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Insert at p. lxix:

NEIL GORSUCH (1967-)—Neil Gorsuch was born in Colorado, and raised there and in the Washington, D.C. area. He attended Columbia University and Harvard Law School. Gorsuch clerked for Justice Anthony Kennedy in 1992-93 and for retired Justice Byron White the following year. Gorsuch remained in Washington in the private practice of law, and also served in the Department of Justice shortly before his nomination to the United States Court of Appeals for the Tenth Circuit. In 2004, he earned a doctorate in law and philosophy from Oxford University. In 2006, Gorsuch was nominated to serve as a federal appellate judge. He remained on the Tenth Circuit until his confirmation to the position of Associate Justice of the Supreme Court in April 2017.

Jurisprudentially, Gorsuch is an originalist, one who seeks the original understanding of the text of the Constitution. He has written opinions on the Court that diverge from the view that judges follow a particular political behavioral type. This behavioralist approach does not account for a number of his early opinions; his fidelity to originalist has served as a better guide to understanding his writings.

Gorsuch was nominated to take the seat of Justice Antonin Scalia, who died in February 2016. President Barack Obama nominated Merrick Garland to replace Justice Scalia, but the Republican Senate majority refused to hold hearings on Garland's nomination until after the 2016 presidential election.

Insert in Chapter 1 § D.1.a. at page 64:

TOWN OF CHESTER V. LAROE ESTATES, INC., 581 U.S. ___, 137 S. Ct. 1645 (2017)—A unanimous Court, in an opinion by Justice Alito, held that an intervenor in a federal civil action, even when intervening as a matter of right under the Federal Rules of Civil Procedure, must meet Article III standing requirements. If an intervenor requests relief in addition to that sought by a party possessing standing, the intervenor must demonstrate constitutional standing.

TRUMP V. HAWAII, 585 U.S. __, 138 S. Ct. 2392 (2018)—Plaintiffs challenged the President's Proclamation restricting the admission of citizens of a small subset of countries. Most of the persons banned from entry were Muslim, or at least citizens of countries in which a majority were Muslim. One of plaintiffs' claims was that the Proclamation was intended to exclude Muslims from entry into the United States, which violated the Nonestablishment Clause (see the discussion below in Chapter 9 § B). To reach that constitutional question required the Court to determine whether the plaintiffs possess constitutional standing. It held they possessed a concrete injury: the Proclamation kept the plaintiffs "separated from certain relatives who seek to enter the country." The Court refused to decide whether a claim that the Proclamation disfavored Islam and injured the plaintiffs' right to be free of a federal establishment was a dignitary and spiritual harm cognizable in law.

Insert in Chapter 1§ E. at page 76:

In the Appendix to Chief Justice Roberts's 2016 Year-End Report on the Federal Judiciary, the Supreme Court listed a decrease from the previous year in the number of filings. A total of 6,475 cases were filed in the Court during the 2015 Term. The decline was accounted for by a decrease in the *in forma pauperis* docket to 4,926. The number of paid filings in the 2015 Term was 1,549, almost exactly the same as the previous Term. The Court heard arguments in 82 cases, 70 of which were disposed of, 62 of which were by signed opinion. The signed opinions were slightly higher in number than in the 2014 Term. Twelve cases were not argued, but decided by *per curiam* opinion.

Insert in Chapter 2 § C. at page 181:

MURPHY V. NCAA, 584 U.S. ___, 138 S. Ct. 1461 (2018)—Congress adopted the Professional and Amateur Sports Protection Act (PASPA) in 1991. The Act made it unlawful for a state to "sponsor, operate, advertise, promote, license, or authorize" any sports gambling scheme. The Act grandfathered the sports gambling operations of four states, including Nevada. For the Court, Justice Alito held that PASPA violated the anticommandeering principle of the Tenth Amendment, based on the structural concept of dual sovereignty. The majority noted that "conspicuously absent from the list of [enumerated] powers given to Congress is the power to issue direct orders to the governments of the United States." PASPA's prohibition on states authorizing sports gambling unconstitutionally placed state legislatures "under the direct control of Congress." Because Congress possesses power to regulate persons, not governments, PASPA's regulation of the latter violated the structure of the Constitution. The Court also reaffirmed the principle of anticommandeering: It promotes individual liberty, political accountability, and "prevents Congress from shifting the costs of regulation to the States." The Court also rejected (calling it "empty") the distinction between compelling a state to enact legislation, as in *New York v. United States*, and prohibiting a state from doing so.

AFTERWORD—States almost immediately began to adopt legislation establishing and regulating sports gambling operations. Congress made no effort to adopt legislation regulating sports gambling nationwide, which it is permitted to do pursuant to its commerce clause power.

Insert in Chapter 3 § B. at page 232:

LUCIA V. SEC, 585 U.S. ___, 138 S. Ct. 2044 (2018)—Lucia was charged with violating securities laws. An administrative law judge (ALJ) was assigned by the SEC to decide the matter. The ALJ found Lucia had violated the law. On appeal, Lucia claimed the ALJ was not constitutionally appointed. The Court agreed. It held that ALJs are "Officers of the United States," and thus must be appointed by the President, "Courts of Law," or "Heads of Departments," pursuant to Art. II, § 2, cl. 2. The ALJs working at the SEC had been selected by SEC staff members, not the Commissioners of the SEC. The ALJs were officers of the United States because they held a continuing office created by statute, and possessed some significant authority in the power they possessed.

Insert in Chapter 4 § B.2.b. at page 284:

SOUTH DAKOTA V. WAYFAIR, 585 U.S. ___, 138 S. Ct. 2080 (2018)—The South Dakota legislature adopted, and the governor signed, a bill requiring companies that deliver more than $100,000 worth of goods within South Dakota to remit sales taxes to the state even when the delivering company possesses no physical presence in the state. The South Dakota act was held unconstitutional by the South Dakota Supreme Court on the ground that it contradicted a 1992 case, *Quill Corp. v. North Dakota*, 504 U.S. 298. *Quill* required a company to have a physical presence in a state for the latter to require the former to remit sales taxes. The Supreme Court overruled its decision in *Quill*, and held the act constitutional.

The Court, in an opinion by Justice Kennedy, began its re-assessment with reference to "two primary principles": One, states may not discriminate against interstate commerce, and two, states may not impose undue burdens on interstate commerce. The Court found three reasons suggesting Quill was wrongly decided: First, the physical presence rule did not mean the company was not engaged in a taxable activity in the taxing state. Second, *Quill* created rather than calmed market distortions, and third, "Quill imposes the sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow." Maintaining the physical presence rule did not reduce or even affect any state discrimination against interstate commerce. It did, of course, place businesses with a physical presence in a state at a competitive disadvantage against out-of-state sellers, for the latter did not have to collect sales tax, often making the overall purchase price of a good less expensive to the purchaser. This was a market distortion, and no constitutional rule required the Commerce Clause to favor those without a physical presence. Finally, formalism failed to account for the more sensitive case by case approach that assessed both purposes and effects in determining the constitutionality of the state's law or action.

The dissent by Chief Justice Roberts, for the four dissenters, emphasized the "heightened form of *stare decisis* in the dormant Commerce Clause context." Because Congress enjoys the power to override any decision of the Court regarding the dormant Commerce Clause, and has not chosen to do so, the Court should stay its hand.

Insert in Chapter 6 § A. at page 368:

BECKLES V. UNITED STATES, 580 U.S. ___, 136 S. Ct. 2510 (2017)—Beckles was convicted of unlawfully possessing a firearm as a previously convicted felon. He challenged his sentence, based in part on a residual clause in the guidelines from the United States Sentencing Commission, as void for vagueness. The Court held that the advisory guidelines were not subject to a vagueness challenge under the Due Process Clause. The majority opinion by Justice Thomas concluded a vagueness challenge under the Due Process Clause could be made to "laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses." In *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), the Court held violative of the Due Process Clause a statute that fixed permissible sentences "in an impermissibly vague way." *Johnson* was irrelevant, the Court concluded, because in Beckles's case, the advisory guidelines "do not fix the permissible range of sentences." Instead, the guidelines "merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range."

