

2017 SUPPLEMENT

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The First Amendment Cases, Problems, and Materials Fifth Edition

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Chapter 2

Advocacy of Illegal Action

On page 57, insert a new problem # 9 at the end of the problems:

9. *Get 'Em Outta Here.* A Kentucky statute provides that a plaintiff may recover for injuries suffered as a result of a defendant's violation of a criminal statute. The crime of incitement to riot occurs when a person "incites or urges five or more persons to create or engage in a public disturbance which by tumultuous or violent conduct creates grave danger of damage or injury to persons or property." Assume that the term "incites" may include an act of "provoking, urging on, or stirring up." During a Trump campaign rally in Louisville on March 1, 2016, the presence of anti-Trump protesters was noticed by then candidate Donald Trump. Videos of the rally captured the conduct of Trump who stopped his speech and stated repeatedly, "Get 'em outta here." Several anti-Trump protesters were shoved, pushed, struck and punched by members of the crowd as they were driven out of the forum. Trump also stated, "Don't hurt 'em. If I say 'go get 'em,' I get in trouble with the press . . ." Three injured protesters file a civil action against Donald Trump and the Trump Campaign for damages based on the cause of action of incitement to riot. Counsel for defendant argues that Trump did not commit incitement to riot because he was not addressing the crowd and did not intend for violence to occur. Counsel also argues that his speech was protected under the First Amendment. What pro and con arguments can be made regarding the First Amendment issues? See *Nwanguma v. Trump*, 2017 WL 1234152 (W.D. Ky., Mar. 31, 2017).

Chapter 4

Content-Based Speech Restrictions: Post-Chaplinsky Categorical Exclusions

A. “Offensive” Speech

On p. 185, before problem # 6, insert the following new note, and renumber the remaining problems beginning with the # 1:

Note

In *Matal v. Tam*, 137 S. Ct. 1744 (2017), in a trademark case in which petitioner tried to trademark his band’s name, “The Slants.” The Patent and Trademark Office (PTO) declined to register the name, relying on a provision of federal law that allowed the PTO to reject a trademark that might “disparage or bring into contempt or disrepute” any “persons living or dead.” The Court struck down the law on the basis that it violated the Free Speech Clause because it offended “a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.” The Court explained:

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.” *Street v. New York*, 394 U. S. 576, 592 (1969). See also *Texas v. Johnson*, 491 U. S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46 (1988); *Coates v. Cincinnati*, 402 U. S. 611 (1971); *Bachellar v. Maryland*, 397 U. S. 564 (1970); *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969); *Cox v. Louisiana*, 379 U. S. 536 (1965); *Edwards v. South Carolina*, 372 U. S. 229 (1963); *Terminiello v. Chicago*, 337 U. S. 1 (1949); *Cantwell v. Connecticut*, 310 U. S. 296 (1940); *Schneider v. State (Town of Irvington)*, 308 U. S. 147 (1939); *De Jonge v. Oregon*, 299 U. S. 353 (1937).

Justice Kennedy, joined by three other justices, authored a concurring opinion:

§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. The viewpoint discrimination rationale renders unnecessary any extended treatment of other questions raised by the parties.

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*, 559 U. S. 460 (2010). 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 v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995).

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*, 576 U. S. ___, ___ (2015) (slip op., at 12). This category includes a subtype of laws that go further, aimed at the suppression of “particular views on a subject.” *Rosenberger*, 515 U. S., at 829. A law found to discriminate based on viewpoint is an “egregious form of content discrimination,” which is “presumptively unconstitutional.” *Id.*, at 829–830.

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. See *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788 (1985). 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 argues 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, supra*, at ___–___ (slip op., at 11–12), 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 assumes that respondent’s mark is a negative comment. 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.

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, 566 (2011). 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. See *Bolger v. Youngs*

Drug Products Corp., 463 U. S. 60 (1983).

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*, 250 U. S. 616, 630 (1919) (dissenting opinion), 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. Nonprofit organizations—ranging from medical-research charities and other humanitarian causes to political advocacy groups—also have trademarks, which they use to compete in a real economic sense for funding and other resources as they seek to persuade others to join their cause. To permit viewpoint discrimination in this context is to permit Government censorship.

This case does not present the question of how other provisions of the Lanham Act should be analyzed under the First Amendment. It is well settled that to the extent a trademark is confusing or misleading the law can protect consumers and trademark owners. This case also does not involve laws related to product labeling or otherwise designed to protect consumers. These considerations, however, do not alter the speech principles that bar the viewpoint discrimination embodied in the statutory provision at issue here.

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. See *Legal Services Corporation v. Velazquez*, 531 U. S. 533 (2001). 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, 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,” *Velazquez, supra*, at 542.

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.

B. “Hate” Speech

On p. 209, at the end of existing problem # 7, insert the following:

If you believe that the Gayssot law is constitutional, could Congress also pass a law making it a crime to deny that the Turks committed genocide in Armenia?

On p. 210, insert a new problem # 8 that reads as follows, and then renumber the remaining problems:

8. *More on Sexual Harassment.* Some civil rights groups (e.g., FIRE (Foundation for Individual Rights in

Education)), complained about what they regarded as Obama administration “overreaching” in areas involving free expression. In particular, concerns have been raised regarding an expansion of “sexual harassment” to include “cruel jokes” rather than focusing on the more limited definition articulated by the U.S. Supreme Court in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) (in order to qualify as “harassment,” conduct must be “so severe, pervasive and objectively offensive, that the victim-students are effectively denied access to an institution’s resources and opportunities”). Is it/should it be permissible under the First Amendment to define sexual harassment broadly enough to include a joke?

On p. 210, at the end of the problems, insert a new problem # 11 and renumber the remaining problem:

11. *Facebook Posts and Criminal Convictions*. Defendant is charged with illegal firearm possession as well as possession of crack cocaine with intent to distribute. At his trial, the prosecution seeks to introduce a Facebook video that defendant posted which contained the following lyrics: Real thugz ‘bout dat, get at me. Bang, bang!!!!!!!!!!!!!!” The gun that was found in defendant’s vehicle (on which the firearms charge was based) had a fingerprint which corresponded to the way defendant held the gun in the video, and the prosecution felt that it helped show “knowing possession.” Would it violate defendant’s First Amendment rights to admit the video against him? See *United States v. Rembert*, (8th Cir. 2017).

C. True Threats

On p. 220, at the end of note # 2, add the following new paragraph:

On remand, Elonis’ conviction was reinstated. See *United States v. Elonis*, 841 F.3d 589 (3rd Cir. 2016). The court held that, if “If a defendant transmits a communication for the purpose of issuing a threat or with knowledge that the recipient will view it as a threat, and a jury determines that communication is objectively threatening, then the defendant has violated Section 875(c) whether or not he agrees the communication was objectively threatening.” The court reinstated the conviction, concluding that the error in the original jury instruction was “harmless.”

On p. 225, insert a new problem # 11 that reads as follows, and renumber the following problems:

11. *More Online (and Other) Threats Against President Obama*. When President Obama is going to give a speech in his city, a man posts on Facebook that he intends to kill the President and he makes similar statements to a number of people. When charged, he claims that his threat could not have been taken as a “true threat” because he did not have a ticket to the Obama event, had no weapon other than a slingshot, and freely discussed his plan with others who had the power to stop him. Is there a “true threat” against the President so that conviction is appropriate? See *United States v. Dutcher*, (7th Cir. 2017).

