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NEIL GORSUCH (1967-)—Neil Gorsuch was born in Colorado. He was raised there and in the Washington, D.C. area. He graduated from Columbia University and Harvard Law School. After law school, Gorsuch clerked for Justice Anthony Kennedy in 1992-93 and for retired Justice Byron White the following year. Gorsuch then entered the private practice of law in the District of Columbia. He later served as a government lawyer in the Department of Justice. In 2004, he earned a doctorate in law and philosophy from Oxford University. In 2006, President George W. Bush nominated Gorsuch to serve as a judge in the United States Court of Appeals for the Tenth Circuit. 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 a textualist, one who seeks to interpret the text of the Constitution through the meaning of the words used at the time of its framing. Although also described as a political conservative, Gorsuch has written opinions as a member of the Court that diverge from the view that the justices fit neatly into the political categories of conservative and liberal. This political lens, generally known as the behavioralist model, can be helpful in some respects but fails in others. Gorsuch's early opinions may be perceived as politically conservative, but a significant number of his opinions do not fit neatly into that box. Gorsuch's understanding of his fidelity to constitutional textualism often serves as a more informative guide to understanding his jurisprudence.

Gorsuch was nominated after the death of Justice Antonin Scalia 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.

He is married and the father of two daughters.

Insert at page lxxiv:

BRETT KAVANAUGH (1965-)—Brett Kavanaugh was born and raised in the Washington, D.C. area. He is the only child of Edward and Martha Kavanaugh. His father worked as a lobbyist, and his mother served as a public school teacher, and later worked as a prosecutor and judge in Maryland. Kavanaugh graduated from Yale University in 1987 and Yale Law School in 1990. Kavanaugh clerked for two federal appellate court judges, worked in the Solicitor General's office for a year and then clerked for Justice Anthony Kennedy.

After his Supreme Court clerkship, Kavanaugh was a lawyer in the office of the independent counsel investigating President Bill Clinton, led by Kenneth Starr. Kavanaugh then worked in the private practice of law. During the disputed presidential election of 2000, Kavanaugh worked as part of the legal team for George W. Bush. After the Court's decision in *Bush v. Gore* (2001) and Bush's inauguration, Kavanaugh served in the Bush White House in several capacities.

He was confirmed by the Senate after his third nomination by President Bush to the United States Court of Appeals for the District of Columbia Circuit.

Kavanaugh was nominated to the Supreme Court by President Donald Trump in July 2018 to replace the retiring Justice Kennedy. Because Kennedy was widely considered the "swing" justice, Kavanaugh's nomination was strongly opposed by most Democratic senators, who believed he would make the Court a more politically conservative body. Even so, it initially appeared Kavanaugh would be routinely, if contentiously, confirmed by the Republican Senate majority. A private letter sent to Senator Dianne Feinstein (D.–Calif.) claimed that Kavanaugh, when a high school student, had sexually assaulted a female teenager at a party. Once the letter was leaked (Feinstein denied doing so), Kavanaugh's nomination was vociferously attacked, and his confirmation chances seemed to dim. The Senate Judiciary Committee eventually held a hearing on this charge in late September. The two witnesses who testified were Dr. Christine Blasey Ford, who wrote the letter alleging Kavanaugh assaulted her, and Kavanaugh, who denied any assault. As expected, both were certain of their memories.

By a vote of 51-49, the Senate voted to move the nomination to a final vote. Only one Democrat voted yes, and only one Republican voted no. The vote to confirm Kavanaugh the following day, October 6, was 50-48 in favor. (Two Senators with opposing views "paired" their votes so one could miss the confirmation vote and attend his daughter's wedding.) Kavanaugh was sworn into office that day.

He is married and the father of two daughters.

Insert at p. liii:

AMY CONEY BARRETT (1972-)—Amy Coney Barrett was born and raised in the New Orleans, Louisiana area. She attended Notre Dame University for college and law school. She graduated first in her law school class (Class of 1997), and served as a judicial clerk in the United States Court of Appeals for the District of Columbia Circuit and in the Supreme Court (as a clerk for Justice Antonin Scalia) in her first two years after graduating. She then worked for several years in a small, well-known private practice law firm in the District of Columbia. After a stint as a visiting associate professor at George Washington University Law School, her alma mater hired her in 2002. She had spent about fifteen years at Notre Dame Law School when she was nominated to the United States Court of Appeals for the Seventh Circuit in mid-2017.

The death of Justice Ruth Bader Ginsburg in mid-September 2020 created both an open seat and much controversy about filling that seat during a presidential election campaign. President Donald Trump nominated Coney Barrett eight days after Ginsburg's death. The Senate confirmed Coney Barrett on October 26 in a strictly partisan vote, 52-48.