Although unanimous, Justices Kennedy, Ginsburg, and Sotomayor wrote opinions concurring in the judgement. The latter two opinions took issue with the breadth of the Court's conclusion. Justice Ginsburg concluded that the commentary stating possession of a sawed-off shotgun by a felon was a crime of violence was authoritative, making Beckles's claim inapt in his case. Because his conduct was clearly prohibited, Beckles was not permitted to complain on behalf of others. Justice Sotomayor's dissent concluded that, in some instances, the guidelines should be subject to vagueness challenges, because of "the central role that the Guidelines play at sentencing." In reaching this conclusion, Justice Sotomayor focused on the crucial functional role the Guidelines play in sentencing, not its formal role as advisory rather than binding statements of law.

NELSON V. COLORADO, 581 U.S. ___, 137 S. Ct. 1249 (2017)—Nelson was convicted of several crimes in Colorado state court. She was sentenced and fined. Her conviction was reversed on appeal, and at the retrial she was acquitted. Nelson demanded a return of money she had paid Nelson's state-held account while a prisoner was withheld from her after her acquittal. In an opinion by Justice Ginsburg, the Court held Colorado's action violated the Due Process Clause. Using the balancing test in *Matthews v. Eldridge*, the Court decided the interests of the individuals were great in receiving back their money, and the state's interest negligible.

Concurring in the judgment, Justice Alito rejected the *Matthews* test in favor of the "fundamental and deeply rooted principle of justice" test in *Medina v. California*, 505 U.S. 437 (1992).

Justice Thomas dissented, arguing Nelson lacked a substantive entitlement to the money. In his view, once Nelson paid the state money required by their conviction, it became public funds, and the Due Process Clause provided no substantive right to its return.

Insert in Chapter 6 § D.1. at page 524:

MURR V. WISCONSIN, 582 U.S. ___, 137 S. Ct. 1933 (2017)—Murr family members claimed the Wisconsin Department of Natural Resources (DNR) regulated the use of their real property to such an extent that it constituted a regulatory taking. The Murrs owned two lots along the Lower St. Croix River. The DNR prohibited the Murrs and others with undeveloped land to build on the land if the amount of suitable land was less than one acre. The lots owned were each 1.25 acres, but the suitable land for building on each was 0.98 acres. In a 5-3 opinion (Justice Gorsuch did not participate), the Court, in an opinion by Justice Kennedy, held that no regulatory taking existed. The Court noted that the trial court found the Murrs had not been "deprived of all economic value of their property," and also that the regulations caused a decrease in its value of less than 10 percent, because it looked at the two lots as one whole parcel. The Court used "a number of factors," including the physical characteristics of the land, the prospective value of the regulated land, the reasonable expectations of the landowners, and background customs and the whole of our legal tradition, in reaching its conclusion. This test was "objective." The Court rejected the request by both parties for a "formalistic rule to guide the parcel inquiry," and affirmed the lower court's holding in favor of the state based on its multi-factor test of the two lots as one parcel.

Chief Justice Roberts dissented, concluding the Court went "astray" in its broad definition of private property. The Takings Clause protected "*established* property rights," those rights to property as created and defined by state law. Instead of looking at the two lots as one contiguous whole, which he calls applying "a takings-specific definition of the property at issue," courts should look at the lots under "general state law principles," and thus, as "legally distinct parcels of land."

Justice Thomas also dissented, and raised the issue of whether regulatory takings was a concept found in the original meaning of the Takings Clause.

Insert in Chapter 7 § E. at page 644:

SESSIONS V. MORALES-SANTANA, 582 U.S. ___, 137 S. Ct. 1678 (2017)—Morales-Santana was born in the Dominican Republic. His mother was a citizen of the Dominican Republic. His father, Jose Morales, was born in Puerto Rico and lived there until 20 days before his nineteenth birthday, when he moved to the Dominican Republic for work. Decades later, Morales fathered Morales-Santana, and a decade after the birth of Morales-Santana, the couple married. Morales-Santana lived in the Dominican Republic until moving to the United States (first Puerto Rico, then New York City) when he was thirteen. After several convictions, Morales-Santana was made subject to removal proceedings. He claimed American birth citizenship based on his father's status as an American citizen. Under federal law, because Jose Morales left Puerto Rico before spending five years in the United States after the age of fourteen, Jose Morales was not an American citizen, and therefore, neither was Morales-Santana. If Morales-Santana's mother had been an American citizen, and given birth while unwed, Morales-Santana would have received American citizenship based on his mother's citizenship. The Court held that Morales-Santana could "vindicate his father's right to the equal protection of the laws." It held an exception existed to the rule that a party can protect or advance only one's own rights, for there was a "close relationship" between father and son and the Jose Morales's failure to assert his own claims to American citizenship created a "hindrance" to Morales-Santana's ability to effectuate his own interests in claiming American citizenship. The gender-based distinction in according citizenship to the children of mothers and fathers was unconstitutional as it reflected overbroad gender stereotypes. Although the law violated the Equal Protection Clause, the Court reversed the Second Circuit because it disagreed with the remedy to be applied.

Insert in Chapter 8 § A.4. at page 660:

PACKINGHAM V. NORTH CAROLINA, 582 U.S. ___, 137 S. Ct. 1730 (2017)—Registered sex offenders in North Carolina committed a felony if they gained "access [to] 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." Packingham created a Facebook account and was prosecuted for and convicted of violating the act. The Court held the law violated the First Amendment's Free Speech Clause. The act contradicted the "fundamental principle of the First Amendment [] that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." The unanimous opinion for the Court was written by Justice Kennedy. The Court concluded the statute was "unprecedented in the scope of First Amendment speech it burdens." Even if the Court adopted intermediate scrutiny, the law was unconstitutional because it was not narrowly tailored and burdened substantially more speech than necessary to effectuate the government's interests.

Justice Alito, joined by Chief Justice Roberts and Justice Thomas, concurred in the judgment. They agreed the statute's "staggering reach" and "extraordinary breadth" made it unconstitutional, but rejected the Court's "undisciplined dicta," which incorrectly suggested "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." Though the state possessed a compelling interest in preventing sexual abuse of children, the act swept so broadly that it banned registered sex offenders from accessing "a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child," such as Amazon.com and WebMD. The concurrence also disagreed with the Court's analogy of cyberspace to public streets and parks. In Justice Alito's view, parents were much more able to monitor the physical locations their children visited than cyberspace locations, and it was easier for the public to visually observe a sex offender loitering in a public space than cyberspace.

MATAL V. TAM, 582 U.S. ___, 137 S. Ct. 1744 (2017)—The Patent and Trademark Office (PTO) refused to register as a trademark "THE SLANTS," which is the name of a rock band consisting of Asian-Americans. The band wanted to "reclaim" this derogatory name for persons of Asian descent. The PTO justified its decision on a federal statute, which prohibited the registration of any trademark that may "disparage ... or bring ... into contemp[t] or disrepute" any persons living or dead. The Court, in an opinion by Justice Alito, held this provision violated the Free Speech Clause. Two pluralities differed on the justifications for this conclusion. The Court was unanimous that the speech regulated by federal law was private speech, not government speech. PTO registration does not indicate governmental approval of a message, nor does it convey a public message. It also differed from *Walker* because specialty license plates messages have been long used by states to convey messages, are identified with the state in the public mind, and the state maintains control over the messages conveyed. The unanimous Court then suggested that holding registrations of trademarks government speech might implicate the registration of copyrights,

which were clearly understood to be private speech. For Justice Alito, the law unconstitutionally banned speech "on the ground that it expresses ideas that offend." For a plurality, Justice Alito concluded this case was unlike any case in which the government provided a cash subsidy or other financial support for the speech. Third, Justice Alito rejected for his plurality a speech doctrine related to "cases involving a "government program." Finally, Justice Alito rejected the argument that the disparagement provision was constitutional because it regulated commercial speech alone. The plurality decided that, even if trademarks were commercial speech, the law failed the *Central Hudson* test regarding when commercial speech may be regulated.