On p. 286, problem # 3, following the “See” in the citation, insert the following:

United States v. Swisher, 811 F.3d 299 (9th Cir. 2016) (en banc);

G. Commercial Speech

On p. 310, insert a new note # 4 that reads as follows, and renumber the following notes:

4. In *Matal v. Tam*, 137 S. Ct. 1744 (2017), in a trademark case in which petitioner tried to trademark his band’s name, “The Slants.” The Patent and Trademark Office (PTO) declined to register the name, relying on a provision of federal law that allowed the PTO to reject a trademark that might “disparage or bring into contempt or

disrepute” any “persons living or dead.” The Court struck down the law on the basis that it violated the Free Speech Clause of the First Amendment. The Court rejected the idea that the law could be upheld as a legitimate restriction on commercial speech:

We 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.*, 447 U. S. 557 (1980). 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* 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 “the 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. 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*, 279 U. S. 644 (1929) (Holmes, J., dissenting).

The second interest asserted is protecting the orderly flow of commerce. Commerce, we are told, is disrupted by trademarks that “involve 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 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. If affixing the commercial label permits the suppression of any speech that may lead to political or social “volatility,” free speech would be endangered.

On p. 313, before the problems, add the following new note:

13. *Credit Card Charges and Free Expression*. In *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), the merchants wanted to implement a “single sticker regime” in which they post a cash price with an additional credit card surcharge. The Court held that the New York statute that prohibited this regime was a regulation of “speech” because it regulated the communication of prices, although not the prices themselves. The Court also held that the statute was not void for vagueness and remanded the case for a determination whether the statute violates the First Amendment.

On p. 317-18, delete problem # 15.

On p. 318, at the end of the problems, add the following new problem:

17. *Promoting Responsible Consumption.* Assume that the following statute is challenged in a § 1983 suit as violating the First Amendment:

No advertisement by *beer or wine retailers* shall contain any statement offering any coupon, premium, prize, rebate, sales price below cost, or discount as an inducement to purchase the advertised beer or wine. Nor shall any advertisement of beer or wine contain a price that is below the retailer's actual cost.

a) However, this section does *not* prohibit the advertising of sales, promotions, and discounts for beer or wine available *within* a retail establishment itself.

b) Furthermore, such advertisements for beer or wine *within* retail establishments are *not* prohibited from containing a price below the retailer's actual cost.

c) Also, this section does *not* prohibit the *manufacturers* of intoxicating liquor *other than beer or wine* from offering and advertising consumer cash rebate coupons.

The plaintiffs are a winery and a food and drink establishment that is licensed to sell alcohol. As the attorneys for the plaintiffs point out, the effect of the statute is to prohibit beer and wine retailers from advertising discounted prices for these products that are available *outside* their establishments, such as “a two-for-one special on beer at the local grocery store, a going-out-of-business sale at a specialty wine shop, or an offer for one free glass of beer or wine with the purchase of a meal at a neighborhood bar and grill.” The Attorney General argues that the goal of the statute is to “promote the responsible consumption of alcohol” and cites the “common sense link” between the existence of advertising and an increase in the public demand for a product. The Attorney General argues further that the statute should be upheld because there must be a similar “common sense link” between the advertisement restrictions in the statute and the achievement of the government's goal to promote the responsible consumption of alcohol. What arguments will the plaintiffs make to persuade the court that the statute violates *Central Hudson*? See *Missouri Broadcasting Association v. Lacy*, 846 F.3d 295 (8th Cir. 2017).

Chapter 5

Content-Neutral Speech Restrictions: Symbolic Speech and Public Fora

B. Public Forum Doctrine

[2] Restrictions on Public Forum Use

On p. 341, at the end of the problems, insert the following new problems:

10. *Liberal Attacks on Conservative Speakers.* In recent years, liberal activists have aggressively moved to stop conservative speakers from giving speeches on university campuses. For example, University of California at Berkeley administrators cancelled a planned speech by conservative provocateur Milo Yiannopoulos after riots broke out in advance of the speech. Afterwards, one alumnus of the school said that he was glad that the school had denied “that fascist” the right to speak, but felt that it should have intervened sooner. When conservative talk show host Ann Coulter was invited to campus, University administrators changed the date of the speech, noting an obligation to ensure that First Amendment rights can be successfully exercised, and that the public is protected against violence. Is it permissible for university officials to treat conservative speakers differently than liberal speakers? What if there is a threat of violence against the conservative speakers? How specific and imminent must a threat of violence be in order to curb freedom of expression? How should officials respond to that threat?

11. *A Legislative Response to Repression.* The Heritage Foundation has proposed the that universities adopt the following rules regarding outside speakers: 1) an official policy that strongly affirms the importance of free expression and the nullification of restrictive speech codes; 2) a declaration that the campus is open to anyone invited by members of the campus community which includes a bar against university administrators from excluding invited speakers, no matter how controversial; 3) the imposition of disciplinary sanctions on anyone who interferes with the free speech rights of others; & 4) the creation of a right to sue, by anyone whose free speech rights have been infringed, which includes the right to recover courts costs and attorneys fees. Should universities adopt such a policy?

12. *Prohibiting T-Shirts at Polling Places.* A group affiliated with the so-called Tea Party wishes to wear T-shirts bearing Tea Party logos at polling places. A Minnesota law bans the wearing of political badges, buttons or other insignia “on or about a polling place on primary or election day, and it seeks to apply the law to the T-shirts. Does the government have a sufficient interest in prohibiting the wearing of T-shirts near polling places? Is the law constitutional? See *Minnesota Majority v. Mansky*, 849 F.3d 749 (8th Cir. 2017).

13. *The Anti-Videotaping Ordinance.* Defendant sought to videotape a police station from across the street when police officers approached him and demanded identification. Does an individual have the right to videotape what goes on in the street outside of a police station? If this right exists, can it be subjected to reasonable time, place and manner restrictions? See *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017).

On p. 3579 at the end of the problems, add the following new problem 6:

2. *Need Permit in Advance.* An airport regulation requires people who wish to engage in a demonstration at the Denver International Airport (DIA) to apply for a permit one week in advance. The regulation also limits each demonstrator to the use of a sign that is no larger than 12 inches by 12 inches. On January 28, 2017, hundreds of people went to the DIA to engage in a spontaneous protest of the Executive Order signed by President Trump the previous day. That Order “established a 90-day ban on individuals from seven Muslim-majority countries from

entering the United States, a 120-day suspension of all refugee admissions, and an indefinite suspension of refugee admissions from Syria.” The protesters at the DIA were threatened with arrest on the ground that they had not applied for a permit one week earlier. When plaintiffs filed a § 1983 suit seeking an injunction against the advance permit requirement and size limitation for signs, what arguments will they make? How will the federal court resolve the First Amendment issues? See *McDonnell v. City and County of Denver*, Civil Action No. 17-cv-0332-WJM-MJW, U. S. District Court, D. Colorado, February 22, 2017, Order Granting Preliminary Injunction in Part.

[5] **Content-Based Restrictions**

On p. 403, at the end of the notes, but before the case, insert the following:

Problems

1. *More on Sign-Posting Ordinances.* Suppose that a city enacts an ordinance which allows most signs to be posted indefinitely, but provides that “event” signs must be removed within 30 days after the event is held. Does the ordinance violate the First Amendment if it does not distinguish between signs based on the messages they send, but simply regulates the length of time a sign may be posted. Would the ordinance be valid if applied to signs that combine “general messages of advocacy with references to specific events?” See *Act Now to Stop War and End Racism Coalition v. District of Columbia*, 846 F.3d 391 (D.C. Cir. 2017).

