations. They claim protection under RFRA, the federal statute discussed with care and in detail in the Court's opinion. . . .
>
> [The] Government has not made the second showing required by RFRA, that the means it uses to regulate is the least restrictive way to further its interest. As the Court's opinion explains, the record in these cases shows that there is an existing, recognized, workable, and already-implemented framework to provide coverage. That framework is one that HHS has itself devised, that the plaintiffs have not criticized with a specific objection that has been considered in detail by the courts in this litigation, and that is less restrictive than the means challenged by the plaintiffs in these cases.
>
> The means the Government chose is the imposition of a direct mandate on the employers in these cases. But in other instances the Government has allowed the same contraception coverage in

> issue here to be provided to employees of nonprofit religious organizations, as an accommodation to the religious objections of those entities. The accommodation works by requiring insurance companies to cover, without cost sharing, contraception coverage for female employees who wish it. That accommodation equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs.
>
> On this record and as explained by the Court, the Government has not met its burden of showing that it cannot accommodate the plaintiffs' similar religious objections under this established framework. RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers — burdening one while accommodating the other — when it may treat both equally by offering both of them the same accommodation. . . .
>
> "The American community is today, as it long has been, a rich mosaic of religious faiths." *Town of Greece v. Galloway* (Kagan, J., dissenting) [*supra* this Supplement Chapter 16]. Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling. In these cases the means to reconcile those two priorities are at hand in the existing accommodation the Government has designed, identified, and used for circumstances closely parallel to those presented here. RFRA requires the Government to use this less restrictive means. As the Court explains, this existing model, designed precisely for this problem, might well suffice to distinguish the instant cases from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise. . . .

Justice Ginsburg wrote a dissenting opinion, joined by Justices Breyer, Kagan, and Sotomayor. Her opinion added emphases on gender and reproductive rights — her dissent opened with a quotation from *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the joint opinion reaffirming women's reproductive rights. As for religious liberty, her first point was that "[any] First Amendment Free Exercise Clause claim [the plaintiffs] might assert is foreclosed by this Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith* [Casebook p. 1024]." In a portion of her dissent joined only by Justice Sotomayor, she squarely rejected the majority's interpretation of RFRA to apply to for-profit corporations. She further maintained that "the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial [under the statute]." She believed that the government's purpose to provide birth control to employees did satisfy the "compelling interest" prong of the statute. As for the "least restrictive means" prong, she concluded:

> [The] Government has shown that there is no less restrictive, equally effective means that would both (1) satisfy the challengers' religious objections to providing insurance coverage for certain contraceptives (which they believe cause abortions); and (2) carry out the objective of the ACA's contraceptive coverage requirement, to ensure that women employees receive, at no cost to them, the preventive care needed to safeguard their health and well being. A "least restrictive means" cannot require employees to relinquish benefits accorded them by federal law in order to ensure that their commercial employers can adhere unreservedly to their religious tenets. . . .
>
> There is an overriding interest, I believe, in keeping the courts "out of the business of evaluating the relative merits of differing religious claims," or the sincerity with which an asserted religious belief is held. Indeed, approving some religious claims while deeming others unworthy of accommodation could be "perceived as favoring one religion over another," the very "risk the Establishment Clause was designed to preclude." The Court, I fear, has ventured into a minefield, by its immoderate reading of RFRA. I would confine religious exemptions under that Act to organizations formed "for a religious purpose," "engaged primarily in carrying out that religious purpose," and not "engaged . . . substantially in the exchange of goods or services for money beyond nominal amounts."

Justices Breyer and Kagan filed a short dissenting opinion declining to vote either with the majority opinion ("yes") or with Justice Ginsburg's dissent ("no") on the question whether for-profit corporations or their owners may bring claims under RFRA.

What about future religious liberty claims under RFRA after *Hobby Lobby*? How would you answer Justice Ginsburg's rhetorical questions?

> Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)? According to counsel for Hobby Lobby [at oral argument], "each one of these cases . . . would have to be evaluated on its own . . . applying the compelling interest-least restrictive alternative test." Not much help there for the lower courts bound by today's decision.

## Note: RLUIPA Resolves a Prisoner's Dilemma to Grow a Beard for Religious Reasons

**1.** The Supreme Court has once again demonstrated its willingness to interpret and apply the federal religious exemption statutes broadly in favor of religious exercise claims. The Religious Freedom Restoration Act of 1993 was the basis for two decisions previously noted. *Gonzales v. O Centro Espirita Beneficente*

*União do Vegetal*, 546 U.S. 418 (2006), held that the federal Controlled Substances Act could not be enforced against a Christian spiritualist sect whose sacramental tea contained an illegal hallucinogen. *See* Note: Statutory Strict Scrutiny — RFRA & RLUIPA (Casebook p. 1034). *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), struck down HHS regulations that required closely-held corporations to provide contraceptives under their employee group health plans in violation of their religious beliefs. *See* Note: RFRA and the Contraceptive Mandate (Supplement *supra* this Chapter). Most recently, in *Holt v. Hobbs*, 135 S. Ct. 853 (2015), the Court unanimously ruled in favor of a prisoner who sought a religious exemption under RLUIPA from a state prison regulation prohibiting beards. Is the Supreme Court applying an even stricter "strict scrutiny standard" under these federal statutes than it applied in the older Free Exercise Clause cases such as *Sherbert v. Verner* (Casebook p. 1011) and *Wisconsin v. Yoder* (Casebook p. 1016)?

**2.** Petitioner Gregory Holt, also known as Abdul Maalik Muhammad, was a devout Muslim. He objected to the Arkansas Department of Corrections' [Department] grooming policy, which provided that "no inmates will be permitted to wear facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip." The policy made no exception for inmates who object on religious grounds, but it did include an exemption for prisoners with a medically-diagnosed dermatological problem to allow facial hair no longer than 1/4 of an inch. Although he believed that his faith required him not to trim his beard at all, petitioner requested that he be permitted to grow a 1/2-inch beard. When the prison officials denied his request, petitioner filed a *pro se* complaint in U.S. District Court challenging the grooming policy under RLUIPA. The District Court ruled against the petitioner and upheld the prison regulation. The U.S. Court of Appeals for the Eighth Circuit affirmed in a brief *per curiam* opinion, holding that the Department had satisfied its statutory burden of showing that the grooming policy was the least restrictive means of furthering its compelling security interests. The Court of Appeals emphasized that the prison officials deserved judicial deference due to their expertise and experience. The Supreme Court reversed by a unanimous vote. Justice Alito wrote for the Court. Justices Ginsburg and Sotomayor joined the opinion of the Court but wrote short concurring opinions.

**3.** The Court's opinion underscored the expansive protection for religious liberty under RLUIPA — in comparison to the narrower protection afforded under the Free Exercise Clause. The Department's regulation that required petitioner to shave his beard or suffer serious disciplinary action substantially burdened his sincere religious belief. It mattered not that the Department had accommodated petitioner's other religious exercises, for example, to use a prayer rug, to adhere to dietary restrictions, and to observe religious holidays. The Department could not argue that the burden was insignificant because petitioner's religion would somehow "credit" him for attempting to grow a beard and being forced to shave. The Department could not argue that some Muslim men do not believe they have a religious duty to grow their beard. Even if that were so, the protection of RLUIPA, like the protection of the Free Exercise Clause, is not limited to only those beliefs that are accepted by all members of a religious sect.

Once the petitioner met his burden to show that the grooming policy substantially burdened his exercise of religion, the burden shifted to the Department to demonstrate that the ban on beards was the least restrictive means of furthering a compelling government interest. The Department argued that the Court should defer to the expertise and experience of the prison officials in general. The Court countered that "RLUIPA, like RFRA, contemplates a 'more focused' inquiry and 'requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person" — the particular claimant whose sincere exercise of religion is being substantially burdened.' " The Court continued its focused inquiry:

> The Department first claims that the no-beard policy prevents prisoners from hiding contraband. The Department worries that prisoners may use their beards to conceal all manner of prohibited items, including razors, needles, drugs, and cellular phone subscriber identity module (SIM) cards. We readily agree that the Department has a compelling interest in staunching the flow of contraband into and within its facilities, but the argument that this interest would be seriously compromised by allowing an inmate to grow a 1/2-inch beard is hard to take seriously. [The] Magistrate Judge observed that it was "almost preposterous to think that [petitioner] could hide contraband" in the short beard he had grown at the time of the evidentiary hearing. An item of contraband would have to be very small indeed to be concealed by a 1/2-inch beard, and a prisoner seeking to hide an item in such a short beard would have to find a way to prevent the item from falling out. Since the Department does not demand that inmates have shaved heads or short crew cuts, it is hard to see why an inmate would seek to hide contraband in a 1/2-inch beard rather than in the longer hair on his head. . . .
>
> The Department failed to establish that it could not satisfy its security concerns by simply searching petitioner's beard. The Department already searches prisoners' hair and clothing, and it presumably examines the 1/4-inch beards of inmates with dermatological conditions. It has offered no sound reason why hair, clothing, and 1/4-inch beards can be searched but 1/2-inch beards cannot. The Department suggests that requiring guards to search a prisoner's beard would pose a risk to the physical safety of a guard if a razor or needle was concealed in the beard. But that is no less true for searches of hair, clothing, and 1/4-inch beards. And the Department has failed to prove that it could not adopt the less restrictive alternative of having the prisoner run a comb through his beard. For all these reasons, the Department's interest in eliminating contraband cannot sustain its refusal to allow petitioner to grow a 1/2-inch beard.