Barrett is generally viewed as a constitutional "originalist." In addition, her first years on the Court suggest she is also an "institutionalist," someone who shows some concern for protecting the institution of the Court. This differentiates her from Justice Gorsuch, and makes her somewhat

similar to the two other institutionalists on the current Court, Justice Kavanaugh and Chief Justice Roberts.

Coney Barrett married Jesse Barrett, also a Notre Dame Law School graduate, in 1999. They are the parents of seven children. She is a practicing Roman Catholic.

Insert at p. lix:

KETANJI BROWN JACKSON (1970-)—Ketanji Brown was born in Washington, D.C., on September 14, 1970. She grew up in Miami, Florida. Her father Johnny Brown was a lawyer and her mother Ellery was a teacher and principal. She graduated with honors from both Harvard-Radcliffe College (1992) and Harvard Law School (1996). During her first three years after graduating law school, she served as a law clerk for a federal district court judge, a federal circuit court judge, and for Justice Stephen G. Breyer of the Supreme Court of the United States, respectively. She then worked in the private practice of law for three years, followed by work as a lawyer at the U.S. Sentencing Commission (2003-2005). Brown Jackson worked as an assistant federal public defender in the District of Columbia between 2005-2007. She is the only member of the current Court to have worked as a criminal defense lawyer. She returned to private practice for three years. In 2012, President Barack Obama nominated her to the United States District Court for the District of Columbia. She served in this court from 2013 to 2021. In 2021, she was nominated and confirmed to serve on the United States Court of Appeals for the District of Columbia Circuit. After less than a year on that court she was nominated by President Biden to replace Justice Breyer upon his retirement at the end of the October 2021 Term. She was confirmed (53-47) as an Associate Justice of the Supreme Court and took her seat on June 30, 2022.

She married Patrick Jackson in 1996. They are the parents of two daughters.

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. In particular, when an intervenor requests relief in addition to that sought by a party having standing, the Constitution places a burden on the intervenor to prove constitutional standing exists regarding the intervenor's matter.

TRUMP V. HAWAII, 585 U.S. __, 138 S. Ct. 2392 (2018)—Plaintiffs challenged the President's Proclamation restricting the admission to the United States of citizens of a small subset of countries. Most banned from entry were Muslim, or at least were citizens of nations in which a majority of the population was Muslim. One of plaintiffs' claims was that the Proclamation was intended to exclude Muslims from entry into the United States in violation of the Nonestablishment Clause (see the discussion below in Chapter 9 § B). To reach that constitutional question required the Court to determine whether the plaintiffs enjoyed constitutional standing. It held the plaintiffs possessed a concrete injury: The Proclamation kept the plaintiffs "separated from certain relatives who seek to enter the country." The Court left for another day a separate claim of constitutional injury made by the plaintiffs. They argued the Proclamation disfavored Islam and injured them in two respects: 1) their right to be free of a federal establishment of religion; and 2) a dignitary and spiritual harm.

JUNE MEDICAL SERVS. V. RUSSO, 591 U.S. ___, 140 S. Ct. 2103 (2020)—Shortly before a Louisiana law requiring physicians who performed abortions to have "active admitting privileges" to a nearby hospital went into effect, "three abortion clinics and two abortion providers" sued, claiming the law was unconstitutional in part because "it imposed an undue burden on the right of their patients to obtain an abortion." A plurality held that Louisiana had waived the argument that the petitioner-plaintiffs lacked standing to pursue this claim. The plurality stated that the general rule prohibiting third-party standing was "prudential," not a constitutional requirement. Louisiana had waived the standing claim to obtain a quick decision from the district court, which barred the Court's consideration of the issue. Even so, the plurality in dictum strongly suggested that in abortion cases such as these, allowing third party standing was proper to effectuate the constitutional rights of the clients of the clinics. Chief Justice Roberts, who concurred in the judgment of the plurality, ignored the standing issue.

In dissent, Justice Thomas concluded this was a case in which constitutional standing was lacking. It was not one merely of prudential standing. Thus, even if Louisiana waived standing, a proposition with which he disagreed, waiver is irrelevant to the requirement that a party possess constitutional standing. In this instance, the clinics "assert no private rights of their own." Instead, they claimed to represent the constitutional interests of their future clients. The view that third-party standing was not a constitutional issue was wrong because it was inconsistent with recent standing decisions of the Court and because third-party standing was unsupported by a "coherent explanation" why it was best characterized as a prudential rule. Not only was the history of the Court's explication of prudential standing thin, the Court had recently "questioned the validity of

our prudential standing doctrine more generally." Further, Justice Thomas concluded that the history of the case or controversy requirement of Article III "confirms" the assertion that the "rule against third-party standing is constitutional, not prudential."