2. *The Iowa Civil Rights Act.* Iowa’s Civil Rights Commission interprets the state’s Civil Rights Act as prohibiting anyone from expressing views that would “directly or indirectly” make “persons of any gender identity” feel “unwelcome.” The law also requires organizations to make their bathrooms, locker rooms and shower facilities open based on “gender identity” rather than on “biological sex.” The Commission takes the position that this law applies to any activities at a church that do not have “a bona fide religious purpose” which the Commission defines as including child care facilities at a church, or church services that are open to the public. Could the Commission’s interpretation be used to prevent a church from openly expressing its views on gender identity?

3. *The Anti-Panhandling Ordinance.* In Kentucky, the Lexington-Fayette Urban County Government adopted Ordinance 14-5 prohibiting all begging and soliciting from public streets or intersections within the urban-county area. Penalty of fines up to \$100 and 10 to 30 days in jail. Does panhandling involve communicative activity that should be protected under the First Amendment? If so, what standard of review should apply? Is the ordinance content-based? See *Champion v. Commonwealth*, 2017 WL 636420, — S.W.3d — (Ky 2017).

4. *Marijuana Shirts.* A student group that promotes marijuana legalization creates fund raising t-shirts that merge images of marijuana leaves with a university’s trademark logo. Although the university allows other student groups to use the logo in association with their messages, it prohibits the marijuana shirts because of the message. The university claims that the logo constitutes university speech, and that it is entitled to disassociate itself from marijuana messages. Can the university prohibit the student group from associating marijuana with its logo? See *Gerlich v. Leath*, 847 F.3d 1005 (8th Cir. 2017).

Chapter 7

Freedom of Association and Compelled Expression

B. The Right Not to Speak

On p. 504, insert a new problem # 2, and renumber the remaining problems:

2. *Requiring Intercultural Competency.* A Clemson administrator has proposed that student government candidates be required to pass an “inter-cultural competency” test before being permitted to run for or hold office. The administrator suggested that the test could be satisfied by proof that the candidate/office holder had gone through training or workshops on intercultural competency. One student senator denounced the requirement as equivalent to “vetting candidates ideologically regarding their commitment to inclusivity and multiculturalism. It reminds me of the kind of political totalitarianism that one sees in modern-day fascist and communist regimes.” May a public university impose an “intercultural competency” test as a condition for running or holding a student government office?

3. *Regulating Pregnancy Centers.* Some pro-life groups have created pregnancy crisis centers to counsel pregnant women. California has passed the California Reproductive Freedom, Accountability, Comprehensive Care and Transparency Act which requires all pregnancy crisis centers to inform pregnant women regarding the availability of publicly funded family-planning programs which include abortion and contraception. Can the state require pregnancy centers to inform women regarding the availability of abortion resources? If the law was drafted to target pro-life centers, which attempt to push women away from abortion and towards other options (e.g., adoption), should the law be regarded as viewpoint-based? See *National Institute of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016); *Evergreen Association v. City of New York*, 740 F.3d 233 (2d Cir. 2014).

Chapter 8

The Government as Employer, Educator, and Source of Funds

A. First Amendment Rights of Public Employees

[2] Other Employee Speech

On p. 531, insert a new note # 1 that reads as follows, and renumber the remaining notes:

A similar decision was rendered in *Vidt v. City of Allegheny*, 2016 WL 6095522 (W.D. Pa. 2016), in a case involving a public defender who complained to higher-ups about the ethical issues posed by increasing workloads. The Court rejected her First Amendment claim on the basis that she was speaking as a government employee rather than as a private citizen.

On p. 537, after problem # 10, insert the following new problems:

11. *More on Police Speech.* In Louisville, Kentucky, a police posted information related to his employment on his Facebook page. Following protests against the police in the African-American community, he posted: “If we really wanted you dead all we’d have to do is stop patrolling your neighborhoods. . . . And wait.” Later, he testified: “You take any neighborhood in America and if they realize the police are not patrolling, crime would go through the roof.” Regarding the Black Lives Matter movement, he posted the following: “Has it occurred to anyone that if you’re able to organize this many people for a protest, you can organize this many people to clean up your community and get rid of the criminal element causing the problem.” In another post, he stated: “It’s NOT about color. It’s about the law.” The police department gave him a 30 day suspension on the theory that his statements demonstrated “blatant racial bias,” and “hurt relationships within our community and damaged the image of the department.” Did the officer have a First Amendment right to make the statements?

12. *The Sexual Harassment Complaint.* Would it matter whether a police officer was reporting sexual harassment? A female police officer reported to superiors that a fellow officer had referred to her as a “stupid bitch” and made other derogatory remarks to her. After she reported the harassment to her supervisor, she claims that they retaliated against her by reassigning her to a foot patrol in a dangerous neighborhood. Is the report entitled to First Amendment protection? If not, can she make a claim under other legal principles? See *Kubiak v. Chicago*, 810 F.3d 476 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 491 (2016).

13. *Prohibiting Critical Speech.* Would it be permissible for a police department to adopt a social networking policy that makes it impermissible for police officers to engage in speech that is critical of the department? What if officers were sanctioned under the policy for posting comments critical of the department’s promotion policies? See *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016).

14. *Collaboration with the FBI.* A police officer made statements to the FBI regarding alleged fraud in the city’s use of federal emergency funds, and also wore a wire to record conversations by city officials. When the officials found out, they fired him. Are the officer’s statements to the FBI protected under the First Amendment? Might they be protected under others laws? See *Town of Ball v. Howell*, 827 F.3d 515 (5th Cir. 2016), *cert denied*, 137 S. Ct. 815 (2017).

15. *The Policeman’s Tattoo.* A police department regulation prohibits policemen from exhibiting tattoos. A police officer, who has a tattoo that memorializes his military service, and their religious beliefs, wants to have it viewable while he is working. Does the officer have a First Amendment right to engage in this expression during work hours? See *Medici v. City of Chicago*, 2017 WL 1905967, — F.3d — (7th Cir. 2017).

[3] **Associational Rights**

On p. 553, at the end of note # 3, add the following:

Heffernan ultimately reached a \$1.6 million settlement with the city.

On p. 553, at the end of the problems, insert the following new problem:

3. *The Political T-Shirt.* A police officer resigned to take a position in another organization. When the other position didn't work out, he applied to be rehired by the sheriff's office. While his application was pending, the officer's would-be boss (the current sheriff, Lamberti) was in a tough reelection contest, and he spotted the officer wearing a t-shirt supporting his opponent ("Cops for Jerry Israel"). After Lamberti won reelection, the officer was informed that he would not be rehired because he supported the opponent. Under prior precedent, can the officer prevail on a First Amendment claim when he wasn't rehired? See *Stanley v. Israel*, 843 F.3d 920 (11th Cir. 2016).

B. The First Amendment in the Public Schools

On p. 579, at the end of problem # 3, add the following cite to the end of the problem:

; see also *Keeffe v. Adams*, 840 F.3d 523 (8th Cir. 2016) (nursing student who stated that there wasn't "enough whiskey to control his anger" and who threatened to use a hemopneumothorax (lung puncturing) device on someone).

C. Government Financed Speech

On p. 593, at the bottom of the page, insert the following new note # 3:

Matal v. Tam
137 S. Ct. 1744 (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 contempt or disrepute" any "persons, living or dead." 15 U. S. C. §1052(a). We 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

"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." *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U. S. ____ (2015) (slip op., at 3). A trademark "designates the goods as the product of a particular trader" and "protects his good will against the sale of another's product as his." *United Drug Co. v. Theodore Rectanus Co.*, 248 U. S. 90, 97 (1918). It helps consumers identify goods and services that they wish to purchase, as well as those they want to avoid. See *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U. S. 189 (1985).