The second compelling interest put forward by the Department was "preventing prisoners from disguising their identities." According to the prison officials, "bearded inmates could shave their beards and change their appearance in order to enter restricted areas within the prison, to escape, and to evade apprehension after

escaping." The Court acknowledged that this was a compelling government interest but concluded that the no-beard policy was not the least restrictive means:

> We agree that prisons have a compelling interest in the quick and reliable identification of prisoners, and we acknowledge that any alteration in a prisoner's appearance, such as by shaving a beard, might, in the absence of effective countermeasures, have at least some effect on the ability of guards or others to make a quick identification. But even if we assume for present purposes that the Department's grooming policy sufficiently furthers its interest in the identification of prisoners, that policy still violates RLUIPA as applied in the circumstances present here. The Department contends that a prisoner who has a beard when he is photographed for identification purposes might confuse guards by shaving his beard. But as petitioner has argued, the Department could largely solve this problem by requiring that all inmates be photographed without beards when first admitted to the facility and, if necessary, periodically thereafter. Once that is done, an inmate like petitioner could be allowed to grow a short beard and could be photographed again when the beard reached the 1/2-inch limit. Prison guards would then have a bearded and clean-shaven photo to use in making identifications. In fact, the Department (like many other States) already has a policy of photographing a prisoner both when he enters an institution and when his "appearance changes at any time during his incarceration."

The Court was dogmatically skeptical of the Department's reasons for not using other measures to prevent the prisoners from disguising themselves:

> The Department argues that the dual-photo method is inadequate because, even if it might help authorities apprehend a bearded prisoner who escapes and then shaves his beard once outside the prison, this method is unlikely to assist guards when an inmate quickly shaves his beard in order to alter his appearance within the prison. The Department contends that the identification concern is particularly acute at petitioner's prison, where inmates live in barracks and work in fields. Counsel for the Department suggested at oral argument that a prisoner could gain entry to a restricted area by shaving his beard and swapping identification cards with another inmate while out in the fields.
>
> We are unpersuaded by these arguments for at least two reasons. First, the Department failed to show, in the face of petitioner's evidence, that its prison system is so different from the many institutions that allow facial hair that the dual-photo method cannot be employed at its institutions. Second, the Department failed to establish why the risk that a prisoner will shave a 1/2-inch beard to disguise himself is so great that 1/2-inch beards cannot be allowed, even though prisoners are allowed to grow mustaches, head hair, or 1/4-inch beards for medical reasons. All of these could also be shaved off at a moment's notice, but the Department apparently does not think that this possibility raises a serious security concern.

The Court went further to conclude that the no-beard policy was "substantially underinclusive" under RLUIPA for two additional reasons:

> Although the Department denied petitioner's request to grow a 1/2-inch beard, it permits prisoners with a dermatological condition to grow 1/4-inch beards. The Department does this even though both beards pose similar risks. And the Department permits inmates to grow more than a 1/2-inch of hair on their heads. With respect to hair length, the grooming policy provides only that hair must be worn "above the ear" and "no longer in the back than the middle of the nape of the neck." 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. Nevertheless, the Department does not require inmates to go about bald, barefoot, or naked. Although the Department's proclaimed objectives are to stop the flow of contraband and to facilitate prisoner identification, "the proffered objectives are not pursued with respect to analogous nonreligious conduct," which suggests that "those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree." *Church of Lukumi Babalu Aye, Inc. v. Hialeah* [*supra* this Chapter] (1993).

The Department's two remaining arguments gained no traction with the Court whatsoever. There was no meaningful difference between petitioner's 1/2-inch beard and the 1/4-inch beard allowable for medical reasons. And religious accommodations were not likely to be so more numerous than medical accommodations as to overwhelm the Department's administration or budget. The Court characterized the Department's no-beard policy as being something of an anomaly in that the majority of the states and the federal government permit their inmates to grow 1/2-inch beards for any reason — religious or otherwise:

> That so many other prisons allow inmates to grow beards while ensuring prison safety and security suggests that the Department could satisfy its security concerns through a means less restrictive than denying petitioner the exemption he seeks. We do not suggest that RLUIPA requires a prison to grant a particular religious exemption as soon as a few other jurisdictions do so. But when so many prisons offer an accommodation, a prison must, at a minimum, offer persuasive reasons why it believes that it must take a different course, and the Department failed to make that showing here.

Finally, the Court challenged correctional officials to accept their general obligation under the federal statute to protect the religious practices of prisoners while maintaining the security and safety of prisons:

> We emphasize that although RLUIPA provides substantial protection for the religious exercise of institutionalized persons, it also affords prison officials ample ability to maintain security. We highlight three ways in which this is so. First, in applying RLUIPA's statutory standard, courts should not blind themselves to the fact that the analysis is conducted in the prison setting. Second, if an institution suspects that an inmate is using religious activity to cloak illicit conduct, "prison officials may appropriately

question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic." *Cutter v. Wilkinson* [Casebook p. 1037 Note]. *See also Hobby Lobby* [*supra* this Supplement]. Third, even if a claimant's religious belief is sincere, an institution might be entitled to withdraw an accommodation if the claimant abuses the exemption in a manner that undermines the prison's compelling interests.

**4.** Justice Sotomayor's concurring opinion sounded more supportive of prison officials generally but, at the same time, was skeptical of the particular no-beard policy in this case:

> Nothing in the Court's opinion calls into question our prior holding in *Cutter v. Wilkinson* [Casebook p. 1037 Note] that "context matters" in the application of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). In the dangerous prison environment, "regulations and procedures" are needed to "maintain good order, security and discipline, consistent with consideration of costs and limited resources." Of course, that is not to say that cost alone is an absolute defense to an otherwise meritorious RLUIPA claim. Thus, we recognized "that prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this area."
>
> I do not understand the Court's opinion to preclude deferring to prison officials' reasoning when that deference is due — that is, when prison officials offer a plausible explanation for their chosen policy that is supported by whatever evidence is reasonably available to them. But the deference that must be "extended to the experience and expertise of prison administrators does not extend so far that prison officials may declare a compelling governmental interest by fiat." *Yellowbear v. Lampert*, 741 F.3d 48, 59 (CA10 2014). Indeed, prison policies "grounded on mere speculation" are exactly the ones that motivated Congress to enact RLUIPA.
>
> Here, 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 — is ultimately fatal to the Department's position. The Court is appropriately skeptical of the relationship between the Department's no-beard policy and its alleged compelling interests because the Department offered little more than unsupported assertions in defense of its refusal of petitioner's requested religious accommodation. RLUIPA requires more.
>
> One final point bears emphasis. RLUIPA requires institutions refusing an accommodation to demonstrate that the policy it defends "is the least restrictive means of furthering the alleged compelling . . . interests." § 2000cc-1(a)(2). But nothing in the Court's opinion suggests that prison officials must refute every conceivable option to satisfy RLUIPA's least restrictive means requirement. Nor does it intimate that officials must prove that

> they considered less restrictive alternatives at a particular point in time. Instead, the Court correctly notes that the Department inadequately responded to the less restrictive policies [from the federal system and from other states] that petitioner brought to the Department's attention during the course of the litigation. . . .

**5.** Justice Ginsburg's one-paragraph separate concurring opinion cited the portion of her dissenting opinion in *Burwell v. Hobby Lobby* (*supra* this Chapter) in which she previously sounded a caution about judicially-determined religious exemptions under the companion free exercise exemption statute (RFRA). In that prior dissent, she wrote:

> There is an overriding interest, I believe, in keeping the courts "out of the business of evaluating the relative merits of differing religious claims," or the sincerity with which an asserted religious belief is held. Indeed, approving some religious claims while deeming others unworthy of accommodation could be "perceived as favoring one religion over another," the very "risk the Establishment Clause was designed to preclude."

How do you judge the judges? In these cases interpreting and applying the federal free exercise exemption statutes — RFRA and RLUIPA — are the Justices merely respecting congressional policy favoring religious exercise or are the Justices coming close to indirectly violating the Establishment Clause? We will explore the interrelationships among the clauses in the next chapter.

**Page 1050:** ***add new Problems after the Problem:***

## Problem: Snakes in a Church

Suppose you are an Assistant Attorney General in the State of Appalachia. Your assignment is to draft a statute regulating snake handling.

Some background: Snake handling began in the early twentieth century in the United States, as a practice of a small number of nondenominational Pentecostal churches in the evangelical Holiness movement, typically found in rural areas in the South. Worshipers speak in tongues, lay hands on the sick, and give witness in personal testimonies. Adherents believe that snake handling dates back to antiquity and that it is a literal requirement commanded by the Bible.[*] During a service, they sing and dance and pass around venomous snakes. (You can view a CNN report with videos of actual snake handling religious services at this link: https://www.youtube.com/watch?v=cwBVcsWYJd8.)

The current controversy surrounding the religious practice of snake handling is a result of a reality television series, "Snake Salvation," on the National Geographic Channel that featured interviews with a Pentecostal minister and

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[*] Believers find the religious obligation in these two verses: "And these signs shall follow them that believe: In my name shall they cast out devils; they shall speak with new tongues. They shall take up serpents; and if they drink any deadly thing, it shall not hurt them; they shall lay hands on the sick, and they shall recover." *Mark* 16:17-18 (KJV). "Behold, I give unto you power to tread on serpents and scorpions, and over all the power of the enemy: and nothing shall by any means hurt you." *Luke* 10:19 (KJV). Another passage used to support their belief tells how Paul was bitten by a venomous viper and suffered no harm. *See Acts* 28:1-6 (KJV).

members of his small congregation in your state. The series filmed several services that showed entire families — parents and their young children — handling various kinds of poisonous snakes, including rattlesnakes, copperheads, and cottonmouths. Dramatically, in one episode a minister was bitten and died after he refused medical treatment. In the next episode, the congregation held a memorial service for him at which the members present again handled poisonous snakes led by a new minister. The press coverage of these events has attracted large numbers of curious onlookers to attend these services. Several new congregations have been founded recently by self-anointed preachers who are inexperienced and untrained handlers but fervent and sincere believers. Estimates are that there are at least forty small congregations in the state.

Your supervisor instructs you to "Write a constitutional statute that satisfies the *Smith-Lukumi* doctrine under the First Amendment. We do not want to violate anyone's Free Exercise rights, but we want to protect these people."