Justice Kennedy, joined by Justices Ginsburg, Sotomayor, and Kagan, concurred in part and concurred in the judgement. They agreed with the conclusion that the law was unconstitutional viewpoint discrimination, and expanded on the reasons "why the First Amendment's protections against viewpoint discrimination apply to the trademark here." That discussion led Justice Kennedy to ignore "other questions raised by the parties." The government "singled out a subset of messages for disfavor based on the views expressed," for the registrant could register a "positive or benign mark but not a derogatory one." This disapproval of a particular message "is the essence of viewpoint discrimination."

MINNESOTA VOTERS ALLIANCE V. MANSKY, 585 U.S. ___, 138 S. Ct. 1876 (2018)**--**A Minnesota law banning voters (and others) from wearing any "political badge, political button, or other political insignia" in a polling location. Whether some apparel was banned was determined by state election judges. The Court held the ban unconstitutional. The ban applied only to polling locations, which are a nonpublic forum. The test was whether the ban was reasonable and not intended to suppress speech disfavored by government. The Court held limitations on campaign advocacy near polling places was constitutionally permissible. However, the statute did not define "political," and the state's interpretive guidance regarding several categories of banned apparel was unreasonable. One category of banned apparel was that concerning "issue oriented material designed to influence or impact voting." A second was items "promoting a group with recognizable political views," which was so broad that application of this category was subject to idiosyncratic and thus unconstitutional application.

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES V. BECERRA, 585 U.S. ___, 138 S. Ct. 2361 (2018)—California adopted a law requiring crisis pregnancy centers to display certain notices. The centers affected were "pro-life (largely Christian belief-based)." They were required to post notices that the state of California provides free or low-cost abortions and include a phone number to call. The Court held the notice requirement was content-based, and thus subject to strict scrutiny. The Ninth Circuit applied lesser scrutiny on the ground that the state was regulating "professional speech." The Court held no such category of speech exists, and none should be created. This did not, the Court concluded, make a constitutional difference, for it then held the law unconstitutional on intermediate scrutiny grounds. The only purpose for the law was "providing low-income women with information about state-sponsored services." The act did not sufficiently achieve this purpose, because was "wildly underinclusive," applying only to a

particular and small subset of family planning or crisis pregnancy centers, those that were pro-life. In addition, California could have informed low-income women of the option of abortion at little or no cost without burdening the pro-life centers. For example, a public information campaign could have been undertaken by California. But to "co-opt the licensed facilities to deliver its message for it" was unconstitutional.

A concurrence by Justice Kennedy for four justices noted the underlying issue of viewpoint discrimination, which was unnecessary to decide the case, but sufficiently important to note. The concurrence concluded, "The law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, though, and expression."

The dissent by Justice Breyer for himself and three others. He concluded that the disclosure notice was similar to other disclosure notifications required in reproductive health care, and thus constitutional.

Insert in Chapter 8 § B.7.a. at page 764:

EXPRESSIONS HAIR DESIGN V. SCHNEIDERMAN, 581 U.S. ___, 137 S. Ct. 1144 (2017)—New York law regulated differential pricing by merchants. It allowed them to discount the sales price if the customer paid with cash, but prohibited merchants from exacting a surcharge if the customer used a credit card. The Court held the law regulated speech, not just conduct, and remanded the case for a determination whether that regulation violated the Free Speech Clause.

Justice Breyer concurred in the judgment, noting that "it is often wiser not to try to distinguish between 'speech' and 'conduct,' " for "virtually all government regulation affects speech," as "[h]uman relations take place through speech." Deciding what level of review should occur was a more profitable approach than determining the line between speech and conduct. Justice Sotomayor, joined by Justice Alito, also concurred in the judgment. She noted that the case was difficult because the breadth of the New York law had not been determined by New York courts, and suggested the question of the statute's meaning be certified to the New York Court of Appeals for a determinative interpretation.

Insert in Chapter 8 § E.3. at page 811:

Janus v. AFSCME
585 U.S. ___, 138 S. Ct. 2448 (2018)

Justice ALITO delivered the opinion of the Court.

Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.

We upheld a similar law in *Abood v. Detroit Bd. of Ed*. (1977). *Abood* was poorly reasoned. It has led to practical problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions. Developments since *Abood* was handed down have shed new light on the issue of agency fees, and no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years. *Abood* is therefore overruled.

I

A

Under the Illinois Public Labor Relations Act (IPLRA), employees of the State and its political subdivisions are permitted to unionize. If a majority of the employees in a bargaining unit vote to be represented by a union, that union is designated as the exclusive representative of all the employees. Employees in the unit are not obligated to join the union selected by their co-workers, but whether they join or not, that union is deemed to be their sole permitted representative.

Once a union is so designated, it is vested with broad authority. Only the union may negotiate with the employer on matters relating to "pay, wages, hours [,] and other conditions of employment." And this authority extends to the negotiation of what the IPLRA calls "policy matters," such as merit pay, the size of the work force, layoffs, privatization, promotion methods, and non-discrimination policies.

Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees.

Employees who decline to join the union are not assessed full union dues but must instead pay what is generally called an "agency fee," which amounts to a percentage of the union dues. Under *Abood,* nonmembers may be charged for the portion of union dues attributable to activities

that are "germane to [the union's] duties as collective-bargaining representative," but nonmembers may not be required to fund the union's political and ideological projects.

Excluded from the agency-fee calculation are union expenditures "related to the election or support of any candidate for political office."

[A] union categorizes its expenditures as chargeable or nonchargeable; this determination is then audited; the amount of the "proportionate share" is certified to the employer; and the employer automatically deducts that amount from the nonmembers' wages. Nonmembers need not be asked, and they are not required to consent before the fees are deducted.

If nonmembers "suspect that a union has improperly put certain expenses in the [chargeable] category," they may challenge that determination.

[U]nions charge nonmembers, not just for the cost of collective bargaining *per se,* but also for many other supposedly connected activities. Here, the nonmembers were told that they had to pay for "[l]obbying," "[s]ocial and recreational activities," "advertising," "[m]embership meetings and conventions," and "litigation," as well as other unspecified "[s]ervices" that "may ultimately inure to the benefit of the members of the local bargaining unit." The total chargeable amount for nonmembers was 78.06% of full union dues.

B

Petitioner Mark Janus is employed by the Illinois Department of Healthcare and Family Services. The employees in his unit are among the 35,000 public employees in Illinois who are represented by respondent American Federation of State, County, and Municipal Employees, Council 31 (Union). Janus refused to join the Union because he opposes "many of the public policy positions that [it] advocates," including the positions it takes in collective bargaining.

III

Abood upheld the constitutionality of an agency-shop arrangement like the one now before us, but in more recent cases we have recognized that this holding is "something of an anomaly" and that *Abood*'s "analysis is questionable on several grounds."

A

[M]ost of our free speech cases have involved restrictions on what can be said, rather than laws compelling speech. But measures compelling speech are at least as threatening.

Free speech serves many ends. It is essential to our democratic form of government, and it furthers the search for truth. Whenever the Federal Government or a State prevents individuals

from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.

When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence.

Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns. As [Thomas] Jefferson famously put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." We have therefore recognized that a "significant impingement on First Amendment rights" occurs when public employees are required to provide financial support for a union that "takes many positions during collective bargaining that have powerful political and civic consequences."

Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed.

V

C

We readily acknowledge that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Our analysis is consistent with that principle. The exacting scrutiny standard we apply in this case was developed in the context of commercial speech, another area where the government has traditionally enjoyed greater-than-usual power to regulate speech. It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms that would not be tolerated in other contexts. We simply draw the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views.

VI

For the reasons given above, we conclude that public-sector agency-shop arrangements violate the First Amendment, and *Abood* erred in concluding otherwise. There remains the question whether stare decisis nonetheless counsels against overruling *Abood*. It does not.

Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: the quality of *Abood*'s reasoning, the

workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision. After analyzing these factors, we conclude that stare decisis does not require us to retain Abood.

A

An important factor in determining whether a precedent should be overruled is the quality of its reasoning.

Abood went wrong at the start when it concluded that two prior decisions, "appear[ed] to require validation of the agency-shop agreement before [the Court]." Properly understood, those decisions did no such thing. *Abood* failed to appreciate that a very different First Amendment question arises when a State requires its employees to pay agency fees.

Abood's unwarranted reliance on [precedent] appears to have contributed to another mistake: *Abood* judged the constitutionality of public-sector agency fees under a deferential standard that finds no support in our free speech cases.

Abood also did not sufficiently take into account the difference between the effects of agency fees in public- and private-sector collective bargaining. The challengers in *Abood* argued that collective bargaining with a government employer, unlike collective bargaining in the private sector, involves "inherently 'political' " speech. But the *Abood* Court asserted that public employees do not have "weightier First Amendment interest[s]" against compelled speech than do private employees. That missed the point. "In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector."

B

Another relevant consideration in the stare decisis calculus is the workability of the precedent in question, and that factor also weighs against *Abood*.

1

Abood's line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision.

Respondents agree that *Abood*'s chargeable-nonchargeable line suffers from "a vagueness problem." They therefore argue that we should "consider revisiting" this part of *Abood*. This concession only underscores the reality that *Abood* has proved unworkable: Not even the parties defending agency fees support the line that it has taken this Court over 40 years to draw.

2

Objecting employees also face a daunting and expensive task if they wish to challenge union chargeability determinations.

How could any nonmember determine whether these numbers are even close to the mark without launching a legal challenge and retaining the services of attorneys and accountants? Indeed, even with such services, it would be a laborious and difficult task to check these figures.

The Union respondent argues that challenging its chargeability determinations is not burdensome because the Union pays for the costs of arbitration, but objectors must still pay for the attorneys and experts needed to mount a serious challenge. And the attorney's fees incurred in such a proceeding can be substantial. The Union respondent's suggestion that an objector could obtain adequate review without even showing up at an arbitration is therefore farfetched.

C

Developments since Abood, both factual and legal, have also "eroded" the decision's "underpinnings" and left it an outlier among our First Amendment cases.

1

Abood pinned its result on the "unsupported empirical assumption" that "the principle of exclusive representation in the public sector is dependent on a union or agency shop." But experience has shown otherwise.

It is also significant that the Court decided Abood against a very different legal and economic backdrop. Public-sector unionism was a relatively new phenomenon in 1977. The first State to permit collective bargaining by government employees was Wisconsin in 1959, and public-sector union membership remained relatively low until a "spurt" in the late 1960's and early 1970's.

This ascendance of public-sector unions has been marked by a parallel increase in public spending. Not all that increase can be attributed to public-sector unions, of course, but the mounting costs of public-employee wages, benefits, and pensions undoubtedly played a substantial role. These developments have given collective-bargaining issues a political valence that *Abood* did not fully appreciate.

2

Abood is also an "anomaly" in our First Amendment jurisprudence. Our later cases involving compelled speech and association have also employed exacting scrutiny, if not a more demanding standard.

Abood particularly sticks out when viewed against our cases holding that public employees generally may not be required to support a political party. It is an odd feature of our First Amendment cases that political patronage has been deemed largely unconstitutional, while forced subsidization of union speech (which has no such pedigree) has been largely permitted. By overruling *Abood*, we end the oddity of privileging compelled union support over compelled party support and bring a measure of greater coherence to our First Amendment law.

D

In some cases, reliance provides a strong reason for adhering to established law. In this case, however, reliance does not carry decisive weight.

For one thing, it would be unconscionable to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions that will expire on their own in a few years' time.

For another, *Abood* does not provide "a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced." *South Dakota v. Wayfair*.

This is especially so because public-sector unions have been on notice for years regarding this Court's misgivings about *Abood*.

[T]he uncertain status of Abood, the lack of clarity it provides, the short-term nature of collective-bargaining agreements, and the ability of unions to protect themselves if an agency-fee provision was crucial to its bargain all work to undermine the force of reliance as a factor supporting *Abood*.

All these reasons—that *Abood*'s proponents have abandoned its reasoning, that the precedent has proved unworkable, that it conflicts with other First Amendment decisions, and that subsequent developments have eroded its underpinnings—provide the "special justification[s]" for overruling *Abood*.

VII

For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees.

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

For over 40 years, *Abood* struck a stable balance between public employees' First Amendment rights and government entities' interests in running their workforces as they thought proper.

That holding fit comfortably with this Court's general framework for evaluating claims that a condition of public employment violates the First Amendment. The Court's decisions have long made plain that government entities have substantial latitude to regulate their employees' speech—especially about terms of employment—in the interest of operating their workplaces effectively. *Abood* allowed governments to do just that. While protecting public employees' expression about non-workplace matters, the decision enabled a government to advance important managerial interests—by ensuring the presence of an exclusive employee representative to bargain with. Far from an "anomaly," the *Abood* regime was a paradigmatic example of how the government can regulate speech in its capacity as an employer.

Not any longer. [The] decision will have large-scale consequences. Public employee unions will lose a secure source of financial support. State and local governments that thought fair-share provisions furthered their interests will need to find new ways of managing their workforces. Across the country, the relationships of public employees and employers will alter in both predictable and wholly unexpected ways.

Rarely if ever has the Court overruled a decision—let alone one of this import—with so little regard for the usual principles of stare decisis. There are no special justifications for reversing *Abood*. It has proved workable. No recent developments have eroded its underpinnings. And it is deeply entrenched, in both the law and the real world. More than 20 States have statutory schemes built on the decision. Reliance interests do not come any stronger than those surrounding *Abood*. And likewise, judicial disruption does not get any greater than what the Court does today. I respectfully dissent.

II

Unlike the majority, I see nothing "questionable" about *Abood*'s analysis. The decision's account of why some government entities have a strong interest in agency fees (now often called fair-share fees) is fundamentally sound. And the balance *Abood* struck between public employers' interests and public employees' expression is right at home in First Amendment doctrine.

A

Abood's reasoning about governmental interests has three connected parts. First, exclusive representation arrangements benefit some government entities because they can facilitate stable labor relations. Second, the government may be unable to avail itself of those benefits unless the single union has a secure source of funding. And third, agency fees are often needed to ensure such stable funding. That is because without those fees, employees have every incentive to free ride on the union dues paid by others.

[T]he majority stakes everything on the third point—the conclusion that maintaining an effective system of exclusive representation often entails agency fees.

But basic economic theory shows why a government would think that agency fees are necessary for exclusive representation to work. What ties the two together, as *Abood* recognized, is the likelihood of free-riding when fees are absent. Remember that once a union achieves exclusive-representation status, the law compels it to fairly represent all workers in the bargaining unit, whether or not they join or contribute to the union. Because of that legal duty, the union cannot give special advantages to its own members. And that in turn creates a collective action problem of nightmarish proportions. Everyone—not just those who oppose the union, but also those who back it—has an economic incentive to withhold dues; only altruism or loyalty—as against financial self-interest—can explain why an employee would pay the union for its services. And so emerged *Abood*'s rule allowing fair-share agreements.

B

1

In many cases over many decades, this Court has addressed how the First Amendment applies when the government, acting not as sovereign but as employer, limits its workers' speech. Those decisions have granted substantial latitude to the government, in recognition of its significant interests in managing its workforce so as to best serve the public. *Abood* fit neatly with that caselaw, in both reasoning and result. Indeed, its reversal today creates a significant anomaly—an exception, applying to union fees alone, from the usual rules governing public employees' speech.

2

The key point about *Abood* is that it fit naturally with this Court's consistent teaching about the permissibility of regulating public employees' speech. The Court allows a government entity to regulate that expression in aid of managing its workforce to effectively provide public services. That is just what a government aims to do when it enforces a fair-share agreement. And so, the key point about today's decision is that it creates an unjustified hole in the law, applicable to union fees alone.