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. See Act of July 8, 1870, §§77–84. 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. 15 U. S. C. §1051(a)(1). Some marks “capable of distinguishing an applicant’s goods or services and not registrable on the principal register which are in lawful use in commerce by the owner thereof” may instead be placed on a different federal register: the supplemental register. §1091(a). There are now more than two million marks that have active federal certificates of registration. This system of federal registration helps to ensure that trademarks are fully protected and supports the free flow of commerce. “National protection of trademarks is desirable,” we have explained, “because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation.” *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U. S. 522, 531 (1987).

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. Even if a trademark is not federally registered, it may still be enforceable under §43(a) of the Lanham Act, which creates a federal cause of action for trademark infringement. Unregistered trademarks may also be entitled to protection under other federal statutes, such as the Anticybersquatting Consumer Protection Act, 15 U. S. C. §1125(d). And an unregistered trademark can be enforced under state common law, or if it has been registered in a State, under that State’s registration system.

Federal registration, however, “confers important legal rights and benefits on trademark owners who register their marks.” *B & B Hardware*, 575 U. S., at ___ (slip op., at 3). Registration on the principal register (1) “serves as ‘constructive notice of the registrant’s claim of ownership’ of the mark” “is ‘prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner’s ownership of the mark, and of the owner’s exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate,’ ” *B & B Hardware*, 575 U. S. ___ (slip op., at 3) (quoting §1057(b)); and (3) can make a mark “incontestable” once a mark has been registered for five years.” Registration also enables the trademark holder “to stop the importation into the United States of articles bearing an infringing mark.” 15 U. S. C. §1124.

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, §1052(e)(1), 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,” §1052(d). At issue 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.” §1052(a). This clause appeared in the original Lanham Act and has remained the same to this day. See §2(a), 60 Stat. 428.

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.” Trademark Manual of Examining Procedure §1203.03(b)(i) (Apr. 2017), p. 1200–150 “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.” *Ibid.* 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. *Ibid.* What is more, the PTO has specified that “the 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.” *Ibid.*

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

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) to no avail. Eventually, he took the case to court, where the en banc Federal Circuit found the disparagement clause facially unconstitutional under the First Amendment’s Free Speech Clause. The Government filed a petition for certiorari, which we granted.

II

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.” Tam’s argument is refuted by the plain terms of the disparagement clause.

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. 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

Our cases recognize that “the Free Speech Clause does not regulate government speech.” *Pleasant Grove City v. Summum*, 555 U. S. 460, 467 (2009). “The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others,” *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U. S. 384, 394 (1993), 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. 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 is the content of trademarks 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. Except as required by statute, 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. If the mark meets the Lanham Act’s viewpoint-neutral requirements, registration is mandatory. If an examiner finds that a mark is eligible for placement on the principal register, that decision is not reviewed by any higher official unless the registration is challenged. Moreover, once a mark is registered, the PTO is not authorized to remove it from the register unless a party moves for cancellation, the registration expires, or the Federal Trade Commission initiates proceedings based on certain grounds. 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. It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public. For example, if trademarks represent government speech, what does the Government have in mind when it advises Americans to “make.believe” (Sony), “Think different” (Apple), “Just do it” (Nike), or “Have it your way” (Burger King)? Was the Government warning about a coming disaster when it registered the mark “EndTime Ministries”? 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, 1220, n. 3 (TTAB 1993).

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 beef and beef

products.” 544 U. S., at 561 (quoting 7 U. S. C. § 2902(13)). 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 “the 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; “public parks are often closely identified in the public mind with the government unit that owns the land”; and “the 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 *Walker* which likely marks the outer bounds of the government-speech doctrine. Holding that the messages on Texas specialty license plates are government speech, *Walker* 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 “maintained direct control over the messages conveyed on its specialty plates.” 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. Perhaps the most worrisome implication of the Government’s argument concerns the system of copyright registration. If federal registration makes a trademark government speech and thus eliminates all First Amendment protection, would the registration of the copyright for a book produce a similar transformation? The Government attempts to distinguish copyright on the ground that it is “the engine of free expression,” but as this case illustrates, trademarks often have an expressive content. Companies spend huge amounts to create and publicize trademarks that convey a message. It is true that the necessary brevity of trademarks limits what they can say. But powerful messages can sometimes be conveyed in just a few words. 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. “We have held that the Government ‘may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit.’ ” *Agency for Int’l Development v. Alliance for Open Society Int’l, Inc.*, 570 U. S. ___, ___ (2013) (slip op., at 8). 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,” 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*, 500 U. S. 173 (1991), a federal law provided funds to private parties for family planning services. In *National Endowment for Arts v. Finley*, 524 U. S. 569 (1998), cash grants were awarded to artists. 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. See *Regan v. Taxation With Representation of Wash.*, 461 U. S. 540 (1983). 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. 37 CFR §2.6(a)(1). And

to maintain federal registration, the holder of a mark must pay a fee of \$300–\$500 every 10 years. These fees have fully supported the registration system for the past 27 years.

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. Trademark registration is not the only government registration scheme. For example, the Federal Government registers copyrights and patents. State governments and their subdivisions register the title to real property and security interests; they issue driver’s licenses, motor vehicle registrations, and hunting, fishing, and boating licenses or permits. Cases like *Rust* and *Finley* are not instructive in analyzing the constitutionality of restrictions on speech imposed in connection with such services.

C

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 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.

In *Davenport v. Washington Ed. Assn.*, 551 U. S. 177 (2007), a Washington law permitted a public employer automatically to deduct from the wages of employees who chose not to join the union the portion of union dues used for activities related to collective bargaining. But unless these employees affirmatively consented, the law did not allow the employer to collect the portion of union dues that would be used in election activities. A public employee union argued that this law unconstitutionally restricted its speech based on its content; that is, the law permitted the employer to assist union speech on matters relating to collective bargaining but made it harder for the union to collect money to support its election activities. Upholding this law, we characterized it as imposing a “modest limitation” on an “extraordinary benefit,” namely, taking money from the wages of non-union members and turning it over to the union free of charge. Refusing to confer an even greater benefit, we held, did not upset the marketplace of ideas and did not abridge the union’s free speech rights. *Ysursa v. Pocatello Ed. Assn.*, 555 U. S. 353 (2009), is similar. There, we considered an Idaho law that allowed public employees to elect to have union dues deducted from their wages but did not allow such a deduction for money remitted to the union’s political action committee. We reasoned that the “the government was not required to assist others in funding the expression of particular ideas.”

Davenport and *Ysursa* are akin to our subsidy cases. Although the laws at issue in *Davenport* and *Ysursa* did not provide cash subsidies to the unions, they conferred a very valuable benefit—the right to negotiate a collective-bargaining agreement under which non-members would be obligated to pay an agency fee that the public employer would collect and turn over to the union free of charge. As in the cash subsidy cases, the laws conferred this benefit because it was thought that this arrangement served important government interests. See *Aboud v. Detroit Bd. of Ed.*, 431 U. S. 209 (1977). But the challenged laws did not go further and provide convenient collection mechanisms for money to be used in political activities. In essence, the Washington and Idaho lawmakers chose to confer a substantial non-cash benefit for the purpose of furthering activities that they particularly desired to promote but not to provide a similar benefit for the purpose of furthering other activities. Thus, *Davenport* and *Ysursa* are no more relevant for present purposes than the subsidy cases previously discussed.