## Problem: Banning Sex Offenders from Attending Church

You are an Assistant Attorney General working in the Office of the Attorney General responsible for drafting State Attorney General Legal Opinions. Complete this draft. Fill-in the applicable analysis under the First and Fourteenth Amendments:

**OFFICE OF THE STATE ATTORNEY GENERAL**
**ADVISORY LEGAL OPINION — AGO 2015-6**
**SUBJECT: ATTENDANCE AT RELIGIOUS SERVICES BY REGISTERED SEX OFFENDERS**

The Sheriff of Nambla County has requested an Advisory Legal Opinion concerning the constitutional right of registered sex offenders to attend religious services. State Statute § 765.1 (2010), the applicable statute, provides that the County Sheriff is responsible for the supervision of registered sex offenders. That statute provides further:

> *Sex offender unlawfully on premises.* It shall be unlawful for any person required to register under this chapter to knowingly be at any of the following locations: (1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds; (2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors; and (3) At any place where minors gather for regularly scheduled educational, recreational, or social programs.

The Sheriff has interpreted this statute to prohibit registered sex offenders from attending regular religious services if the congregation provides a child care nursery during the services on the premises within 300 feet of the church building — literally the length of a football field. Consequently, as a practical matter, the Sheriff's interpretation prohibits all registered sex offenders in his county from attending any and all religious services in the county. (Not surprisingly, no congregation in the county is willing to hold a regular religious service exclusively for registered sex offenders without children being allowed on the premises.) The Sheriff has invited registered sex offenders to attend a non-

denominational service held every Sunday for inmates at the jail he administers. The Sheriff reports, however, that several registered sex offenders have objected to his policy because they insist they have a right to attend a denominational religious service of their own choosing — one or more of them is Catholic or Jewish — and they have threatened litigation.

The plain meaning of the language of the statute, particularly subsection (2) *supra*, arguably supports the Sheriff's strict interpretation. The only other statutory exceptions to § 765.1 factually do not apply here: a juvenile sex offender may attend school; an eligible voter may go to a voting precinct in a school building; a parent or guardian may attend a teacher conference or a school program in which his or her child is performing after disclosing his or her status to the principal. However, a close study of the legislative history of the statute, including hearings transcripts, committee reports, and floor debates, demonstrates beyond peradventure that the 2010 Legislature intended to regulate the activities of registered sex offenders up to the limits of the Constitution but not past those limits. Finally, our State Supreme Court adheres to the long-standing canon of statutory interpretation which prefers an interpretation that avoids calling into question the constitutional validity of the statute. Therefore, the controlling question of how to interpret and apply § 765.1 to attendance at religious services by registered sex offenders must be determined in harmony with the applicable U.S. Supreme Court decisions on the right to free exercise of religion under the First and Fourteenth Amendments. . . .

## Problem: "I Now Pronounce You ~~Husband and Wife~~ Married"

In the aftermath of the historic Supreme Court decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which held that the fundamental right to marry is guaranteed to same-sex couples under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, the State Legislature revised its marriage statutes:

> *§ 2-1-11. Qualifications for the Legal Solemnization of a Marriage*
>
> (1) A marriage may be solemnized by an active or retired judge of any court of this State, by any other public official whose statutory powers expressly include the solemnization of marriages, or by any other person authorized and acting in accordance with any rite, ritual, or mode of solemnization recognized by any religious denomination. The person solemnizing the marriage shall complete the marriage certificate form and forward it to the county clerk and recorder within thirty days after the solemnization.
>
> (2) No member of any religious denomination shall be required to solemnize or participate in any marriage in violation of the religious beliefs or tenets of his or her denomination.
>
> (3) Notwithstanding any other provision in this statute, a member of any religious denomination that discriminates on the basis of sex, gender, or sexual orientation in its practice of solemnizing marriages is prohibited from solemnizing any marriage in this State.
>
> (4) Upon receipt of the completed marriage certificate, the county clerk shall register the marriage.

This controversial and controverted legislative compromise includes two competing and compensating provisions. First, Subsection (2) seeks to protect the beliefs and practices of religious denominations that deem marriage a sacramental between a man and a woman by explicitly protecting their religious practice to refuse to perform same-sex marriages. Second, Subsection (3) protects the LGBTQ community against discrimination on the basis of sexual orientation by prohibiting anyone who discriminates against them by refusing to perform same-sex marriages from legally solemnizing marriages in the State.

How would this statute work in practice? Consider two examples. A priest of the Catholic Church, which prohibits same-sex marriage, would have the right to conduct a religious marriage ceremony, but he would be disqualified from legally solemnizing the marriage or completing the marriage certificate, i.e., the Catholic, opposite-sex couple he marries would be required to participate in a civil ceremony in addition to their religious ceremony, and the civil ceremony would satisfy the statutory solemnization requirement. A priest of the Episcopalian Church, which approves of same-sex marriages, would be able to perform a religious ceremony that legally solemnizes any marriage — between a same-sex couple or an opposite-sex couple — and also complete the marriage certificate and forward it to the county clerk to be registered, i.e., the Episcopalian couples would not be required to participate in an additional civil ceremony — their religious ceremony would be sufficient to solemnize their marriage under the statute.

Analyze this statute under the incorporated Free Exercise Clause.

# Chapter 18
# Interrelationships Among the Clauses

## A. Definition of Religion

**Page 1071:** ***add new Problem after the Problem.***

### Problem: What Do the Cards Reveal? — Is Fortunetelling Protected by the First Amendment?

You have been retained by Sister Jeanne Marie to challenge an ordinance in the City of Oz that regulates the practice of fortunetelling. Persons engaged in the occupation of fortunetelling are obliged to obtain a permit and purchase a business license. Permits are issued by the chief of police. The application requires the name and any aliases of the applicant and other relevant identifying information; applicants must provide written consent and authorization to undergo a background check. A permit must be denied if the applicant has ever been convicted of a felony or any crime of moral turpitude. The licensing fee is $300 per year. The fine for telling fortunes without a permit is "not less than $100 and not more than $500 for each offense." The ordinance defines a "fortuneteller" as:

> Any person or establishment engaged in the occupation of occult sciences, including a fortuneteller, palmist, astrologist, numerologist, clairvoyant, craniologist, phrenologist, card reader, spiritual reader, tea leaf reader, prophet, psychic or advisor, or who in any other manner claims or pretends to tell fortunes or claims or pretends to disclose mental faculties of individuals for any form of compensation.

Technically, Sister Jeanne Marie admittedly falls within this definition. But during your client interview she tells you:

> I should not have to obtain a license or pay a fee. I am not a fortuneteller. I am a spiritual counselor. I am very spiritual in nature, yet I do not follow any particular religion or practice. "Organized" anythings — including organized religions — are not for me or of me. I pretty much go with my inner flow, and that seems to work best in the greatest harmony with the world. I find inspiration in a whole host of beliefs and practices, including: spirituality, astrology, Reiki, natural healing, meditation, mind-body-soul-spirit-chakra study, metaphysics, mindfulness, new age philosophy, psychology, human behavior, quantum physics, ancient history, philosophy, Kabala, music, and art — indeed, human creativity in all forms are passions and interests of mine along with a profound appreciation of the natural world. Furthermore, I profess a strong belief in the words and teachings of Jesus — which are incorporated into tarot cards — along with a foundational belief in the New Age movement — which essentially is a decentralized Western spiritual movement that seeks Universal Truth and the attainment of the highest individual potential. I incorporate all of these beliefs into my readings, and they inspire my spiritual counseling with my clients. Since I was a child, I have had the gift of synesthesia — my senses blend so that

> I taste colors and visualize sounds. For example, seeing something yellow gives me a tart and citrusy taste like a lemon and hearing a car horn makes me see a floating red triangle. Numbers and letters have geometrical shapes in my mind so words and sentences appear to me like strings of odd building blocks. Each punctuation mark has a distinct sound. For a long time, I thought everyone saw and heard like I do. I find it lovely and pure. It situates me in the world as not being of this world.

To better understand Sister Jeanne Marie's spiritual counseling, you sat for a psychic reading session. You observed that her counseling consists primarily of her use of tarot cards in conjunction with the name, age, birthdate, general background information, and astrological sign — as well as the same information about any other person about whom the person wishes to inquire — to attempt to perceive whatever she can on behalf of her client. Her clients often bring her specific inquiries about their jobs, businesses, relationships, or other personal matters. She encourages clients to take notes during their sessions in order to remember details of what she has said and to ask her questions about anything that remains unclear. She charges a fee of $125 for a half-hour session, but she does not strictly enforce the time limit. Besides in-person sessions, she also does online readings on her webpage. During your own in person session, you were impressed with her sincerity and personal empathy. The advice she gave you had the quality and usefulness of a religious counselor or secular life coach with which you have had personal experience. Her advice did contain several particular references to the beliefs she described in her client interview with you. You are agnostic about Sister Jeanne Marie's spiritual claims about the universe. You suspect that she is a highly intuitive person who is very skillful at "cold reading," i.e., carefully observing the client's facial expressions and body language and making vague guesses based on probabilities and deductions that give the impression of clairvoyance or what psychics and spiritualists call the "third eye." But, again, you are sure that she honestly and sincerely believes what she professes to believe. And you found the content of her reading credible and useful and sound advice. You also know that synesthesia is a rare but medically-recognized condition that suggests an unusually sensitive personality.

What First Amendment arguments do you make to challenge the ordinance on its face and as applied to Sister Jeanne Marie? Is her spiritual counseling protected by the Free Speech Clause or the Free Exercise Clause? Make a prediction of your own: will your arguments prevail?

## B. Tensions Between the Religion Clauses

**Page 1088:** ***insert new case before the Problem:***

### Trinity Lutheran Church of Columbia, Inc. v. Comer

*137 S. Ct. 2012 (2017)*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to footnote 3.

The Missouri Department of Natural Resources offers state grants to help public and private schools, nonprofit daycare centers, and other nonprofit entities purchase rubber playground surfaces made from recycled tires. Trinity Lutheran Church applied for such a grant for its preschool and daycare center and would

have received one, but for the fact that Trinity Lutheran is a church. The Department had a policy of categorically disqualifying churches and other religious organizations from receiving grants under its playground resurfacing program. The question presented is whether the Department's policy violated the rights of Trinity Lutheran under the Free Exercise Clause of the First Amendment.