III

But the worse part of today's opinion is where the majority subverts all known principles of *stare decisis*.

Consider first why these principles about precedent are so important. Stare decisis—"the idea that today's Court should stand by yesterday's decisions"—is "a foundation stone of the rule of law."

And *Abood* is not just any precedent: It is embedded in the law in a way not many decisions are. Over four decades, this Court has cited *Abood* favorably many times

Ignoring our repeated validation of *Abood*, the majority claims it has become "an outlier among our First Amendment cases." That claim fails most spectacularly for reasons already discussed. [T]he majority [also] suggests that *Abood* conflicts with "our political patronage decisions." But in fact those decisions strike a balance much like *Abood*'s.

The majority is likewise wrong to invoke "workability" as a reason for overruling *Abood*. Does *Abood* require drawing a line? Yes, between a union's collective-bargaining activities and its political activities. Is that line perfectly and pristinely "precis[e]," as the majority demands? Well, not quite that—but as exercises of constitutional line drawing go, *Abood* stands well above average. In the 40 years since *Abood*, this Court has had to resolve only a handful of cases raising questions about the distinction. And that tranquility is unsurprising: There may be some gray areas (there always are), but in the mine run of cases, everyone knows the difference between politicking and collective bargaining.

And in any event, one *stare decisis* factor—reliance—dominates all others here and demands keeping *Abood*. *Stare decisis*, this Court has held, "has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision." That is because overruling a decision would then "require an extensive legislative response" or "dislodge settled rights and expectations." Both will happen here.

Over 20 States have by now enacted statutes authorizing fair-share provisions. Every one of them will now need to come up with new ways—elaborated in new statutes—to structure relations between government employers and their workers.

Still more, thousands of current contracts covering millions of workers provide for agency fees. The majority undoes bargains reached all over the country. It prevents the parties from fulfilling other commitments they have made based on those agreements. It forces the parties—immediately—to renegotiate once-settled terms and create new tradeoffs. It does so knowing that many of the parties will have to revise (or redo) multiple contracts simultaneously. It does so with no real clue of what will happen next—of how its action will alter public-sector labor relations. It does so even though the government services affected—policing, firefighting, teaching, transportation, sanitation (and more)—affect the quality of life of tens of millions of Americans.

The majority asserts that no one should care much because the canceled agreements are "of rather short duration" and would "expire on their own in a few years' time." But that response ignores the substantial time and effort that state legislatures will have to devote to revamping their statutory schemes. And anyway, it misunderstands the nature of contract negotiations when the parties have a continuing relationship. The parties, in renewing an old collective-bargaining agreement, don't start on an empty page. Instead, various "long-settled" terms—like fair-share provisions—are taken as a given.

The majority, though, offers another reason for not worrying about reliance: The parties, it says, "have been on notice for years regarding this Court's misgivings about *Abood*."

But that argument reflects a radically wrong understanding of how *stare decisis* operates. *Abood*'s holding was square. It was unabandoned before today. It was, in other words, the law—however much some were working overtime to make it not. Parties, both unions and governments, were thus justified in relying on it. To dismiss the overthrowing of their settled expectations as entailing no more than some "adjustments" and "unpleasant transition costs" is to trivialize *stare decisis*.

IV

There is no sugarcoating today's opinion. The majority overthrows a decision entrenched in this Nation's law—and in its economic life—for over 40 years. As a result, it prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.

The majority has overruled *Abood* for no exceptional or special reason, but because it never liked the decision. It has overruled *Abood* because it wanted to.

Because, that is, it wanted to pick the winning side in what should be—and until now, has been—an energetic policy debate. Some state and local governments (and the constituents they serve) think that stable unions promote healthy labor relations and thereby improve the provision of services to the public. Other state and local governments (and their constituents) think, to the contrary, that strong unions impose excessive costs and impair those services. Americans have debated the pros and cons for many decades—in large part, by deciding whether to use fair-share arrangements. Yesterday, 22 States were on one side, 28 on the other (ignoring a couple of in-betweeners). Today, that healthy—that democratic—debate ends.

And maybe most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy. Today is not the first time the Court has wielded the First Amendment in such an aggressive way. And it threatens not to be the last. Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices. The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions.

Insert in Chapter 9 § B at page 869:

TRUMP V. HAWAII, 585 U.S. __, 138 S. Ct. 2392 (2018)—Plaintiffs challenged the President's Proclamation restricting the admission of citizens of a small subset of countries on Nonestablishment Clause grounds. The Court, noting the facial neutrality of the Proclamation and its relation to issues of national security, adopted rational basis review to assess its constitutionality. It held the Proclamation was not based solely on the purpose to harm a politically popular group, in part due to the language speaking not of Muslims or Islam but of nations, and possessed a "legitimate grounding in national security concerns." It was thus constitutional.

The dissent by Justice Sotomayor began, "The United States of America is a Nation built upon the promise of religious liberty." Because "a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus," the plaintiffs had offered sufficient proof of the merits of their request for an injunction. The dissent went into great detail concerning the anti-Muslim remarks of candidate and President Trump. Those statements demonstrated "that the primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country." Further, the dissent concluded that the Proclamation was unconstitutional even when judged based on rational basis review, for only anti-Muslim animus explained its issuance.

Insert in Chapter 9 § C. at page 892:

Trinity Lutheran Church of Columbia v. Comer
582 U.S. ___, 137 S. Ct. 2012 (2017)

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

The Missouri Department of Natural Resources offers state grants to help public and private schools, nonprofit daycare centers, and other nonprofit entities purchase rubber playground surfaces made from recycled tires. Trinity Lutheran Church applied for such a grant for its preschool and daycare center and would have received one, but for the fact that Trinity Lutheran is a church. The Department had a policy of categorically disqualifying churches and other religious organizations from receiving grants under its playground resurfacing program. The question presented is whether the Department's policy violated the rights of Trinity Lutheran under the Free Exercise Clause of the First Amendment.

I

A

The Trinity Lutheran Church Child Learning Center is a preschool and daycare center open throughout the year to serve working families in Boone County, Missouri. [T]he Center merged with Trinity Lutheran Church in 1985 and operates under its auspices on church property. The Center admits students of any religion, and enrollment stands at about 90 children ranging from age two to five.

The Center includes a playground that is equipped with the basic playground essentials. Almost the entire surface beneath and surrounding the play equipment is coarse pea gravel.

In 2012, the Center sought to replace a large portion of the pea gravel with a pour-in-place rubber surface by participating in Missouri's Scrap Tire Program.

[T]he Department cannot offer grants to all applicants and so awards them on a competitive basis to those scoring highest based on several criteria, such as the poverty level of the population in the surrounding area and the applicant's plan to promote recycling. When the Center applied, the Department had a strict and express 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.

The Center ranked fifth among the 44 applicants in the 2012 Scrap Tire Program. [T]he Center was deemed categorically ineligible to receive a grant [due to] the Missouri Constitution.

[The Center sued and lost. The Court granted certiorari, and reversed.]

II

The parties agree that the Establishment Clause does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program. That does not, however, answer the question under the Free Exercise Clause, because we have recognized that there is "play in the joints" between what the Establishment Clause permits and the Free Exercise Clause compels.

The Free Exercise Clause "protect[s] religious observers against unequal treatment" and subjects to the strictest scrutiny laws that target the religious for "special disabilities" based on their "religious status." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*. Applying that basic principle, this Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest "of the highest order."

In *Everson v. Board of Education*, for example, we upheld against an Establishment Clause challenge a New Jersey law enabling a local school district to reimburse parents for the public transportation costs of sending their children to public and private schools, including parochial schools. [W]e 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 the adoption of its first Constitution in 1796, and that a number of early States had also disqualified ministers from legislative office. This historical tradition, however, did not change the fact that the statute discriminated against McDaniel by denying him a benefit solely because of his "*status* as a 'minister.'" McDaniel could not seek to participate in the convention while also maintaining his role as a minister; to pursue the one, he would have to give up the other.