Potentially more analogous are cases in which a unit of government creates a limited public forum for private speech. See, *e.g.*, *Good News Club v. Milford Central School*, 533 U. S. 98 (2001); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Lamb’s Chapel*, 508 U. S., at 392. When government creates such a forum, in either a literal or “metaphysical” sense, 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, 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.” *Street v. New York*, 394 U. S. 576, 592 (1969). See also *Texas v. Johnson*, 491 U. S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46 (1988); *Coates v. Cincinnati*, 402 U. S. 611 (1971); *Bachellar v. Maryland*, 397 U. S. 564 (1970); *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969); *Cox v. Louisiana*, 379 U. S. 536 (1965); *Edwards v. South Carolina*, 372 U. S. 229 (1963); *Terminiello v. Chicago*, 337 U. S. 1 (1949); *Cantwell v. Connecticut*, 310 U. S. 296 (1940); *Schneider v. State (Town of Irvington)*, 308 U. S. 147 (1939); *De Jonge v. Oregon*, 299 U. S. 353 (1937).

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

[In this section of the opinion, the Court rejected the argument that the law could be upheld as a regulation of commercial speech. That issue is discussed in Chapter 4, Section C.]

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.

§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. The viewpoint discrimination rationale renders unnecessary any extended treatment of other questions raised by the parties.

Justice Thomas, concurring in part and concurring in the judgment.

I join the opinion of Justice Alito, except for Part II. I write separately because “when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial.’ ” *Lorillard Tobacco Co. v. Reilly*, 533 U. S. 525 (2001) (Thomas, J., concurring in part and concurring in judgment). I join Part IV of Justice Alito’s opinion because it correctly concludes that the disparagement clause is unconstitutional even under the less stringent test announced in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N. Y.*, 447 U. S. 557 (1980).

On p. 605, at the end of the problems, add the following new problem:

7. *Using Funding to Compel Free Speech on College Campuses.* As noted, on some college campuses, liberal activists have tried to prevent conservative speakers from giving speeches on their campuses. In response, some university officials have denied conservatives the right to speak, fearing violence. President Trump has suggested that universities who are unwilling to protect the rights of conservative speakers should be denied all federal funding, including funding for student loans and research. Would such a funding denial be permissible under the First Amendment?

Chapter 10

Electronic Media and the First Amendment

B. Post-Broadcasting Technology

On p. 719, before the problems, add the following new note:

NOTES

1. *The Internet and Social Protest.* The Internet has had a profound impact on the functioning of the democratic system. During the 2016 political campaign, candidate Donald Trump used Twitter to do an end run around traditional media and communicate directly with potential supporters. Following Trump's election victory, protestors used social media to organize and coordinate protests against President Trump's policies.

2. *Net Neutrality.* In recent years, there has been much controversy regarding so-called "net neutrality" which would prevent broadband providers from giving preferential treatment (e.g., a speed boost) to preferred content (e.g., a company that is willing to pay for the boost).

On p. 720, at the end of the problems, add the following new case and problems:

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 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.

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), (e) (2015). A "commercial social networking Web site" is defined as a website that meets four criteria. First, it "is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site." §14–202.5(b). Second, it "facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges." Third, it "allows 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." Fourth, it "provides 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 "provide only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform." §14–202.5(c)(1). 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." §14–202.5(c)(2). §14–202.5 applies to about 20,000 people in North Carolina and the State has prosecuted over 1,000 people for violating it.

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. See §14–208.6A; see §14–208.7(a). 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!” A member of the Durham Police Department was investigating registered sex offenders who were thought to be violating §14–202.5. The officer noticed that a “J. R. Gerrard” had posted the statement quoted above. By checking court records, the officer discovered that a traffic citation for petitioner had been dismissed around the time of the post. Evidence obtained by search warrant confirmed the officer’s suspicions that petitioner was J. R. Gerrard. 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 did the State allege that petitioner contacted a minor—or committed any other illicit act—on the Internet. The Court of Appeals of North Carolina struck down §14–202.5 on First Amendment grounds. The North Carolina Supreme Court reversed, concluding that the law is “constitutional in all respects.” The Court granted certiorari and reverses.

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 is that a street or a park is a quintessential forum for the exercise of First Amendment rights. See *Ward v. Rock Against Racism*, 491 U. S. 781 (1989). 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*, 521 U. S. 844, 868 (1997), 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 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, supra*, at 870. 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. 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, supra*, at 870.

The nature of a revolution in thought can be that, in its early stages, even its participants may be unaware of it. When awareness comes, they still may be unable to know or foresee where its changes lead. So too here. While we may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate 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 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.

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*, 573 U. S. ____ (2014) (slip op., at 18). In other words, the law must not “burden substantially more speech than is necessary to further the government’s legitimate interests.” *Id.*, at ____ (slip op., at 19).

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, and the telephone another, see *1* So it will be with the Internet and social media. There is also no doubt that, as this Court has recognized, “the 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*, 535 U. S. 234, 244 (2002). It is clear that a legislature “may pass valid laws to protect children” and other victims of sexual assault “from abuse.” See *id.*, at 245; accord, *New York v. Ferber*, 458 U. S. 747 (1982). 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*, 394 U. S. 557, 563 (1969).

It is necessary to make two assumptions to resolve this case. First, given the broad wording of the North Carolina statute, 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*, 395 U. S. 444 (1969) (*per curiam*). 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. Specific laws of that type must be the State’s first resort to ward off the serious harm that sexual crimes inflict. (the fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system is also not before the Court.)

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*, 521 U. S., at 870.

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. 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*, 573 U. S., at ___ (slip op., at 28).

No case or holding of this Court has approved of a statute as broad in its reach. The closest analogy that the State has cited is *Burson v. Freeman*, 504 U. S. 191 (1992). There, the Court upheld a prohibition on campaigning within 100 feet of a polling place. That case gives little or no support. The law in *Burson* was a limited restriction that, in a context consistent with constitutional tradition, was enacted to protect another fundamental right—the right to vote. The restrictions there were far less onerous than those the State seeks to impose here. The law meant only that the last few seconds before voters entered a polling place were “their own, as free from interference as possible.” The Court noted that, were the buffer zone larger than 100 feet, it “could effectively become an impermissible burden” under the First Amendment.

The better analogy is *Board of Airport Comm’rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U. S. 569 (1987), where the Court struck down an ordinance prohibiting any “First Amendment activities” at Los Angeles International Airport because the ordinance covered all manner of protected, nondisruptive behavior including “talking and reading, or the wearing of campaign buttons or symbolic clothing.” If a law prohibiting “all protected expression” at a single airport is not constitutional, it follows that the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture. 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*, 535 U. S., at 255. 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.

It is so ordered.

Justice Gorsuch took no part in the consideration or decision of this case.

Justice Alito, with whom The Chief Justice and Justice Thomas join, concurring in the judgment.

The North Carolina statute was enacted to serve an interest of “surpassing importance.” *New York v. Ferber*, 458 U. S. 747 (1982)—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 that it violates the Free Speech Clause of the First Amendment.

I cannot join the opinion 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. 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. The North Carolina law at issue 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.” As I will explain, the statutory definition of a “commercial social networking Web site” is very broad.

Packingham and the State debate the analytical framework that governs this case. The State argues that the law is content neutral and merely regulates a “place” (*i.e.*, the internet) where convicted sex offenders may wish to engage in speech. According to the State, the standard applicable to “time, place, or manner” restrictions should apply. See *Ward v. Rock Against Racism*, 491 U. S. 781 (1989). 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.

A content-neutral “time, place, or manner” restriction must serve a “legitimate” government interest, and the North Carolina law easily satisfies this requirement. “The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” *Ferber, supra*, at 757. “Sex offenders are a serious threat,” and “the victims of sexual assault are most often juveniles.” *McKune v. Lile*, 536 U. S. 24, 32 (2002) (plurality opinion). “The interest of safeguarding the physical and psychological well-being of a minor is a compelling one,” *Globe Newspaper Co. v. Superior Court, County of Norfolk*, 457 U. S. 596, 607 (1982). “We have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights,” *Ferber, supra*, at 757. 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.” *McKune, supra*, at 33 (plurality opinion);.