I

[The Trinity Lutheran Church Child Learning Center is a preschool and daycare center. The Center began as a nonprofit organization in 1980, it merged with Trinity Lutheran Church in 1985, and it currently operates under the Church's auspices on church property. The Center admits students of any religion, and enrollment stands at about 90 children ranging from age two to five. The Center includes a playground, which has coarse pea gravel beneath the play equipment. In 2012, the Center sought to replace the gravel with a pour-in-place rubber surface by participating in Missouri's Scrap Tire Program. That program is administered by Missouri's Department of Natural Resources and is intended to reduce the number of used tires disposed of in landfills and dump sites. The program offers reimbursement grants to qualifying nonprofit organizations that purchase playground surfaces made from recycled tires. It is funded through a fee imposed on the sale of new tires in the State. The Department adhered to a strict and express policy of denying grants to any applicant owned or controlled by a religious entity. It believed that this policy was compelled by Article I, Section 7 of the Missouri Constitution, which provides:

> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

In a letter rejecting the Center's application, the program director explained that, under Article I, Section 7, the Department could not provide financial assistance directly to a church. The Department awarded 14 grants in 2012. Although the Center ranked fifth out of 44 applicants, it did not receive a grant because it is a church.

Trinity Lutheran sued the Director of the Department in U.S. District Court alleging that the Department's rejection of the Church's grant application violated the Free Exercise Clause. The District Court granted the Department's motion to dismiss, citing *Locke v. Davey*, 540 U.S. 712 (2004). The Court of Appeals for the Eighth Circuit agreed and affirmed. The Eighth Circuit recognized that it was "rather clear" that Missouri could award a scrap tire grant to Trinity Lutheran without running afoul of the Establishment Clause of the United States Constitution, but explained that did not mean the Free Exercise Clause necessarily compelled the State to disregard the antiestablishment principle reflected in its own Constitution. Viewing a monetary grant to a religious institution as a "hallmark of an established religion," the Eighth Circuit concluded that the State could rely on an applicant's religious status to deny its application. We granted certiorari and now reverse.]

II

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The parties agree that the Establishment Clause of that Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program. That does not, however, answer the question under the Free Exercise Clause, because we have recognized that there is "play in the joints" between what the Establishment Clause permits and the Free Exercise Clause compels. *Locke v. Davey* (2004) [*supra* this Chapter].

The Free Exercise Clause "protect[s] religious observers against unequal treatment" and subjects to the strictest scrutiny laws that target the religious for "special disabilities" based on their "religious status." *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993) [Chapter 17]. Applying that basic principle, this Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest "of the highest order."

In *Everson v. Board of Education of Ewing* (1947) [Chapter 16], for example, we upheld against an Establishment Clause challenge a New Jersey law enabling a local school district to reimburse parents for the public transportation costs of sending their children to public and private schools, including parochial schools. In the course of ruling that the Establishment Clause allowed New Jersey to extend that public benefit to all its citizens regardless of their religious belief, we explained that a State "cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Id. . . .*

In recent years, when this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion. We have been careful to distinguish such laws from those that single out the religious for disfavored treatment. . . . In *Employment Division, Department of Human Resources of Oregon v. Smith* (1990) [Chapter 17], we rejected a free exercise claim brought by two members of a Native American church denied unemployment benefits because they had violated Oregon's drug laws by ingesting peyote for sacramental purposes. [We] held that the Free Exercise Clause did not entitle the church members to a special dispensation from the general criminal laws on account of their religion. At the same time, we again made clear that the Free Exercise Clause *did* guard against the government's imposition of "special disabilities on the basis of religious views or religious status."[2]

[In] *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, we struck down three facially neutral city ordinances that outlawed certain forms of animal slaughter. Members of the Santeria religion challenged the ordinances under the Free Exercise Clause, alleging that despite their facial neutrality, the ordinances had a

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[2] This is not to say that any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause. Recently, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012) [*supra* this Chapter], this Court held that the Religion Clauses required a ministerial exception to the neutral prohibition on employment retaliation contained in the Americans with Disabilities Act. Distinguishing *Smith*, we explained that while that case concerned government regulation of physical acts, "[t]he present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself."

discriminatory purpose easy to ferret out: prohibiting sacrificial rituals integral to Santeria but distasteful to local residents. We agreed. Before explaining why the challenged ordinances were not, in fact, neutral or generally applicable, the Court recounted the fundamentals of our free exercise jurisprudence. A law, we said, may not discriminate against "some or all religious beliefs." Nor may a law regulate or outlaw conduct because it is religiously motivated. And we restated the now-familiar refrain: The Free Exercise Clause protects against laws that "impose special disabilities on the basis of . . . religious status."

III

A

The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. If the cases just described make one thing clear, it is that such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny. *Lukumi Babalu Aye, Inc.* . . . [The] Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution. Of course, Trinity Lutheran is free to continue operating as a church . . . . But that freedom comes at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified. And when the State conditions a benefit in this way, [the] State has punished the free exercise of religion . . . .

The Department contends that merely declining to extend funds to Trinity Lutheran does not *prohibit* the Church from engaging in any religious conduct or otherwise exercising its religious rights. In this sense, says the Department, its policy is unlike the ordinances struck down in *Lukumi*, which outlawed rituals central to Santeria. Here the Department has simply declined to allocate to Trinity Lutheran a subsidy the State had no obligation to provide in the first place. That decision does not meaningfully burden the Church's free exercise rights. And absent any such burden, the argument continues, the Department is free to heed the State's antiestablishment objection to providing funds directly to a church.

It is true the Department has not criminalized the way Trinity Lutheran worships or told the Church that it cannot subscribe to a certain view of the Gospel. But, as the Department itself acknowledges, the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." As the Court put it more than 50 years ago, "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner* (1963) [Chapter 17].

Trinity Lutheran is not claiming any entitlement to a subsidy. It instead asserts a right to participate in a government benefit program without having to disavow its religious character. The "imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights." *Sherbert*. The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church — solely because it is a church — to compete with secular organizations for a grant. Trinity Lutheran is a member of the community too, and the State's decision to exclude it for purposes of this public program must withstand the strictest scrutiny.

B

The Department attempts to get out from under the weight of our precedents by arguing that the free exercise question in this case is instead controlled by our decision in *Locke v. Davey*. It is not. In *Locke*, the State of Washington created a scholarship program to assist high-achieving students with the costs of postsecondary education. The scholarships were paid out of the State's general fund, and eligibility was based on criteria such as an applicant's score on college admission tests and family income. While scholarship recipients were free to use the money at accredited religious and non-religious schools alike, they were not permitted to use the funds to pursue a devotional theology degree — one "devotional in nature or designed to induce religious faith." *Id.* Davey was selected for a scholarship but was denied the funds when he refused to certify that he would not use them toward a devotional degree. He sued, arguing that the State's refusal to allow its scholarship money to go toward such degrees violated his free exercise rights.

This Court disagreed. It began by explaining what was *not* at issue. Washington's selective funding program was not comparable to the free exercise violations found in the "*Lukumi* line of cases," including those striking down laws requiring individuals to "choose between their religious beliefs and receiving a government benefit." *Id.* At the outset, then, the Court made clear that *Locke* was not like the case now before us.

Washington's restriction on the use of its scholarship funds was different. According to the Court, the State had "merely chosen not to fund a distinct category of instruction." *Id.* Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do* — use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is — a church.

The Court in *Locke* also stated that Washington's choice was in keeping with the State's antiestablishment interest in not using taxpayer funds to pay for the training of clergy; in fact, the Court could "think of few areas in which a State's antiestablishment interests come more into play." *Id.* The claimant in *Locke* sought funding for an "essentially religious endeavor"... and opposition to such funding "to support church leaders" lay at the historic core of the Religion Clauses. *Id.* Here nothing of the sort can be said about a program to use recycled tires to resurface playgrounds.

Relying on *Locke*, the Department nonetheless emphasizes Missouri's similar constitutional tradition of not furnishing taxpayer money directly to churches. But *Locke* took account of Washington's antiestablishment interest only after determining, as noted, that the scholarship program did not "require students to choose between their religious beliefs and receiving a government benefit." *Id.* As the Court put it, Washington's scholarship program went "a long way toward including religion in its benefits." *Id.* Students in the program were free to use their scholarships at "pervasively religious schools." Davey could use his scholarship to pursue a secular degree at one institution while studying devotional theology at another. *Id.* He could also use his scholarship money to attend a religious college and take devotional theology courses there. *Id.* The only thing he could not do was use the scholarship to pursue a degree in that subject.

In this case, there is no dispute that Trinity Lutheran *is* put to the choice between being a church and receiving a government benefit. The rule is simple: No churches need apply.[3]

C

The State in this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified. Our cases make clear that such a condition imposes a penalty on the free exercise of religion that must be subjected to the "most rigorous" scrutiny. *Lukumi v. Babalue Aye, Inc.*[4]

Under that stringent standard, only a state interest "of the highest order" can justify the Department's discriminatory policy. Yet the Department offers nothing more than Missouri's policy preference for skating as far as possible from religious establishment concerns. In the face of the clear infringement on free exercise before us, that interest cannot qualify as compelling. The State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far. The Department's policy violates the Free Exercise Clause.[5]

* * *

The consequence [of the policy of the Missouri Department of Natural Resources] is, in all likelihood, a few extra scraped knees. But the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.

The judgment of the United States Court of Appeals for the Eighth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring in part.

[This] Court's endorsement in *Locke* of even a "mil[d] kind" of discrimination against religion remains troubling. *See Locke v. Davey* (2004) (Scalia, J., dissenting) [*supra* this Chapter]. But because the Court today appropriately construes *Locke* narrowly, see Part III-B, *ante*, and because no party has asked us to reconsider it, I join nearly all of the Court's opinion. I do not, however, join footnote 3, for the reasons expressed by Justice Gorsuch, *post*, (opinion concurring in part).

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring in part.

Missouri's law bars Trinity Lutheran from participating in a public benefits program only because it is a church. I agree this violates the First Amendment and

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[3] This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.