In recent years, when this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion. We have been careful to distinguish such laws from those that single out the religious for disfavored treatment.

In *Employment Division v. Smith,* we rejected a free exercise claim brought by two members of a Native American church denied unemployment benefits because they had violated Oregon's drug laws by ingesting peyote for sacramental purposes. [W]e held that the Free Exercise

Clause did not entitle the church members to a special dispensation from the general criminal laws on account of their religion. At the same time, we again made clear that the Free Exercise Clause *did* guard against the government's imposition of "special disabilities on the basis of religious views or religious status."

Finally, in *Church of Lukumi Babalu Aye,* we struck down three facially neutral city ordinances that outlawed certain forms of animal slaughter.

III

A

The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. If the cases just described make one thing clear, it is that such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny. This conclusion is unremarkable in light of our prior decisions.

Like the disqualification statute in *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. Of course, Trinity Lutheran is free to continue operating as a church, just as McDaniel was free to continue being a minister. But that freedom comes at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified. And when the State conditions a benefit in this way, *McDaniel* says plainly that the State has punished the free exercise of religion.

The Department contends that merely declining to extend funds to Trinity Lutheran does not *prohibit* the Church from engaging in any religious conduct or otherwise exercising its religious rights. In this sense, says the Department, its policy is unlike the ordinances struck down in *Lukumi*. Here the Department has simply declined to allocate to Trinity Lutheran a subsidy the State had no obligation to provide in the first place.

It is true the Department has not criminalized the way Trinity Lutheran worships or told the Church that it cannot subscribe to a certain view of the Gospel. But, as the Department itself acknowledges, the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." As the Court put it more than 50 years ago, "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert*.

Trinity Lutheran is not claiming any entitlement to a subsidy. It instead asserts a right to participate in a government benefit program without having to disavow its religious character. The

"imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights." *Sherbert*. The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant. Trinity Lutheran is a member of the community too, and the State's decision to exclude it for purposes of this public program must withstand the strictest scrutiny.

B

The Department attempts to get out from under the weight of our precedents by arguing that the free exercise question in this case is instead controlled by our decision in *Locke v. Davey*. It is not. In *Locke,* the State of Washington created a scholarship program to assist high-achieving students with the costs of postsecondary education. The scholarships were paid out of the State's general fund, and eligibility was based on criteria such as an applicant's score on college admission tests and family income. While scholarship recipients were free to use the money at accredited religious and non-religious schools alike, they were not permitted to use the funds to pursue a devotional theology degree—one "devotional in nature or designed to induce religious faith." Davey was selected for a scholarship but was denied the funds when he refused to certify that he would not use them toward a devotional degree. He sued, arguing that the State's refusal to allow its scholarship money to go toward such degrees violated his free exercise rights.

This Court disagreed. It began by explaining what was *not* at issue. Washington's selective funding program was not comparable to the free exercise violations found in the "*Lukumi* line of cases," including those striking down laws requiring individuals to "choose between their religious beliefs and receiving a government benefit." At the outset, then, the Court made clear that *Locke* was not like the case now before us.

Washington's restriction on the use of its scholarship funds was different. According to the Court, the State had "merely chosen not to fund a distinct category of instruction." Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church.

The Court in *Locke* also stated that Washington's choice was in keeping with the State's antiestablishment interest in not using taxpayer funds to pay for the training of clergy; in fact, the Court could "think of few areas in which a State's antiestablishment interests come more into play." Here nothing of the sort can be said about a program to use recycled tires to resurface playgrounds.

Relying on *Locke,* the Department nonetheless emphasizes Missouri's similar constitutional tradition of not furnishing taxpayer money directly to churches. But *Locke* took account of Washington's antiestablishment interest only after determining, as noted, that the

scholarship program did not "require students to choose between their religious beliefs and receiving a government benefit." As the Court put it, 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.[1]

C

The State in this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified. Our cases make clear that such a condition imposes a penalty on the free exercise of religion that must be subjected to the "most rigorous" scrutiny.

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.

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

Missouri's law bars Trinity Lutheran from participating in a public benefits program only because it is a church. I agree this violates the First Amendment. I offer only two modest qualifications.

First, the Court leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious status and religious use. Respectfully, I harbor doubts about the stability of such a line. Does a religious man say grace before dinner? Or does a

[1] 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.

man begin his meal in a religious manner? Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission? The distinction blurs in much the same way the line between acts and omissions can blur when stared at too long, leaving us to ask (for example) whether the man who drowns by awaiting the incoming tide does so by act (coming upon the sea) or omission (allowing the sea to come upon him). Often enough the same facts can be described both ways.

Neither do I see why the First Amendment's Free Exercise Clause should care. After all, that Clause guarantees the free exercise of religion, not just the right to inward belief (or status). *Smith*. And this Court has long explained that government may not "devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Lukumi*. Generally the government may not force people to choose between participation in a public program and their right to free exercise of religion. I don't see why it should matter whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way.

For these reasons, reliance on the status-use distinction does not suffice for me to distinguish *Locke v. Davey*.

Second and for similar reasons, I am unable to join [footnote 3.] Of course the footnote is entirely correct, but I worry that some might mistakenly read it to suggest that only "playground resurfacing" cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court's opinion. Such a reading would be unreasonable for our cases are "governed by general principles, rather than ad hoc improvisations." And the general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else.

Justice BREYER, concurring in the judgment.

I agree with much of what the Court says and with its result. But I find relevant, and would emphasize, the particular nature of the "public benefit" here at issue.

The Court stated in *Everson* that "cutting off church schools from" such "general government services as ordinary police and fire protection ... is obviously not the purpose of the First Amendment." Here, the State would cut Trinity Lutheran off from participation in a general program designed to secure or to improve the health and safety of children. I see no significant difference. The fact that the program at issue ultimately 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. And it is

that last mentioned fact that calls the Free Exercise Clause into play. I would leave the application of the Free Exercise Clause to other kinds of public benefits for another day.

Justice SOTOMAYOR, with whom Justice GINSBURG joins, dissenting.

This case is about nothing less than the relationship between religious institutions and the civil government—that is, between church and state. The Court today profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church. Its decision slights both our precedents and our history, and its reasoning weakens this country's longstanding commitment to a separation of church and state beneficial to both.

II

[T]his is a case about whether Missouri can decline to fund improvements to the facilities the Church uses to practice and spread its religious views. This Court has repeatedly warned that funding of exactly this kind—payments from the government to a house of worship—would cross the line drawn by the Establishment Clause. 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.

A

The government may not directly fund religious exercise. See *Everson*. Put in doctrinal terms, such funding violates the Establishment Clause because it impermissibly "advanc[es] ... religion."

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. When a government funds a house of worship, it underwrites this religious exercise.

The Church seeks state funds to improve the Learning Center's facilities, which, by the Church's own avowed description, are used to assist the spiritual growth of the children of its members and to spread the Church's faith to the children of nonmembers. The Church's playground surface—like a Sunday School room's walls or the sanctuary's pews—are integrated with and integral to its religious mission.

True, this Court has found some direct government funding of religious institutions to be consistent with the Establishment Clause. But the funding in those cases came with assurances that public funds would not be used for religious activity. 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.

B

When the Court last addressed direct funding of religious institutions, in *Mitchell* [*v. Helms*], it adhered to the rule that the Establishment Clause prohibits the direct funding of religious activities. At issue was a federal program that helped state and local agencies lend educational materials to public and private schools, including religious schools. The controlling concurrence [by Justice O'Connor] assured itself that the program would not lead to the public funding of religious activity.

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

III

Even assuming the absence of an Establishment Clause violation and proceeding on the Court's preferred front—the Free Exercise Clause—the Court errs. It claims that the government may not draw lines based on an entity's religious "status." But we have repeatedly said that it can.