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 research² 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.

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*, 491 U. S., at 798. The North Carolina law fails this requirement. The text of N. C. Gen. Stat. Ann. §14–202.5 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 “facilitate 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. A great many websites include this feature. Third, a website must “allow 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 “provide 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. Since a comment function is undoubtedly a “mechanism to communicate with other users,” it appears to follow that any website with such a function satisfies this requirement.

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 services⁵ 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. 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 “mechanism 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. While the law before us addresses a critical problem, it sweeps far too broadly to satisfy the demands of the Free Speech Clause.

While I thus agree with the Court that the particular law at issue 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. We should be cautious in applying our free speech precedents to the internet. Cyberspace is different from the physical world, and we should proceed circumspectly, taking one step at a time.

Problems

1. *Rewriting the Statute.* After the holding in *Packingham*, is it possible to redraft the statute to restrict sex offender access without running afoul of the First Amendment? If so, how?

2. *Sex Offender Online Disclosure Rule.* An Illinois state law requires that convicted sex offenders disclose their Internet identities and websites. Suppose that a young male fails to disclose his Facebook page to the state and is criminally charged. Does the disclosure provision violate the First Amendment? Is it a content-based or viewpoint-based restriction on speech? Should the restriction have been more narrowly tailored? See *People v. Minnis*, 2016 IL 119563, 67 N.E.2d 272 (Ill. 2016).

Chapter II

Overview of the Religion Clauses

On p. 743, insert a new problem # 3, and renumber the remaining problem:

3. *A Mission to Distribute Heroin*. Defendant created a religious nonprofit organization designed to minister to the “lost” of God’s Kingdom. Defendant believe that he is required by his religious believes to provide free heroin to others which they can use for any reason, including non-religious uses. Can defendant legitimately claim that his organization qualifies as a “religion” under the religion clauses? Would you expect the Court to hold that his right to distribute heroin is protected under the Free Exercise Clause? *See United States v. Anderson*, (8th Cir. 2017).

Chapter 12

The Establishment Clause

B. School Prayer

On p. 786, at the beginning of the problems, insert the following new problem # 1, and then renumber the remaining problems:

1. *More on Legislative Prayer.* Suppose that, instead of bringing in outside religious officials to lead the prayers, a county commission asks the commissioners to lead the body in prayer. All of the commissioners are Christian. Those challenging the commissioner led prayer have argued that “when legislators give the prayers, the government and the prayer giver are one and the same. Would legislator-led prayer pass muster under the First Amendment? How is it similar to, or different from, prayers offered by outsiders? See *Bormuth v. County of Jackson*, (6th Cir. 2017), vacated, --- F.3d ---- (6th Cir., en banc, 2017); *Lund v. Rowan County*, 887 F.3d 407 (4th Cir. 2016), *granting rehearing en banc*, 670 Fed. Appx. 106 (4th Cir., en banc, 2017). Is a local school board like a legislative body so that I can also have prayers at the start of its meetings? See *American Humanist Association v. McCarty*, 851 F.3d 521 (5th Cir. 2017). May the school board’s prayers be student led? See *id.*

D. Official Acknowledgement

On p. 821, insert a new problem # 5 that reads as follows, and then renumber the remaining problems:

5. *More on Ten Commandments Monuments.* A city decides to place a Ten Commandments monument on the city hall lawn, and it is challenged by Wiccans who claim that the display offends their religious beliefs. At the dedication ceremony, there were both secular and religious observances. The Star Spangled Banner was sung, the Pledge of Allegiance was recited, and the local Veterans of Foreign Wars chapter ceremoniously folded the American flag. But the event was inaugurated with prayer, the flag-folding was set to religious narration, and the sponsor delivered remarks emphasizing and celebrating Christian precepts. For example, he stated: “Some would believe this monument is a new thing. They have been so busy trying to remove God from every aspect of our lives.... God and his Ten Commandments continue to protect us from our evil.” He also read the disclaimer on the bottom of the Monument (“Any message hereon is of the donors and not the City of Bloomfield.”) out loud. Under prior precedent, is this Ten Commandments monument valid? See *Felix v. City of Bloomfield*, 841 F.3d 848 (10th Cir. 2016).

On p. 847, at the end of the notes, add the following new note:

4. *The French Principle of Laïcité.* Under the French concept of *laïcité*, public authorities are required to 2) guarantee religious freedom, including freedom of worship; & 2) insure that public officials and public agencies remain neutral regarding the separation of church and state by avoiding public recognition or funding of religion. Under that principle, public officials are prohibited from displaying signs or symbols that show a public recognition or preference for a particular religion. In evaluating holiday displays, *Laïcité* requires consideration of the entire context of the display in an effort to determine whether the display reflects a cultural, artistic or festive purpose rather than the purpose of recognizing or showing a preference for a religion. Exterior displays are presumptively permissible unless they reveal proselytism or the expression of a religious opinion. Inside public buildings, the reverse presumption applies and it must be show that the display reflects a cultural, artistic or festive purpose in order to be sustained.

Chapter 13

Free Exercise

A. BURDENS ON RELIGION

[3] Modern Cases

On p. 874, at the end of problem # 3, insert the following:

See State v. Arlene's Flowers, Inc., 187 Wash.2d 804, 389 P.3d 543 (2017).

On p.886, at the end of the problem, add the following new problem:

2. *Controlling Teachings on Gender Identity.* Iowa's Civil Rights Commission interprets the state's Civil Rights Act as prohibiting anyone from expressing views that would "directly or indirectly" make "persons any particular . . . gender identity" feel "unwelcome," and as requiring organizations to make their bathrooms, locker rooms and shower facilities open based on "gender identity" rather than on "biological sex." The Commission takes the position that this law applies to any activities at a church that do not have "a bona fide religious purpose" which the Commission defines as including child care facilities at a church, or church services that are open to the public. Consistently with the First Amendment, could the Commission's interpretation be used to prevent a church from openly expressing its views on gender identity?

Chapter 14

Establishment versus Free Exercise and Free Speech Concerns

On p. 924, before the problems, insert the following new case:

Trinity Lutheran Church of Columbia, Inc. v. Director
137 S. Ct. 2012 (2017).

Chief Justice ROBERTS delivered the opinion of the Court, except as to footnote 3.

The Trinity Lutheran Church Child Learning Center is a preschool and daycare center open to serve working families in Boone County, Missouri, and the surrounding area. The Center merged with Trinity Lutheran Church and operates 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 that is equipped with slides, swings, jungle gyms, monkey bars, and sandboxes. The surface beneath and surrounding the play equipment is gravel. Youngsters, of course, fall on the playground or tumble from the equipment. When they do, the gravel can be unforgiving. The Center sought to replace the gravel with a pour-in-place rubber surface by participating in Missouri's Scrap Tire Program. Run by the State's Department of Natural Resources to reduce the number of used tires destined for landfills and dump sites, the program offers 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.

The Department awards [grants] on a competitive basis based on several criteria, such as the poverty level and the applicant's plan to promote recycling. The Department had a strict policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity. That policy, in the Department's view, 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 its application, the Center disclosed its status as a ministry of Trinity Lutheran Church and specified that the Center's mission was "to provide a safe, clean, and attractive school facility in conjunction with an educational program structured to allow a child to grow spiritually, physically, socially, and cognitively." After describing the playground and the safety hazards, the Center detailed the benefits of the proposed project: increasing access for all children, including those with disabilities, by providing a surface compliant with the Americans with Disabilities Act of 1990; providing a safe, long-lasting, and resilient surface under the play areas; and improving Missouri's environment by putting recycled tires to positive use. The benefits of a new surface would extend to the local community whose children often use the playground during non-school hours. The Center ranked fifth among 44 applicants in the 2012 Scrap Tire Program.