[4] We have held that "a law targeting religious beliefs as such is never permissible." *Id.* We do not need to decide whether the condition Missouri imposes in this case falls within the scope of that rule, because it cannot survive strict scrutiny in any event.

[5] Based on this holding, we need not reach the Church's claim that the policy also violates the Equal Protection Clause.

I am pleased to join nearly all of the Court's opinion. I offer only two modest qualifications.

First, the Court leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious *status* and religious *use*. *See ante*. Respectfully, I harbor doubts about the stability of such a line. . . . Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission? The distinction blurs . . . when stared at too long . . . . Often enough the same facts can be described both ways.

Neither do I see why the First Amendment's Free Exercise Clause should care. After all, that Clause guarantees the free *exercise* of religion, not just the right to inward belief (or status). . . . Generally the government may not force people to choose between participation in a public program and their right to free exercise of religion. I don't see why it should matter whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way.

For these reasons, reliance on the status-use distinction does not suffice for me to distinguish *Locke v. Davey* (2004) [*supra* this Chapter]. In that case, this Court upheld a funding restriction barring a student from using a scholarship to pursue a degree in devotional theology. But can it really matter whether the restriction in *Locke* was phrased in terms of use instead of status (for was it a student who wanted a vocational degree in religion? or was it a religious student who wanted the necessary education for his chosen vocation?). If that case can be correct and distinguished, it seems it might be only because of the opinion's claim of a long tradition against the use of public funds for training of the clergy, a tradition the Court correctly explains has no analogue here.

Second and for similar reasons, I am unable to join the footnoted observation, *ante* n.3, that "[t]his case involves express discrimination based on religious identity with respect to playground resurfacing." Of course the footnote is entirely correct, but I worry that some might mistakenly read it to suggest that only "playground resurfacing" cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court's opinion. Such a reading would be unreasonable for our cases are "governed by general principles, rather than *ad hoc* improvisations." And the general principles here do not permit discrimination against religious exercise — whether on the playground or anywhere else.

JUSTICE BREYER, concurring in the judgment.

I agree with much of what the Court says and with its result. But I find relevant, and would emphasize, the particular nature of the "public benefit" here at issue.

The Court stated in *Everson v. Board of Ed. of Ewing* (1947) [Chapter 16], that "cutting off church schools from" such "general government services as ordinary police and fire protection . . . is obviously not the purpose of the First Amendment." Here, the State would cut Trinity Lutheran off from participation in a general program designed to secure or to improve the health and safety of children. I see no significant difference. . . . The sole reason advanced that explains the difference is faith. And it is that last-mentioned fact that calls the Free Exercise Clause into play. We need not go further. Public benefits come in many

shapes and sizes. I would leave the application of the Free Exercise Clause to other kinds of public benefits for another day.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

[This] case is about nothing less than the relationship between religious institutions and the civil government — that is, between church and state. The Court today profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church. Its decision slights both our precedents and our history, and its reasoning weakens this country's longstanding commitment to a separation of church and state beneficial to both.

I

Founded in 1922, Trinity Lutheran Church (Church) "operates . . . for the express purpose of carrying out the commission of . . . Jesus Christ as directed to His church on earth." *Our Story*, http://www.trinity-lcms.org/story. The Church uses "preaching, teaching, worship, witness, service, and fellowship according to the Word of God" to carry out its mission "to 'make disciples.' " *Mission Statement*, http://www.trinity-lcms.org/mission (quoting *Matthew* 28:18-20). The Learning Center serves as "a ministry of the Church and incorporates daily religion and developmentally appropriate activities into . . . [its] program." *Id.* In this way, "[t]hrough the Learning Center, the Church teaches a Christian world view to children of members of the Church, as well as children of non-member residents" of the area. *Id.* These activities represent the Church's "sincere religious belief" . . . to use [the Learning Center] to teach the Gospel to children of its members, as well to bring the Gospel message to non-members." *Id.*

II

Properly understood then, this is a case about whether Missouri can decline to fund improvements to the facilities the Church uses to practice and spread its religious views. This Court has repeatedly warned that funding of exactly this kind — payments from the government to a house of worship — would cross the line drawn by the Establishment Clause. *See, e.g.*, *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) [*infra* this Chapter]; *Mitchell v. Helms* (2000) (O'Connor, J., concurring in judgment) [Chapter 16]. So it is surprising that the Court mentions the Establishment Clause only to note the parties' agreement that it "does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program." *Ante*. Constitutional questions are decided by this Court, not the parties' concessions. The Establishment Clause does not allow Missouri to grant the Church's funding request because the Church uses the Learning Center, including its playground, in conjunction with its religious mission. The Court's silence on this front signals either its misunderstanding of the facts of this case or a startling departure from our precedents.

A

The government may not directly fund religious exercise. Put in doctrinal terms, such funding violates the Establishment Clause because it impermissibly "advances . . . religion."[1] *Agostini v. Felton* (1997) [Chapter 16].

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[1] Government aid that has the "purpose" or "effect of advancing or inhibiting religion" violates the Establishment Clause. *Agostini v. Felton* (1997). Whether government aid has such an effect turns on whether it "results in governmental indoctrination," "defines its

Nowhere is this rule more clearly implicated than when funds flow directly from the public treasury to a house of worship.[2] A house of worship exists to foster and further religious exercise. . . . Within its walls, worshippers gather to practice and reaffirm their faith. And from its base, the faithful reach out to those not yet convinced of the group's beliefs. When a government funds a house of worship, it underwrites this religious exercise.

[The] Church seeks state funds to improve the Learning Center's facilities, which, by the Church's own avowed description, are used to assist the spiritual growth of the children of its members and to spread the Church's faith to the children of nonmembers. The Church's playground surface — like a Sunday School room's walls or the sanctuary's pews — are integrated with and integral to its religious mission. The conclusion that the funding the Church seeks would impermissibly advance religion is inescapable.

True, this Court has found some direct government funding of religious institutions to be consistent with the Establishment Clause. But the funding in those cases came with assurances that public funds would not be used for religious activity, despite the religious nature of the institution. *See, e.g.*, *Rosenberger* (Souter, J., dissenting) (chronicling cases) [*infra* this Chapter]. The Church has not [provided] and cannot provide such assurances here. The Church has a religious mission, one that it pursues through the Learning Center. The playground surface cannot be confined to secular use any more than lumber used to frame the Church's walls, glass stained and used to form its windows, or nails used to build its altar.

B

The Court may simply disagree with this account of the facts and think that the Church does not put its playground to religious use. If so, its mistake is limited to this case. But if it agrees that the State's funding would further religious activity and sees no Establishment Clause problem, then it must be implicitly applying a rule other than the one agreed to in our precedents.

When the Court last addressed direct funding of religious institutions, in *Mitchell v. Helms*, it adhered to the rule that the Establishment Clause prohibits the direct funding of religious activities. At issue was a federal program that helped state and local agencies lend educational materials to public and private schools, including religious schools. *Id.* (plurality opinion). The controlling concurrence assured itself that the program would not lead to the public funding of religious activity. It pointed out that the program allocated secular aid, that it did so "on the basis of neutral, secular criteria," that the aid would not "supplant non-[program] funds," that "no . . . funds ever reach the coffers of religious schools," that "evidence of actual diversion is *de minimis*," and that the program had "adequate safeguards" to police violations. *Id.* (O'Connor, J., concurring in

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recipients by reference to religion," or "creates an excessive entanglement" between the government and religion. *Id.* (same considerations speak to whether the aid can "reasonably be viewed as an endorsement of religion").

[2] Because Missouri decides which Scrap Tire Program applicants receive state funding, this case does not implicate a line of decisions about indirect aid programs in which aid reaches religious institutions "only as a result of the genuine and independent choices of private individuals." *Zelman v. Simmons-Harris* (2002) [Chapter 16].

judgment). Those factors, it concluded, were "sufficient to find that the program . . . [did] not have the impermissible effect of advancing religion." *Id.*

A plurality would have instead upheld the program based only on the secular nature of the aid and the program's "neutrality" as to the religious or secular nature of the recipient. *See id.* [However,] the controlling concurrence rejected that approach. It viewed the plurality's test — "secular content aid . . . distributed on the basis of wholly neutral criteria" — as constitutionally insufficient. *Id.* (O'Connor, J., concurring in the judgment). This test, explained the concurrence, ignored whether the public funds subsidize religion, the touchstone of establishment jurisprudence.

Today's opinion suggests the Court has made the leap the *Mitchell* plurality could not. For if it agrees that the funding here will finance religious activities, then only a rule that considers that fact irrelevant could support a conclusion of constitutionality. The problems of the "secular and neutral" approach have been aired [in Justice Souter's dissent in *Mitchell*]. *See*, *e.g.*, *id.* (Souter, J., dissenting). It has no basis in the history to which the Court has repeatedly turned to inform its understanding of the Establishment Clause. It permits direct subsidies for religious indoctrination, with all the attendant concerns that led to the Establishment Clause. And it favors certain religious groups, those with a belief system that allows them to compete for public dollars and those well-organized and well-funded enough to do so successfully.

Such a break with precedent would mark a radical mistake. The Establishment Clause protects both religion and government from the dangers that result when the two become entwined, "*not* by providing every religion with an *equal opportunity* (say, to secure state funding or to pray in the public schools), but by drawing fairly clear lines of *separation* between church and state — at least where the heartland of religious belief, such as primary religious [worship], is at issue." *Zelman v. Simmons-Harris* (2002) (Breyer, J., dissenting) [Chapter 16].

III

Even assuming the absence of an Establishment Clause violation and proceeding on the Court's preferred front — the Free Exercise Clause — the Court errs. It claims that the government may not draw lines based on an entity's religious "status." But we have repeatedly said that it can. When confronted with government action that draws such a line, we have carefully considered whether the interests embodied in the Religion Clauses justify that line. The question here is thus whether those interests support the line drawn in Missouri's Article I, § 7, separating the State's treasury from those of houses of worship. They unquestionably do.