A

The Establishment Clause prohibits laws "respecting an establishment of religion" and the Free Exercise Clause prohibits laws "prohibiting the free exercise thereof." "[I]f expanded to a logical extreme," these prohibitions "would tend to clash with the other." *Walz*. Even in the absence of a violation of one of the Religion Clauses, the interaction of government and religion can raise concerns that sound in both Clauses. For that reason, the government may sometimes act to accommodate those concerns, even when not required to do so by the Free Exercise Clause, without violating the Establishment Clause. And the government may sometimes act to accommodate those concerns, even when not required to do so by the Establishment Clause, without violating the Free Exercise Clause. "[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* This space between the two Clauses gives government some room to recognize the unique status of religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws.

Invoking this principle, this Court has held that the government may sometimes relieve religious entities from the requirements of government programs. A State need not, for example, require nonprofit houses of worship to pay property taxes. Nor must a State require nonprofit religious entities to abstain from making employment decisions on the basis of religion. But the government may not invoke the space between the Religion Clauses in a manner that "devolve[s] into an unlawful fostering of religion." *Cutter v. Wilkinson*.

[T]his Court has held that the government may sometimes close off certain government aid programs to religious entities. The State need not, for example, fund the training of a religious group's leaders. It may instead avoid the historic "antiestablishment interests" raised by the use of "taxpayer funds to support church leaders." *Locke*.

B

Missouri has decided that the unique status of houses of worship requires a special rule when it comes to public funds.

Missouri's decision, which has deep roots in our Nation's history, reflects a reasonable and constitutional judgment.

1

This Court has consistently looked to history for guidance when applying the Constitution's Religion Clauses. This case is no different.

This Nation's early experience with, and eventual rejection of, established religion—defies easy summary.

Despite this rich diversity of experience, the story relevant here is one of consistency. The use of public funds to support core religious institutions can safely be described as a hallmark of the States' early experiences with religious establishment. Every state establishment saw laws passed to raise public funds and direct them toward houses of worship and ministers. And as the States all disestablished, one by one, they all undid those laws.

Those who fought to end the public funding of religion based their opposition on a powerful set of arguments, all stemming from the basic premise that the practice harmed both civil government and religion. The civil government, they maintained, could claim no authority over religious belief. For them, support for religion compelled by the State marked an overstep of authority that would only lead to more. Equally troubling, it risked divisiveness by giving religions reason to compete for the State's beneficence. Faith, they believed, was a personal matter, entirely between an individual and his god. Religion was best served when sects reached out on the basis

of their tenets alone, unsullied by outside forces, allowing adherents to come to their faith voluntarily. Over and over, these arguments gained acceptance and led to the end of state laws exacting payment for the support of religion.

[The dissent then discusses the history of disestablishment in Virginia, Maryland and New England.]

The course of this history shows that those who lived under the laws and practices that formed religious establishments made a considered decision that civil government should not fund ministers and their houses of worship.

2

Like the use of public dollars for ministers at issue in *Locke*, turning over public funds to houses of worship implicates serious antiestablishment and free exercise interests. The history just discussed fully supports this conclusion. As states disestablished, they repealed laws allowing taxation to support religion because the practice threatened other forms of government support for, involved some government control over, and weakened supporters' control of religion. 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. And so 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." Finally, and of course, such funding implicates the free exercise rights of taxpayers by denying them the chance to decide for themselves whether and how to fund religion. If there is any "'room for play in the joints' between" the Religion Clauses, it is here. *Locke*.

As was true in *Locke*, a prophylactic rule against the use of public funds for houses of worship is a permissible accommodation of these weighty interests. The rule has a historical pedigree identical to that of the provision in *Locke*. 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, as a general matter, 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." *Locke*.

Missouri has recognized the simple truth that, even absent an Establishment Clause violation, the transfer of public funds to houses of worship raises concerns that sit exactly between the Religion Clauses. To avoid those concerns, and only those concerns, it has prohibited such

funding. In doing so, it made the same choice made by the earliest States centuries ago and many other States in the years since. The Constitution permits this choice.

3

In the Court's view, none of this matters. 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 in this area, and wrong on its own terms.

The Constitution creates specific rules that control how the government may interact with religious entities. And so of course a government may act based on a religious entity's "status" as such. It is that very status that implicates the interests protected by the Religion Clauses. Sometimes a religious entity's unique status requires the government to act. *Hosanna–Tabor*. Other times, it merely permits the government to act.

Start where the Court stays silent. Its opinion does not acknowledge that our precedents have expressly approved of a government's choice to draw lines based on an entity's religious status. Those cases did not deploy strict scrutiny to create a presumption of unconstitutionality, as the Court does today. Instead, they asked whether the government had offered a strong enough reason to justify drawing a line based on that status.

The Court takes two steps to avoid these precedents. First, it recasts *Locke* as a case about a restriction that prohibited the would-be minister from "us[ing] the funds to prepare for the ministry." A faithful reading of *Locke* gives it a broader reach. *Locke* stands for the reasonable proposition that the government may, but need not, choose not to fund certain religious entities (there, ministers) where doing so raises "historic and substantial" establishment and free exercise concerns. Second, it suggests that this case is different because it involves "discrimination" in the form of the denial of access to a possible benefit. But in this area of law, a decision to treat entities differently based on distinctions that the Religion Clauses make relevant does not amount to discrimination. To understand why, keep in mind that "the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." *Wallace v. Jaffree*. If the denial of a benefit others may receive is discrimination that violates the Free Exercise Clause, then the accommodations of religious entities we have approved would violate the free exercise rights of nonreligious entities. We have, with good reason, rejected that idea, and instead focused on whether the government has provided a good enough reason, based in the values the Religion Clauses protect, for its decision.

The Court offers no real reason for rejecting the balancing approach in our precedents in favor of strict scrutiny, beyond its references to discrimination. 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 "establishe[d] neither atheism nor religion as its official creed."

At bottom, the Court creates the following rule today: The government may draw lines on the basis of religious status to grant a benefit to religious persons or entities but it may not draw lines on that basis when doing so would further the interests the Religion Clauses protect in other ways. Nothing supports this lopsided outcome. Not the Religion Clauses. Not precedent. And not reason.

Today's decision discounts centuries of history and jeopardizes the government's ability to remain secular. Just three years ago, this Court claimed to understand that. It makes clear today that this principle applies only when preference suits.

IV

The Court today dismantles a core protection for religious freedom provided in these Clauses. History shows that the Religion Clauses separate the public treasury from religious coffers as one measure to secure the kind of freedom of conscience that benefits both religion and government. If this separation means anything, it means that the government cannot, or at the very least need not, tax its citizens and turn that money over to houses of worship. The Court today blinds itself to the outcome this history requires and leads us instead to a place where separation of church and state is a constitutional slogan, not a constitutional commitment. I dissent.

AFTERWORD

The Court categorizes Missouri's action as singling out "churches and other religious organizations" for disparate and thus discriminatory treatment. By stating the issue in those terms, the case raises Free Exercise concerns. And when a state engages in religious discrimination, strict scrutiny is the constitutional standard of review. The precedential hurdle for the Court is *Locke v. Davey*. In *Locke*, the state constitutional provision was similar to the provision at issue in this case. But the Court held that Davey's Free Exercise claim failed. *Locke* is distinguished from Trinity Lutheran's claim, suggests Chief Justice Roberts's opinion for the Court, because *Locke* was not like other religious discrimination cases (*Church of the Lukumi Babalu Aye* and *McDaniel v. Paty* and *Sherbert v. Verner*) because it did not require a person to "choose between their religious beliefs and receiving a government benefit." Instead, narrowing the level of generality, *Locke* merely concerned a state's decision "not to fund a distinct category of instruction." The majority's conclusion that the law violates the Free Exercise Clause makes irrelevant any discussion of the Nonestablishment Clause.