Despite its score, the Center was ineligible to receive a grant. The program director explained that, under Article I, Section 7 of the Missouri Constitution, the Department could not provide financial assistance directly to a church. The Department awarded 14 grants. The Church alleged that the Department's policy of denying grants to religiously affiliated applicants violates the Free Exercise Clause of the First Amendment. The District Court granted the Department's motion to dismiss[, relying on] *Locke v. Davey*, 540 U.S. 712 (2004). In that case, we upheld against a free exercise challenge the State of Washington's decision not to fund degrees in devotional theology as part of a state scholarship program. The Eighth Circuit affirmed. We granted certiorari and reverse.

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 does not prevent Missouri from including Trinity Lutheran in the Program. That does not, however, answer the question under the Free Exercise Clause, because there is "play in the joints" between what the Establishment Clause permits and the Free Exercise Clause compels. The Free Exercise Clause "protects 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*, 508 U.S. 520, 533 (1993). 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." *McDaniel v. Paty*, 435 U.S. 618 (1978) (plurality opinion). In *Everson*

v. Board of Education of Ewing, 330 U.S. 1 (1947), 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 ruling that the Establishment Clause allowed New Jersey to extend that 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.”

Three decades later, in *McDaniel v. Paty*, the Court struck down under the Free Exercise Clause a Tennessee statute disqualifying ministers from serving as delegates to the State's constitutional convention. Writing for the plurality, Chief Justice Burger acknowledged that Tennessee had disqualified ministers from serving as legislators since 1796, and that a number of early States had also disqualified ministers from legislative office. This historical tradition did not change the fact that the statute discriminated against McDaniel by denying him a benefit solely because of his “*status as a ‘minister.’*” Said Chief Justice Burger, the Tennessee law “effectively penalizes the free exercise of McDaniel's constitutional liberties.” Joined by Justice Marshall in concurrence, Justice Brennan added that “because the challenged provision requires McDaniel to purchase his right to engage in the ministry by sacrificing his candidacy it impairs the free exercise of his religion.”

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 distinguish such laws from those that single out the religious for disfavored treatment. For example, in *Lyng*, we held that the Free Exercise Clause did not prohibit the Government from timber harvesting or road construction on a tract of federal land, even though the Government's action would obstruct the religious practice of several Native American Tribes that held certain sites on the tract to be sacred. Accepting that “the building of a road or the harvesting of timber would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs,” we found no free exercise violation, because the affected individuals were not being “coerced by the Government's action into violating their religious beliefs.” The Court specifically noted that the Government action did not “penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.” In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), we rejected a free exercise claim 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 general criminal laws on account of their religion. We 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

Finally, in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, we struck down 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 discriminatory purpose prohibiting sacrificial rituals integral to Santeria but distasteful to local residents. 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. Citing *McDaniel* and *Smith*, we restated the familiar refrain: The Free Exercise Clause protects against laws that “impose special disabilities on the basis of religious status.”

The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. Such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny. Like *McDaniel*, the Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution. Trinity Lutheran is free to continue operating as a church, but at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified. 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

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. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), held that the Religion Clauses required a ministerial exception to the neutral prohibition on employment retaliation contained in the Americans with Disabilities Act.

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. 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. 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 the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Lyng*, 485 U.S., at 450. "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert*, 374 U.S., at 404.

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 deters or discourages the exercise of First Amendment rights." *Sherbert*, 374 U.S., at 405. 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.

The Department attempts to get out from under the weight of our precedents by arguing that the free exercise question is controlled by our decision in *Locke v. Davey*. 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." 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. 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." Washington's restriction on the use of its scholarship funds was different. The State had "merely chosen not to fund a distinct category of instruction." 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. *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." The claimant in *Locke* sought funding for an "essentially religious endeavor akin to a religious calling as well as an academic pursuit," and opposition to such funding "to support church leaders" lay at the historic core of the Religion Clauses. Here nothing of the sort can be said about a program to use recycled tires to resurface playgrounds.

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 that the scholarship program did not "require students to choose between their religious beliefs and receiving a government benefit." Washington's scholarship program went "a long way toward including religion in its benefits." 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. He could also use his scholarship money to attend a religious college and take devotional theology courses there. 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 The State 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. Such a condition imposes a penalty on the free exercise of religion that must be subjected to the "most rigorous" scrutiny.

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.

Lukumi, 508 U.S., at 546.⁴

Under that stringent standard, only a state interest “of the highest order” can justify the Department’s discriminatory policy. *McDaniel*, 435 U.S., at 628. 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. As we said when considering Missouri’s same policy preference on a prior occasion, “the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause.” *Widmar*, 454 U.S., at 276. 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.

The Missouri Department of Natural Resources has not subjected anyone to chains or torture on account of religion. And the result of the State’s policy is nothing so dramatic as the denial of political office. The consequence 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.

“Denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified,” if at all, “only by a state interest ‘of the highest order.’” The Free Exercise Clause, which generally prohibits laws that facially discriminate against religion, compels this conclusion. *Locke* permitted a State to “disfavor religion” by imposing what it deemed a “relatively minor” burden on religious exercise to advance the State’s antiestablishment “interest in not funding the religious training of clergy.” The Court justified this law based on its view that “there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.” *Locke* did not subject the law at issue to any form of heightened scrutiny. But it also did not suggest that discrimination against religion outside the limited context of support for ministerial training would be similarly exempt from exacting review. This Court’s endorsement in *Locke* of even a “mild kind” of discrimination against religion remains troubling. Because the Court today appropriately construes *Locke* narrowly, and because no party has asked us to reconsider it, I join of the Court’s opinion. I do not join footnote 3.

Justice GORSUCH, with whom Justice THOMAS joins, concurring in part.

This violates the First Amendment. 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*. I harbor doubts about the stability of such a line. The First Amendment’s Free Exercise 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. See *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981). 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 similar reasons, I am unable to join the footnoted observation, that “this case involves express discrimination based on religious identity with respect to playground resurfacing.” The footnote is correct, but some might read it to suggest that only “playground resurfacing” cases, or those with some association with children’s safety or health, or perhaps some other social good, are governed by the legal rules recounted in the Court’s opinion. The general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else.

Justice BREYER, concurring in the judgment.

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. The fact that the program funds only a limited number of projects cannot itself justify a religious distinction. Nor is there any administrative or other reason to treat church schools differently. The sole reason advanced that explains the difference is faith. 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

⁴ “A law targeting religious beliefs as such is never permissible.” *Lukumi*, 508 U.S., at 533. We do not need to decide whether the condition Missouri imposes falls within the scope of that rule, because it cannot survive strict scrutiny in any event.

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 the relationship between religious institutions and the civil government—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 our precedents and our history, and weakens this country's longstanding commitment to a separation of church and state beneficial to both.