Justice Alito also dissented, joined by Justice Gorsuch and in part by Justices Thomas and Kavanaugh. Justice Alito concluded no waiver of the third-party standing issue had been made by the state. He also concluded "[t]his case features a blatant conflict of interest between an abortion provider and its patients." That was because the former had a financial incentive to avoid state regulatory requirements and the latter "have an interest in the preservation of regulations that protect their health." In addition to a conflict of interest, the standards for allowing third-party standing, "(1) closeness to the third party and (2) a hindrance to the third party's ability to bring suit," were not met in this case. Justice Gorsuch's dissent also noted the inapplicability of the facts to the requirements to claim third-party standing and rejected the plurality's waiver conclusion.

CALIFORNIA V. TEXAS, 593 U.S. ___, 141 S. Ct. 2104 (2021)—After Congress repealed the monetary penalty for those persons who failed to obtain minimum health care insurance, Texas and other states, as well as two individuals, sued alleging the Patient Protection and Affordable Care Act (popularly known as Obamacare) was unconstitutional. The Court, in an opinion by Justice Breyer, held neither the individual plaintiffs nor the states enjoyed constitutional standing. The Court's 7-2 opinion concluded the two individuals lacked constitutional standing because, even if they suffered a particularized harm, they failed the requirement that the injury be traceable to the government's conduct. The inability of the IRS and the Secretary of Health and Human Services to seek a penalty for the failure of a person to obtain any health care insurance meant no one in the federal government possessed the authority or ability to enforce the monetary penalty. The unenforceability of the penalty, as in analogous cases, made it impossible to trace any injury to the government.

The states also were unable to meet the traceability requirement because any possible injury was not traceable to "the defendant's allegedly *unlawful* conduct."

Justice Thomas concurred: "Today's result is thus not the consequence of the Court once again rescuing the Act, but rather of us adjudicating the particular claims the plaintiffs chose to bring." And those claims had "not identified any unlawful action that has injured them."

Justice Alito, joined by Justice Gorsuch, dissented. He concluded that repeal of the monetary penalty, declared a "tax" in *NFIB v. Sebelius*, created "huge financial costs" on states. Other recent decisions of the Court were "selectively generous in allowing States to sue." This included cases in which the state's claims "depended on a speculative chain of events."

Insert in Chapter 1 § D.1.b. at page 72:

RUCHO V. COMMON CAUSE, 588 U.S. ___, 139 S. Ct. 2484 (2019)—Plaintiffs in North Carolina and Maryland sued alleging state-created congressional districting maps were gerrymandered to protect incumbents, in the former state to protect Republicans, and in the latter, to protect Democrats. The Supreme Court held that claims of politically partisan gerrymanders raised political questions rather than legal questions, and dismissed the case.

The Court, in an opinion by Chief Justice Roberts, initially noted that no evidence existed that the courts enjoyed the constitutional power to fix political gerrymanders. It then distinguished *Baker v. Carr* and cases allowing courts to remedy racial gerrymandering, concluding political partisan gerrymandering "claims have proved far more difficult to adjudicate." That was because such gerrymandering was constitutionally permissible in some fashion. After all, the Court noted, "[t]o hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities." The Court concluded "different visions of fairness" generated "basic questions that are political, not legal." No constitutionally based legal standards existed to allow the Court to make judgments, much less "limited and precise standards that are clear, manageable, and politically neutral."

In dissent, Justice Kagan, for the four dissenters, began by raising the stakes: "For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities." This constitutional violation "deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives." Partisan gerrymandering thus violated the equal protection, free speech, and elections clauses. The dissent noted that the Court's claim of an absence of constitutionally based legal standards was refuted by the existence of lower court decisions creating such standards, using "as a baseline a State's *own* criteria of fairness, apart from partisan gain." In addition, the dissent concluded that manageable and politically neutral standards did exist, as lower federal courts had already used in deciding prior politically partisan gerrymandering cases.

Insert in Chapter 1§ E. at page 76:

The Appendix to Chief Justice Roberts's 2021 Year-End Report on the Federal Judiciary noted the number of filings for the year ending September 30, 2021, was down significantly, to 5,307 filings, a drop of 104 from the previous Term. The total number of cases filed in the Court's paid docket increased from 1,481 to 1,830, a 24% rise. The Court heard arguments in 72 cases in October Term 2020, one less than in each of the two previous years, and disposed of 69 (the same number as the previous two Terms) in 55 signed opinions. Three cases were 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 the 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 has made no effort to adopt legislation regulating sports gambling nationwide, which it is empowered 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) — The Securities and Exchange Commission (SEC) has the authority to enforce violations of its regulations through the administrative process. It initiated an enforcement action against Raymond Lucia, charging him with engaging in actions that violated the SEC's anti-fraud regulations adopted to enforce the Investment Advisers Act. An administrative law judge (ALJ) was assigned by the SEC to decide the matter. The ALJ found Lucia had violated the regulations. The SEC affirmed the ALJ's conclusion and remedy. 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 exercise of the power they were given.