A

The Establishment Clause prohibits laws "respecting an establishment of religion" and the Free Exercise Clause prohibits laws "prohibiting the free exercise thereof." U.S. CONST. Amdt. 1. "[I]f expanded to a logical extreme," these prohibitions "would tend to clash with the other." *Walz v. Tax Comm'n* (1970). Even in the absence of a violation of one of the Religion Clauses, the interaction of government and religion can raise concerns that sound in both Clauses. For that reason, the government may sometimes act to accommodate those concerns, even when not required to do so by the Free Exercise Clause, without violating the Establishment Clause. And the government may sometimes act to accommodate those concerns, even when not required to do so by the Establishment Clause,

without violating the Free Exercise Clause. "[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* This space between the two Clauses gives government some room to recognize the unique status of religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws.

Invoking this principle, this Court has held that the government may sometimes relieve religious entities from the requirements of government programs. A State need not, for example, require nonprofit houses of worship to pay property taxes. . . . But the government may not invoke the space between the Religion Clauses in a manner that "devolve[s] into an unlawful fostering of religion." *Cutter v. Wilkinson* (2005).

Invoking this same principle, this Court has held that the government may sometimes close off certain government aid programs to religious entities. The State need not, for example, fund the training of a religious group's leaders . . . . It may instead avoid the historic "antiestablishment interests" raised by the use of "taxpayer funds to support church leaders." *Locke v. Davey* (2004) [*supra* this Chapter]. When reviewing a law that, like this one, singles out religious entities for exclusion from its reach, we thus have not myopically focused on the fact that a law singles out religious entities, but on the reasons that it does so.

B

Missouri has decided that the unique status of houses of worship requires a special rule when it comes to public funds. Its Constitution reflects that choice [as provided in Article I, Section 7.] Missouri's decision, which has deep roots in our Nation's history, reflects a reasonable and constitutional judgment.

1

This Court has consistently looked to history for guidance when applying the Constitution's Religion Clauses. Those Clauses guard against a return to the past, and so that past properly informs their meaning. . . . This Nation's early experience with, and eventual rejection of, established religion — shorthand for "sponsorship, financial support, and active involvement of the sovereign in religious activity" — defies easy summary. No two States' experiences were the same. In some a religious establishment never took hold. In others establishment varied in terms of the sect (or sects) supported, the nature and extent of that support, and the uniformity of that support across the State. Where establishment did take hold, it lost its grip at different times and at different speeds. *See* T. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 510-11 (1970).

Despite this rich diversity of experience, the story relevant here is one of consistency. The use of public funds to support core religious institutions can safely be described as a hallmark of the States' early experiences with religious establishment. Every state establishment saw laws passed to raise public funds and direct them toward houses of worship and ministers. And as the States all disestablished, one by one, they all undid those laws.[5]

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[5] This Court did not hold that the Religion Clauses applied, through the Fourteenth Amendment, to the States until the 1940's. *See Cantwell v. Connecticut* (1940) (Free Exercise Clause); *Everson v. Board of Ed. of Ewing* (1947) (Establishment Clause). When the States dismantled their religious establishments, as all had by the 1830's, they did so on

Those who fought to end the public funding of religion based their opposition on a powerful set of arguments, all stemming from the basic premise that the practice harmed both civil government and religion. The civil government, they maintained, could claim no authority over religious belief. For them, support for religion compelled by the State marked an overstep of authority that would only lead to more. Equally troubling, it risked divisiveness by giving religions reason to compete for the State's beneficence. Faith, they believed, was a personal matter, entirely between an individual and his god. Religion was best served when sects reached out on the basis of their tenets alone, unsullied by outside forces, allowing adherents to come to their faith voluntarily. Over and over, these arguments gained acceptance and led to the end of state laws exacting payment for the support of religion. . . .

The course of this history shows that those who lived under the laws and practices that formed religious establishments made a considered decision that civil government should not fund ministers and their houses of worship. To us, their debates may seem abstract and this history remote. That is only because we live in a society that has long benefited from decisions made in response to these now centuries-old arguments, a society that those not so fortunate fought hard to build.

2

In *Locke*, this Court expressed an understanding of, and respect for, this history. *Locke* involved a provision of the State of Washington's Constitution that, like Missouri's nearly identical Article I, § 7, barred the use of public funds for houses of worship or ministers. Consistent with this denial of funds to ministers, the State's college scholarship program did not allow funds to be used for devotional theology degrees. When asked whether this violated the would-be minister's free exercise rights, the Court invoked the play in the joints principle and answered no. The Establishment Clause did not require the prohibition because "the link between government funds and religious training [was] broken by the independent and private choice of [scholarship] recipients." Nonetheless, the denial did not violate the Free Exercise Clause because a "historic and substantial state interest" supported the constitutional provision. The Court could "think of few areas in which a State's antiestablishment interests come more into play" than the "procuring [of] taxpayer funds to support church leaders." *Id.*

The same is true of this case, about directing taxpayer funds to houses of worship. Like the use of public dollars for ministers at issue in *Locke*, turning over public funds to houses of worship implicates serious antiestablishment and free exercise interests. The history just discussed fully supports this conclusion. As states disestablished, they repealed laws allowing taxation to support religion because the practice threatened other forms of government support for, involved some government control over, and weakened supporters' control of religion. Common sense also supports this conclusion. Recall that a state may not fund religious activities without violating the Establishment Clause. *See* Part II-A, *supra*. A state can reasonably use status as a "house of worship" as a stand-in for "religious activities." Inside a house of worship, dividing the religious from the secular would require intrusive line-drawing by government, and monitoring those

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their own accord, in response to the lessons taught by their experiences with religious establishments.

lines would entangle government with the house of worship's activities. . . . Finally, and of course, such funding implicates the free exercise rights of taxpayers by denying them the chance to decide for themselves whether and how to fund religion. If there is any " 'room for play in the joints' between" the Religion Clauses, it is here.

As was true in *Locke*, a prophylactic rule against the use of public funds for houses of worship is a permissible accommodation of these weighty interests. The [Missouri] rule has a historical pedigree identical to that of the [Washington] provision in *Locke*. Almost all of the States that ratified the Religion Clauses [in 1791] operated under this rule. . . . Today, thirty-eight States have a counterpart to Missouri's Article I, § 7. [Footnoted lists of the referenced States are omitted.] [That] so many States have for so long drawn a line that prohibits public funding for houses of worship, based on principles rooted in this Nation's understanding of how best to foster religious liberty, supports the conclusion that public funding of houses of worship "is of a different ilk." *Locke v. Davey*.

And as in *Locke*, Missouri's Article I, § 7, is closely tied to the state interests it protects. A straightforward reading of Article I, § 7, prohibits funding only for "any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such." The Missouri courts have not read the State's Constitution to reach more broadly, to prohibit funding for other religiously affiliated institutions, or more broadly still, to prohibit the funding of religious believers. . . . Article I, § 7, thus stops Missouri only from funding specific entities, ones that set and enforce religious doctrine for their adherents. These are the entities that most acutely raise the establishment and free exercise concerns that arise when public funds flow to religion.

Missouri has recognized the simple truth that, even absent an Establishment Clause violation, the transfer of public funds to houses of worship raises concerns that sit exactly between the Religion Clauses. To avoid those concerns, and only those concerns, it has prohibited such funding. In doing so, it made the same choice made by the earliest States centuries ago and many other States in the years since. The Constitution permits this choice.

3

[The] Constitution creates specific rules that control how the government may interact with religious entities. And so of course a government may act based on a religious entity's "status" as such. It is that very status that implicates the interests protected by the Religion Clauses. Sometimes a religious entity's unique status requires the government to act. Other times, it merely permits the government to act. In all cases, the dispositive issue is not whether religious "status" matters — it does, or the Religion Clauses would not be at issue — but whether the government must, or may, act on that basis.

Start where the Court stays silent. Its opinion does not acknowledge that our precedents have expressly approved of a government's choice to draw lines based on an entity's religious status. Those cases did not deploy strict scrutiny to create a presumption of unconstitutionality, as the Court does today. Instead, they asked whether the government had offered a strong enough reason to justify drawing a line based on that status.

The Court takes two steps to avoid these precedents. First, it recasts *Locke* as a case about a restriction that prohibited the would-be minister from "us[ing] the funds to prepare for the ministry." *Ante*. A faithful reading of *Locke* gives it a

broader reach. *Locke* stands for the reasonable proposition that the government may, but need not, choose not to fund certain religious entities (there, ministers) where doing so raises "historic and substantial" establishment and free exercise concerns. *Id.* Second, it suggests that this case is different because it involves "discrimination" in the form of the denial of access to a possible benefit. *Ante*. But in this area of law, a decision to treat entities differently based on distinctions that the Religion Clauses make relevant does not amount to discrimination. To understand why, keep in mind that "the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." *Wallace v. Jaffree* (1985) [Chapter 16]. If the denial of a benefit others may receive is discrimination that violates the Free Exercise Clause, then the accommodations of religious entities we have approved would violate the free exercise rights of nonreligious entities. We have, with good reason, rejected that idea and instead focused on whether the government has provided a good enough reason, based in the values the Religion Clauses protect, for its decision. [A] State's decision not to fund houses of worship does not disfavor religion; rather, it represents a valid choice to remain secular in the face of serious establishment and free exercise concerns. . . .

Justice Breyer's concurrence offers a narrower rule that would limit the effects of today's decision, but that rule does not resolve this case. Justice Breyer, like the Court, thinks that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order," *ante* (majority opinion). *See ante* (Breyer, J., concurring in judgment). Few would disagree with a literal interpretation of this statement. To fence out religious persons or entities from a truly generally available public benefit — one provided to all, no questions asked, such as police or fire protections — would violate the Free Exercise Clause. This explains why Missouri does not apply its constitutional provision in that manner. Nor has it done so here. The Scrap Tire Program offers not a generally available benefit but a selective benefit for a few recipients each year. In this context, the comparison to truly generally available benefits is inapt.

On top of all of this, the Court's application of its new rule here is mistaken. In concluding that Missouri's Article I, § 7, cannot withstand strict scrutiny, the Court describes Missouri's interest as a mere "policy preference for skating as far as possible from religious establishment concerns." *Ante*. The constitutional provisions of thirty-nine States — all but invalidated today — the weighty interests they protect, and the history they draw on deserve more than this judicial brush aside.[14] Today's decision discounts centuries of history and jeopardizes the government's ability to remain secular. . . .