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 government may not directly fund religious exercise. In doctrinal terms, such funding violates the Establishment Clause because it impermissibly “advances religion.”¹ *Agostini v. Felton*, 521 U.S. 203 (1997). Nowhere is this rule more clearly implicated than when funds flow directly from the public treasury to a house of worship. A house of worship exists to foster and further religious exercise. There, a group of people, bound by common religious beliefs, comes together “to shape its own faith and mission.” *Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 188 (2012). 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. *Tilton v. Richardson*, 403 U.S. 672 (1971), held as much. The federal program at issue provided construction grants to colleges and universities but prohibited grantees from using the funds to construct facilities “used for sectarian instruction or as a place for religious worship” or “used primarily in connection with any part of the program of a school or department of divinity.” It allowed the Federal Government to recover the grant's value if a grantee violated this prohibition within twenty years of the grant. The Court unanimously agreed that this time limit on recovery violated the Establishment Clause. “The original federal grant would in part have the effect of advancing religion,” a plurality explained, if a grantee “converted a facility into a chapel or otherwise used it to promote religious interests” after twenty years. Accordingly, the Court severed the twenty-year limit, ensuring that program funds would be put to secular use and thereby bringing the program in line with the Establishment Clause. This case is no different. 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 are integrated with and integral to its religious mission. The funding the Church seeks would impermissibly advance religion.

This Court has found some direct government funding of religious institutions to be consistent with the Establishment Clause. But the funding came with assurances that public funds would not be used for religious activity, despite the religious nature of the institution. The Church has not 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. When the Court last addressed direct funding of religious institutions, in *Mitchell*, 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. The 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. Those factors were “sufficient to find that the program did not have the impermissible effect of advancing religion.” A plurality would have 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. 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. This test, explained the concurrence, ignored whether the public funds subsidize religion, the touchstone of establishment jurisprudence.

Today's opinion has made the leap the *Mitchell* plurality could not. If it agrees that the funding will finance religious activities, then only a rule that considers that fact irrelevant could support a conclusion of constitutionality.

¹ Government aid that has the “purpose” or “effect of advancing or inhibiting religion” violates the Establishment Clause. *Agostini v. Felton*, 521 U.S. 203 (1997). Whether government aid has such an effect turns on whether it “results in governmental indoctrination,” “defines its recipients by reference to religion,” or “creates an excessive entanglement” between the government and religion.

The problems of the “secular and neutral” approach have been aired before. 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.² 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* (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*, 536 U.S. 639, 722 (2002) (BREYER, J., dissenting).

Even 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 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.

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. “If expanded to a logical extreme,” these prohibitions “would tend to clash with the other.” *Walz*, 397 U.S., at 668–669. 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. 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. “There 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.*, at 669. 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.

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. It may “spare the exercise of religion from the burden of property taxation levied on private profit institutions” and spare the government “the direct confrontations and conflicts that follow in the train of those legal processes” associated with taxation. Nor must a State require nonprofit religious entities to abstain from making employment decisions on the basis of religion. It may instead avoid imposing on these institutions a “fear of potential liability that might affect the way” it “carried out what it understood to be its religious mission” and on the government the sensitive task of policing compliance. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987). But the government may not invoke the space between the Religion Clauses in a manner that “devolves into an unlawful fostering of religion.” *Cutter v. Wilkinson*, 544 U.S. 709 (2005). 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, those “who will preach their beliefs, teach their faith, and carry out their mission.” It may instead avoid the historic “antiestablishment interests” raised by the use of “taxpayer funds to support church leaders.” *Locke v. Davey*, 540 U.S. 712, 722 (2004).

When reviewing a law that 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. 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 and 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.” Art. I, § 7. Missouri's decision, which has deep roots in our Nation's history, reflects a reasonable and constitutional judgment. This Nation's early experience with, and eventual rejection of, established religion—shorthand for “sponsorship, financial support, and active

² The Scrap Tire Program ranks more highly those applicants who agree to generate media exposure for Missouri and its program and who receive the endorsement of local solid waste management entities. It prefers applicants who agree to advertise that the government has funded it and who seek the approval of government agencies. To ignore this result is to ignore the type of state entanglement with, and endorsement of, religion the Establishment Clause guards against.

involvement of the sovereign in religious activity,” *Walz*, 397 U.S., at 668—defies easy summary. No two States’ experiences were the same. In some a religious establishment never took hold. See T. CURRY, *THE FIRST FREEDOMS* 19 (1986) (Curry). 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* 510–511 (1970 ed.) (Cobb).

Every state establishment saw laws passed to raise public funds and direct them toward houses of worship and ministers. As the States disestablished, one by one, they all undid those laws.³ Those who fought to end the public funding of religion based their opposition on the basic premise that the practice harmed both civil government and religion. The civil government could claim no authority over religious belief. 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.

Locke involved a provision of Washington’s Constitution that barred the use of public funds for houses of worship or ministers. Consistent with this denial, the State’s college scholarship program did not allow funds to be used for devotional theology degrees. 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.” The same is true of this case. Turning over public funds to houses of worship implicates serious antiestablishment and free exercise interests. 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. A state may not fund religious activities without violating the Establishment Clause. 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 lines would entangle government with the house of worship’s activities. While not every activity a house of worship undertakes will be inseparably linked to religious activity, “the likelihood that many are makes a categorical rule a suitable means to avoid chilling the exercise of religion.” *Amos*, 483 U.S., at 345 (Brennan, J., concurring in judgment). 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 in *Locke*, a prophylactic rule against the use of public funds for houses of worship is a permissible accommodation of these weighty interests. Almost all of the States that ratified the Religion Clauses operated under this rule. Today, thirty-eight States have a counterpart to Missouri’s Article I, § 7. The provisions date back to or before these States’ original Constitutions. 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.”

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. Missouri will fund a religious organization not “owned or controlled by a church,” if its “mission and activities are secular (separate from religion, not spiritual in) nature” and the funds “will be used for secular (separate from religion; not spiritual) purposes rather than for sectarian (denominational, devoted to a sect) purposes.” 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

³ 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*, 310 U.S. 296 (1940) (Free Exercise Clause); *Everson v. Board of Ed. of Ewing*, 330 U.S. 1 (1947) (Establishment Clause). When the States dismantled their religious establishments, by the 1830’s, they did so on their own in response to the lessons taught by their experiences with religious establishments.

exercise concerns that arise when public funds flow to religion. 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, 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.

The Court focuses on one aspect of Missouri's Article I, § 7: that it denies funding to a house of worship, here the Church, "simply because of what it is—a church." The Court describes this as a constitutionally impermissible line based on religious "status" that requires strict scrutiny. Its rule is out of step with our precedents. The Constitution creates specific rules that control how the government may interact with religious entities. 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. 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.

The Court recasts *Locke* as a case about a restriction that prohibited the would-be minister from "using the funds to prepare for the ministry." *Locke* stands for the proposition that the government may, but need not, choose not to fund certain religious entities where doing so raises "historic and substantial" establishment and free exercise concerns. [It also] suggests that this case is different because it involves "discrimination" in the form of the denial of access to a possible benefit. But a decision to treat entities differently based on distinctions that the Religion Clauses make relevant does not amount to discrimination. "The First Amendment embraces the right to select any religious faith or none at all." *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985). 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 instead focused on whether the government has provided a good enough reason, based in the values the Religion Clauses protect, for its decision. The Court's desire to avoid discrimination is understandable. But the description is inappropriate. 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. That does not make the State "atheistic or antireligious." It means only that the State has "established neither atheism nor religion as its official creed." The Court's conclusion "that the only alternative to governmental support of religion is governmental hostility to it represents a giant step backward in our Religion Clause jurisprudence." 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" Few would disagree. 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. The Scrap Tire Program offers not a generally available benefit but a selective benefit for a few recipients each year. The comparison to truly generally available benefits is inapt.

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 retain our inalienable right to "the free exercise" of religion, to choose for ourselves whether to believe and how to worship. 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 it must do so whenever it decides to create a funding program. 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 history and leads us to a place where separation of church and state is a constitutional slogan, not a constitutional commitment. I dissent.