The dissent by Justice Sotomayor is premised on a very different view of the Religion Clause, one hearkening back to the Court's "separation of church and state" standard largely created in *Everson* in 1947 and abandoned by 1970 in *Walz v. Tax Commission* and in 1971 by

Lemon v. Kurtzman. The wall of separation metaphor frames issues initially in light of the Nonestablishment Clause. Only if a law passes muster under that Clause will the Court turn to Free Exercise claims. Thus, Justice Sotomayor frames the issue as government refusing to directly fund religious exercise. Because the playground is used by a religious organization as part of its evangelization, or as a demonstration of living out its religious faith, any funds given to the Learning Center for improving safety in the playground is a direct funding of religious activity. That is why the Establishment Clause should justify the state's refusal to award any funds to Trinity Lutheran (see § II). In § III of the dissent, Justice Sotomayor begins by declaring the Establishment and Free Exercise Clauses, if expanded to a logical extreme, would tend to clash (quoting *Walz*). The Court so argued this seeming paradox in the 1960s and 1970s, and Justice Stewart declared that such a conclusion was itself illogical, for it suggested the Framers drafted a Constitution that conflicted with itself. Instead, Justice Stewart believed, the Court's interpretations of the two Clauses were to source of the problem, not the provisions themselves. But the dissent believes that, based on history, the state may deny benefits to religious institutions which are available to similar non-religious institutions, as part of the "play in the joints." The historical argument raises the stakes, suggesting that the Court is headed down a dangerously incorrect path. The play in the joints argument also analogizes this case to *Locke*. In both, the dissent claims, the "prophylactic rule" "is a permissible accommodation of" the interests in protecting against a merger of church and state. The dissent also attacks the Court's status/action distinction, concluding that some forms of religious "status" may be used to draw lines protecting both Free Exercise and Nonestablishment Clause interests. It cleverly uses the *Hosanna-Tabor* case as one urging caution. This is clever both because Chief Justice Roberts wrote the Court's opinion in that case, and also because *Hosanna-Tabor*, which broadly protected Free Exercise, is used to promote Nonestablishment Clause interests instead of Free Exercise interests.

One problem with the dissent's historical argument is the absence of any discussion of the reason for Blaine Amendment provisions found in many of the 38 states: it was part of an anti-Roman Catholic effort that began in the 1840s and continued through much of the remainder of the nineteenth century. In common or public schools in the 1840s and 1850s, the Protestant King James Bible was used to aid in reading comprehension and general knowledge. Catholics objected to the use of that Bible, and when their arguments that Catholic students should be permitted to read from the Catholic Bible rather than the King James Bible were rejected, Catholics created their own schools in major cities such as New York, Philadelphia, and Boston, and later, throughout the nation. The Blaine Amendment was a failed constitutional amendment first proposed by Representative James G. Blaine in 1875. In part it declared that "no money raised by taxation in any State for the support of public schools … shall ever be under the control of any religious sect." Thus, no Catholic school could ever be categorized as a public school, and public schools would continue to use the King James Bible. Though it failed in the Senate, it was introduced each session of Congress through 1907, and after 1876, Congress required all territories entering the Union as states to include language requiring the state to maintain public schools free from sectarian control and not to aid any church directly or indirectly. This was part of Washington's Constitution and the subject of *Locke*. Missouri entered the Union well before this time, but Article I, § 7 required

"That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion," and that language is analogous to Blaine Amendment language. The history of discrimination against Roman Catholics, who operated their own schools, is part of the puzzle of understanding both the Nonestablishment and Free Exercise Clauses.

MASTERPIECE CAKESHOP, LTD. V. COLORADO CIVIL RIGHTS COMM'N, 584 U.S. ___, 137 S. Ct. 2290 (2018)—In 2012 a gay couple asked Jack Phillips, the owner of Masterpiece Cakeshop in Colorado, to bake them a wedding cake. Phillips refused to do so because he believed creating it "would be equivalent to participating in a celebration that is contrary to his own most deeply held [religious] beliefs." Phillips offered to bake other types of cakes, but "I just don't make cakes for same sex weddings." The couple filed a complaint against Phillips for violating Colorado law banning discrimination in public accommodations. The Colorado Civil Rights Commission affirmed the decision by an administrative law judge that Phillips had violated the anti-discrimination law, which was affirmed by the Colorado Court of Appeals. The Supreme Court reversed, in an opinion by Justice Kennedy. The Court noted that a balance was to be struck between ensuring that gay couples must be protected in the exercise of their civil rights and that religious organizations and believers may "in some instances" engage in protected forms of expression. The Court noted that in 2012 Colorado did not recognize as value "gay marriages," and the Court's decision in *Obergefell* requiring all states to do so was also in the future. The Court also noted that the Civil Rights Division had concluded on "at least three occasions that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages." Finally, it concluded that the "Commission's treatment of [Phillips's] case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection." In particular, the Court declared that one Commissioner's statement that "Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, … freedom of religion has been used to justify discrimination." Such efforts, the Commissioner stated, "is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others." The Court held this "sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's anti-discrimination law." This statement, as well as the differing conclusions in the other three cake message instances, in which the cake maker was permitted to refuse to make a cake for reasons of conscience, demonstrated "hostility" toward religious beliefs and viewpoints. This official hostility of the government toward Phillips's "sincere religious objections" violated the free exercise clause.

Justices Kagan and Breyer concurred. The concurrence was to point to an approach harmonizing the decisions regarding Phillips with those three instances in which cake makers refused to make cakes with demeaning messages toward gay marriage. The Commission properly supported the cake makers in the latter cases, Justice Kagan concluded, because "the bakers did not single out [the customer] because of his religion, but instead treated him in the same way they would have treated anyone else." In contrast, Phillips's refusal "contravened" the anti-discrimination law because Phillips was willing to make wedding cakes for opposite-sex couples

but not same-sex couples. They concurred because, in this case, the Commission showed hostility to religion.

Justice Gorsuch also concurred to rebut the concurrence of Justice Kagan as well as to challenge the reasoning of Justice Ginsburg's dissent. Regarding the latter, Justice Gorsuch declared that a wedding cake, whether including words or not, is an "irrational" distinction, for no one can "reasonably doubt that a wedding cake without words conveys a message." Justice Kagan's concurrence used the wrong level of generality: the case was not about wedding cakes, but wedding cakes celebrating a same sex marriage. "The problem is, the Commission didn't play with the level of generality" in the other three instances in the same way. If, for example, the proper level of generality was "cakes," then all the cakes should have been made. The concurrence harmonized the different cases "[o]nly by adjusting the dials *just right*–fine-tuning the level of generality up or down for each case based solely on the identity of the parties and the substance of their views."

Justice Thomas also concurring in part and in the judgement. His opinion discussed the free speech claim of Phillips, which the Court set aside. In his view, the conduct of Phillips in "creating and designing custom wedding cakes" is expressive, and thus subject to strict scrutiny. Though he did not attempt to assess whether the anti-discrimination law met this standard, he noted the "bedrock principle" that government may not "punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified."

Justice Ginsburg's dissent concluded that the religious hostility relied upon by the majority was not "of the kind we have previously held to signal a free-exercise violation," and the comments of one or two members of the Commission did not justify reversal. She concluded that the couple was denied a cake by Phillips "for no reason other than their sexual orientation," for he sold such cakes to heterosexual couples. Further, the distinction between Phillips and the three other refusals was not based on the government's view of the "offensiveness" of the messages. Instead, in the Phillips case the couple was denied service due to their identity.

AFTERWORD—It seems clear that Commissions hearing similar cases in the future will avoid putting on the record statements evincing a hostility to religion. That will eliminate the free exercise claim if the baker or other provider of services is found in violation of state or local anti-discrimination provisions. When another such case arises, the Court will have to determine whether the act of creating a cake, or arranging flowers, or engaging in some other activity that has an expressive component (that is, something analogous to nude dancing or burning a draft card or American flag) is better understood as protected free speech or expression, or as an act or conduct subject to state and local anti-discrimination laws.

The issue of the proper level of generality is often an issue in free expression and free exercise cases. How should the Court determine what level of generality is the proper constitutional level?