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[14] In the end, the soundness of today's decision may matter less than what it might enable tomorrow. The principle it establishes can be manipulated to call for a similar fate for lines drawn on the basis of religious use. *See ante* (Gorsuch, J., concurring in part); *see also ante* (Thomas, J., concurring in part) (going further and suggesting that lines drawn on the basis of religious status amount to *per se* unconstitutional discrimination on the basis of religious belief). It is enough for today to explain why the Court's decision is wrong. The error of the concurrences' hoped-for decisions can be left for tomorrow. . . .

IV

The Religion Clauses of the First Amendment contain a promise from our government and a backstop that disables our government from breaking it. The Free Exercise Clause extends the promise. We each retain our inalienable right to "the free exercise" of religion, to choose for ourselves whether to believe and how to worship. And the Establishment Clause erects the backstop. Government cannot, through the enactment of a "law respecting an establishment of religion," start us down the path to the past, when this right was routinely abridged.

The Court today dismantles a core protection for religious freedom provided in these Clauses. It holds not just that a government may support houses of worship with taxpayer funds, but that — at least in this case and perhaps in others, *see ante* n.3 — it must do so whenever it decides to create a funding program. History shows that the Religion Clauses separate the public treasury from religious coffers as one measure to secure the kind of freedom of conscience that benefits both religion and government. If this separation means anything, it means that the government cannot, or at the very least need not, tax its citizens and turn that money over to houses of worship. The Court today blinds itself to the outcome this history requires and leads us instead to a place where separation of church and state is a constitutional slogan, not a constitutional commitment. I dissent.

## Note: Tensions Between the Religion Clauses and Among the Justices

**1.** This case challenged the Justices to reconcile the Establishment Clause with the Free Exercise Clause. These opinions challenge us, in turn, to do the same. Notice how the majority opinion emphasizes the Free Exercise Clause and how the dissenting opinion emphasizes the Establishment Clause. Can you articulate the "play in the joints" principle? Do the Justices disagree on the meaning of that principle or on its application to the facts of this case?

**2.** How does the majority understand the *Locke v. Davey* precedent differently than the dissent? Can you reconcile this holding with that precedent? Does the majority's move to focus on religious discrimination mean that Justice Scalia's dissent in *Locke v. Davey* has prevailed? Is that case limited to church uses of funds that are religious in nature, i.e., studying for the clergy? Are you persuaded by the dissent that the grant here is being put to a religious use of a like nature? Do you think that the dissent is correct that "[t]he Court may simply disagree with [the dissent's] account of the facts and think that the Church does not put its playground to religious use"?

**3.** Chief Justice Roberts drops footnote 3. One wonders why, because that makes Justice Thomas and Justice Gorsuch immediately defect to explicitly disapprove of that footnote in their separate concurring opinions; Justice Breyer does not join the opinion but concurs only in the judgment; Justice Sotomayor, joined by Justice Ginsburg, also takes exception to footnote 3. Therefore, counting Supreme Court noses, there are only four votes in favor and there are five votes seemingly opposed to this observation in footnote 3: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." What future applications of the Religion Clauses are the Justices quarrelling about when they stake out these positions about a two-sentence footnote without a citation?

**4.** Justice Sotomayor's dissent puts down an Establishment Clause marker to express her strong concerns for the long term separation of church and state. She is apprehensive that a majority of the Court has now endorsed the approach the plurality opinion took in *Mitchell v. Helms* (2000) (Chapter 16) to push the constitutional envelope. That approach was rejected by a majority of the Justices in that case — Justice O'Connor, joined by Justice Breyer, concurred in the judgment and Justice Souter, joined by Justices Stevens and Ginsburg, dissented. Is she right? Is the Missouri Scrap Tire Program grant to Trinity Lutheran Church "a direct payment to a house of worship"?

Justice Sotomayor believes that the grant to resurface the Church's playground violates the Establishment Clause under the *Lemon-Agostini* Test (*See* Chapter 16, Note: What is the Test as Modified?). Do you agree? She also observes that — to make matters constitutionally worse — the funding here is paid directly to the Church without the kind of Establishment Clause circuit-breaker that was involved in the school-voucher case in which the government financial aid was paid to parents who then independently decided to enroll their children in the parochial schools. *See Zellman v. Simmons-Harris* (2002) (Chapter 16).

What do you think about Justice Sotomayor's ultimate concerns for the future of the separation of church and state? We will have to wait and see if this decision has such far-reaching implications, but these opinions nicely illustrate the themes of this Chapter and how the Religion Clauses are so complexly interrelated.

**Page 1088:** ***add new Problem after the Problem:***

## Problem: Religious Holy Days or School Holidays?

*Suppose you are the attorney for the Mount Zion Independent School District. Read this redacted transcript of a public hearing of the elected school board to understand your assignment and how best to proceed:*

*Superintendent Solomon*: Agenda Item #6: The School Board has before it a petition signed by 72 current students and their parents to add two Muslim holidays to the official school calendar. Specifically, the petition requests that the Festival of the Sacrifice ("Eid al-Adha") and the Festival of the Breaking of the Fast ("Eid al-Fitr") be recognized along with the existing Jewish and Christian holidays for which the public schools are closed. The Festival of the Sacrifice honors the willingness of Abraham to sacrifice his only son Isaac as an act of submission to the will of God, before God intervened through an angel to accept Abraham's willingness as itself a sufficient sacrifice. The Breaking of the Fast is the day on which Muslims worldwide celebrate the end of Ramadan, the holy month of fasting. According to the petition, these two holy days are sacred to the tradition of Islam and central to the practice of that faith. By notice at the Board's previous meeting, this matter was set for a public hearing at this meeting. [Among the public comments were the following representative statements.]

*Imam Isa Fakhri*: I am the organizer of this petition and I collected the signatures at our local mosque. I will be brief. The petition makes our case and justifies our cause. Admittedly, our Muslim community is small. Only about 2% of the student population in the District are Sunni Muslims. But we hold our holy days as sacred as our brothers and sisters who also are children of Abraham. Jewish and Christian holy days are officially acknowledged and respected. If the District respects their holy days, it must afford the holy days of Islam an equal

dignity and respect. The two holy days we seek to have recognized in the official school calendar are held sacred by all devout Muslims. There can be no doubting either our sincerity or the religious importance of these two holy days. Allah be praised!

*Rabbi Tam Nogah*: Tradition. The Old Testament tradition and the New Testament tradition — the Judeo-Christian covenant — of our Nation is longstanding and enduring. So too in our local community. We fear that if the camel is allowed to poke its nose under the tent then the rest of the beast soon will follow. What's next? Student recesses to answer the *Adhan* call to prayer six times a day? *Halal* cafeteria food? *Wudu* footbaths in homeroom? No! I attended our public schools and my three children are current students and we still practice our religion. What was good enough for Moses is good enough for me and my kids. The *status quo ante*. You should leave the calendar alone. Shalom Aleichem!

*Lissette Trask*: I am a Universalist Unitarian minister. Our local congregation includes: Atheists, Agnostics, Buddhists, Christians, Earth-Centered Worshipers (Pagans, Wiccans, Druids, and Goddess Spirituality), Hindus, Humanists, even Jews and Muslims. We are America's religion! I think this is a wonderful opportunity for educating our children in religious tolerance. We should follow the approach of the Ann Arbor School District — you can *google* it. Each and every religion's major holy days are entered on the calendar and students and teachers of that religious persuasion are allowed a corresponding school holiday. The religious denomination designates the holidays of observance for their members. On those days, the school district refrains from scheduling: exams; standardized tests; tryouts for extra-curricular activities like teams and plays; and important one-time events like proms, graduation, homecoming, student elections, etc. Regular classes and meetings and athletic practices are allowed, however, so the schools are not closed down for others. The calendar should be religiously all-inclusive and spiritually affirming. There are multiple calendared holidays in every month, for example, in December there are Hanukkah (Jewish); Bodhi Day (Buddhist); Yule (Wicca); Mawlid an Nabi (Islam); Christmas (Christian); and Zarathosht Diso (Zoroastrian). And every month of the school year is another beautiful mosaic of sacred beliefs. Three cheers for religious diversity!

*Irvin Barry*: These people are potential terrorists. I don't want them here. You can't tell the difference between a peaceful Muslim and a Radical Islamist. Don't make it easy for some sleeper cell to come alive and do us harm. Deny this petition and hope they all move to Dearborn where they have already taken over the town. Good riddance. And God Bless America!

*Sharon Norbury*: I represent the local chapter of the American Federation of Teachers. The AFT supports this petition on behalf of our Muslim teachers. They should not have to take an unpaid leave day to stay home and observe their holy days when their Jewish and Christian colleagues get paid leave for their holy days when the schools are closed. Fair is fair.

*Dennis Taylor*: I am a taxpayer and a parent and a lawyer. Any student of history has got to believe in the separation of Church and State for the sake of protecting the state from being commandeered by fanatics and zealots. Rather than make the situation worse, the District should remove any and all religious labels from its official calendar. The public schools belong to all of us. Parents and children of all faiths and creeds as well as parents like me and my children who have rejected the three Semitic religions as Iron Age superstitions. No Christian

holidays. No Jewish holidays. No Muslim holidays. No endorsement of any religion. No endorsement of religion over nonreligion. On religious holidays when there will be a significant percentage of student absences, the schools can be closed for that reason, if and only if the statistics demonstrate sufficient empirical evidence. Cost saving is a neutral justification. This is the 21st century. The United States is religiously diverse, admittedly, but the trend is against superstition and magical thinking. The so-called "nones" — Americans who do not identify with any religion — a label I myself wear proudly — are growing in numbers each year. Religion's hold over people is loosening as Jefferson predicted. The government should stand by and allow religion simply to fade away. Not prop it up. We will all be better off without it. Even those who don't know better.

*Ellsworth Farrow*: I am an empty-tomb Christian, a disciple of our Lord and Savior Jesus Christ. The separation of Church and State is supposed to protect the Church from the State — protecting the garden against the wilderness, as Roger Williams originally proclaimed in the 1600s. Jefferson had it backwards! For the School Board to secularize its official calendar now and replace Christmas, Passover, Yom Kippur, and Easter with a "Winter Break" and a "Spring Break" would be to establish a profane religion of secularism. It would be an act of government hostility to religion that is forbidden by the Constitution. The compulsory education laws and the tax-subsidized public schools amount to a religion-free zone that threatens the salvation of our children and the future of our Christian Nation. The efforts by devout, God-fearing parents to inculcate religion into their children's lives is their solemn religious duty. It deserves respect and demands accommodation from the public schools. Don't make things worse than those atheists and agnostics on the Supreme Court already have.

*Action*: After further debate, upon a motion duly seconded: further consideration of this petition is tabled until the next regular meeting. In the meantime, the Board unanimously voted to request a legal opinion from the Board's attorney evaluating the following options: (1) maintain the current calendar; (2) add the Muslim holidays to the current calendar; (3) eliminate all religious holiday references from the calendar and replace them with nonreligious labels such as "Thanksgiving," "Winter holiday," and "Spring holiday" that would coincide with major religious holidays when student absences would be predicted to exceed 10% of enrolled students — based on student censuses and current estimates these renamed secular holidays would include only: Good Friday, Easter, Christmas, Rosh Hashanah, Yom Kippur, and Passover but not the two Muslim holidays in the petition; (4) adopt the Ann Arbor, Michigan ecumenical calendar described in the statement above by the Unitarian minister, *see Ann Arbor Public Schools Religious Holiday Calendar*, *available at* http://www.a2schools.org/Page/7795.

## C. Religious Speech

**Page 1110:** ***add new Problems after the Problem:***

### Problem: Protesting to the Congregation

You are a cooperating attorney for the local chapter of the American Civil Liberties Union. You represent the members of the Survivors Network of those Abused by Priests (SNAP). SNAP members regularly picket and distribute pamphlets outside Catholic parish churches during the weekly masses. They target parishes in the metropolitan area at which priests allegedly sexually abused

children in the past. The organization reaches out to victims who may have been physically, emotionally, and sexually abused with the message that they are not alone and that they have legal recourse in the courts against the predator priests and the archdiocese. Recent SNAP Sunday demonstrations on public sidewalks outside Catholic churches have been disbanded by police officers under the threat of this new city ordinance:

> § 3:16. House of Worship Protection
>
> (1) For purposes of this section, "house of worship" means any church, synagogue, mosque, other building or structure, or public or private place used for religious worship, religious instruction, or other religious purpose.
>
> (2) A person commits the crime of disrupting a house of worship if such person:
>
> a. Intentionally and unreasonably disturbs, interrupts, or disquiets any house of worship by using profane discourse, rude or indecent behavior, or making noise either within the house of worship or so near it as to disturb the order and solemnity of the worship services; or
>
> b. Intentionally injures, intimidates, or interferes with or attempts to injure, intimidate, or interfere with any person lawfully exercising the right of religious freedom in or outside of a house of worship or seeking access to a house of worship, whether by force, threat, or physical obstruction.
>
> (3) Disrupting a house of worship is a class B misdemeanor. Any subsequent offense is a class A misdemeanor.

SNAP wants to continue its outreach and protests. Rather than have its members arrested and face criminal prosecution, SNAP wants you to bring a lawsuit asking for declaratory and injunctive relief challenging the ordinance on its face. Outline a complaint raising any and all First Amendment challenges to this ordinance. What is the likelihood that your challenge will succeed?

## Problem: Football Helmet Decal Controversy

**ASU Email System Message — "*Go Red Wolves!*"**

**To: L. W. Student, Legal Intern**

**From: T. E. Baker, Vice President and General Counsel, Arkansas State University**

Welcome! It is good to have you as a legal intern in our Office of the University General Counsel this semester. Give this assignment your best effort. It is important. Prepare a memorandum on the First Amendment issues in the controversy over the cross decal that the football team is wearing on their helmets. I need this first thing Monday.

As you know, two members of the football team, Maurice Oswalt and Bubba Wilson, were tragically killed in an automobile accident during the summer. To honor their memory, the team members met together without the coaches being present and voted unanimously to adopt a team helmet decal of a white cross with the initials of the victims ("MO" & "BW") on a red background. The student-

athletes designed the decals, paid for them with their own funds, and placed them on their own individual helmets. All of them — no one objected. The coaches approved of this gesture of respect, but were not otherwise involved. They reported it to the Athletic Director ("AD") who took no action.

The first home game was televised on ESPN and the commentators gave considerable attention to the helmet decals commemorating the memory of the deceased players. The next week, the AD received letters from the American Civil Liberties Union of Arkansas — I did not know there was such a thing — and an out-of-state group called the Freedom From Religion Foundation. Both letters were written by the legal counsel of the respective organizations. Both letters objected to a religious symbol appearing on the helmets of a team at a state university and threatened litigation in federal court. The AD told the coaches to order the players to remove the decals for the next game. Apparently, almost all of our players are members of the Fellowship of Christian Athletes, and they contacted that organization to complain. In response, the legal counsel of that organization also wrote the AD and threatened a lawsuit on behalf of the players against the University. So now we are caught between opposing threats of litigation raising the Establishment Clause, the Free Exercise Clause, and the Free Speech Clause — no matter what we do about the decals we are likely going to be sued.

Here's the thing: I myself do not see why this is a big deal, but that is the world we live in. The President is concerned, however, and that concerns me. I do not want to get stuck with a summary judgment against the University and a big award of attorney's fees — either way this plays out. Summarize the law and help me find a way out of this so we can go back to just playing football and stop playing constitutional law *gotcha*.

FYI, here is a picture of the helmet decal:


## Problem: "Whom Do I Arrest?"

You are the County Attorney for Zion County. It is Saturday afternoon. When you check your voicemail, you hear this message from the Sheriff of the county:

> Hey Counsel. This is Sheriff Rick Grimes. Where the hell are you? You need to answer your phone! We have a situation. This is the weekend of the annual Arab Heritage and Cultural Festival

> downtown at City Park. A bunch of yahoos from out of town are walking around provoking the sponsors and the attendees. Call me back right away: 555-4720.

You are familiar with the festival because you worked on the official permitting and you attended last year. Zion County is home to one of the largest populations of Arab Americans in the country comprised of both Christian and Muslim families from several Arab nations. Now in its tenth year, the festival occupies the entire City Park and is free and open to the public. The festival features Middle Eastern food, music, artisan booths, cultural performances and music, and other amusements, including carnival rides. A principal purpose of the festival is to promote cultural exchange. The largest gathering of its kind in the United States, the festival attracts people from all over; last year more than 300,000 people attended over the course of three days.

When you call back the Sheriff, he briefs you over the phone on the situation as follows:

- A group of about twelve self-described Christian evangelicals who called themselves "Bible Followers" showed up this morning.
- The founder and leader of the group, Reverend Gabriel Stokes, announced that he and his followers were there "to convert non-believers and to call sinners to repent."
- The Bible Followers wore tee-shirts and carried posters and signs with messages such as: "Islam Is a Religion of Blood and Murder," "Jesus Is the Way, the Truth, and the Life. All Others Are Thieves and Robbers," "Only Jesus Christ Can Save You from Sin and Hell," "Turn or Burn," and "Fear God."
- One of the Bible Followers carried a severed pig's head on a spike, because, in Reverend Stokes's own words, it would "keep the Muslims at bay" since "they are kind of petrified of that animal."
- At first, few festival attendees paid much attention other than to wonder curiously at the odd assembly following around a man carrying the head of a pig on a pole.
- Then Reverend Stokes began street preaching to the crowd using a megaphone: he hollered that they should not follow "a false prophet," who was nothing but a "liar and an imposter" and "a wicked pedophile" and he yelled at a large group of passing teenagers that "your religion will send you to hell."
- When a crowd of about fifty to a hundred onlookers formed, he taunted, "You believe in a prophet who is a pervert. Your prophet was a child molester," and "God will reject you. God will put your religion into hellfire when you die."
- After approximately ten minutes of this harangue, some elements of the crowd began to express their anger by throwing bottles and rocks at the Bible Followers but stopped when several deputies threatened them with arrest for assault and battery.
- A number of small confrontations formed between members of the larger crowd of onlookers, which had continued to grow, and individual Bible Followers.

- Some of these small confrontations quickly turned into angry shouting and cursing face-offs with a few individuals on each side actually pushing and shoving each other and sympathizers pulling them apart but there were no actual fisticuffs or personal injury.
- At this point, the deputies physically separated the opposing groups.
- The deputies took the Bible Followers aside and warned them that the deputies could no longer protect them from the larger crowd and strongly urged them to leave for their own safety and for the safety of the deputies.
- The Bible Followers eventually, but reluctantly, agreed to leave but they defiantly vowed to return tomorrow to attend the closing ceremony of the festival and continue their proselytizing.
- As he was leaving, Reverend Stokes pointedly warned the deputies that tomorrow they had better be prepared to protect his followers and their constitutional rights to free speech and free exercise "no matter what" and he promised they would record videos of everything that happens.
- One of the planners of the festival, a leader in the Arab community, called the Sheriff and advised him that the events of the day had galvanized many of the Arab youths in the community, particularly some of the Muslim teenagers, who were all over social media urging each other to attend the closing ceremony and vowing to confront the Bible Followers physically if they returned and continued to disrespect Islam and defame the Prophet Mohammed.

At the end of his briefing, the Sheriff tells you, "I assigned some of my best and most experienced deputies to the festival. As many deputies as were detailed when the presidential candidates came to town. My deputies do not believe they can maintain order. They believe that a lot of people are going to get seriously hurt tomorrow. And I think they are right. Realistically, we cannot arrest hundreds of festival attendees, but we can arrest a dozen outside agitators easily enough. So, if the Bible Followers show up and if they start acting out again to provoke our Muslim neighbors, we are planning on arresting them for disorderly conduct. Before things get out of control."

What do you tell the Sheriff?