SEILA LAW LLC V. CONSUMER FINANCIAL PROTECTION BD., 591 U.S. ___, 140 S. Ct. 2138 (2020) — In the aftermath of the Great Recession of 2007-09, Congress adopted the Dodd-Frank Wall Street Reform and Consumer Protections Act. Dodd-Frank created the Consumer Financial Protection Board (CFPB) with "vast" power to make rules, enforce them, adjudicate alleged violations of administrative regulations, issue subpoenas and civil investigative demands, and seek a variety of remedies for violations related to consumer debt issues. The CFPB is an independent agency. Unlike "nearly every other independent administrative agency" (such as the Federal Trade Commission), the CFPB is not a multimember commission, but led by one Director. The Director is appointed by the President with the advice and consent of the Senate to a five-year term. The Director may be removed only upon a showing of "inefficiency, neglect of duty, or malfeasance in office." Funding for the CFPB's operations is through the Federal Reserve, not Congress.

The CFPB issued a civil investigative demand to petitioner Seila Law, which offered legal services for those in debt. Seila Law claimed the law creating a single director removable only for cause violated separation of powers. The Court, in an opinion by Chief Justice Roberts, agreed. Early in the Court's opinion it noted the President's power to remove those "who wield executive power follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision of *Myers v. United States*, 272 U.S. 52 (1926)." It then noted precedent acknowledged just two exceptions to the President's removal power: first, in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), it held Congress could create an expert agency of a "*group* of principal officers" removable for good cause only; second, some "*inferior* officers with narrowly defined duties" could be given "tenure" by Congress. The Court decided not to extend these exceptions to an independent agency led by a single director, claiming "compelling reasons" not to do so. Those compelling reasons were based, the Court decided, on the absence of a "historical practice" of an independent agency like the CFPB, and a structural concern of "concentrating power in a unilateral actor insulated from Presidential control."

The Court concluded that the *Humphrey's Executor* exception was inapplicable in part because in that case the Court held the Federal Trade Commission was not exercising executive power, but performed administrative duties "'as a legislative or as a judicial aid.'" The CFPB possessed some executive "function," but no executive power. The Court then noted this conclusion in *Humphrey's Executor* "has not withstood the test of time." The Court also noted that *Humphrey's Executor* was based on the additional view that the FTC was a nonpartisan (no more than three of its five members could be from one political party) commission of experts (five) with staggered terms. The second exception for inferior officers was recognized in *Morrison v. Olson*, which required the President to show good cause for removing an independent counsel.

Neither *Humphrey's Executor* nor *Morrison* answered the question at issue. The CFPB Director was neither nonpartisan nor part of a group of experts, nor was the director "a mere legislative or judicial aid." Additionally, the director's power to seek monetary penalties from private parties in federal court was "a quintessentially executive power not considered in *Humphrey's Executor*." *Morrison* was inapt because the director, "[e]veryone agrees," is a principal officer, not an inferior officer.

The Court then refused to create a third exception because the CFPB "has no basis in history and no place in our constitutional structure." The few (four) historical examples of "good-cause tenure to principal officers" "shed little light." In none of them did the officer have the power to exercise "regulatory or enforcement authority remotely comparable to that exercised by the CFPB." As a matter of structure, the CFPB was impermissible because it concentrated power in a person rather than dispersed it. And that person was "neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is." And the director's budget was not subject to congressional control, nor to the President's authority to recommend or veto spending bills.

Chief Justice Roberts's remedy was joined only by Justices Alito and Kagan. He concluded that the removal of the Director was severable from other provisions creating the CFPB. Its existence was saved.

Justice Thomas, joined by Justice Gorsuch, concurred in part and dissented in part. He urged the Court to "repudiate" *Humphrey's Executor* in a future case because it "poses a direct threat to our constitutional structure and, as a result, the liberty of the American people." Justice Thomas then offered a lengthy history and critique of the case.

Justice Kagan, with three other Justices, concurred in the judgment with respect to severability and dissented concerning the constitutionality of the CFPB's single-director structure. She began by urging judicial restraint and representation reinforcement, noting that, as a matter of history, "this Court has left most decisions about how to structure the Executive Branch to Congress and the President, acting through legislation they both agree to." The text of the Constitution, which does not "speak of removal," thus allows "these common for-cause removal limits." Justice Kagan then explained why the text of the Constitution, including the "vesting" or "executive power" and "take care" clauses, was insufficient to justify a broad power to remove

executive officers. As a matter of history, "[f]rom the first, Congress debated and enacted measures to create spheres of administration — especially of financial affairs — detached from direct presidential control." She then looked at specific aspects of American constitutional history, including the "Decision of 1789," which concerned congressional debate regarding the President's power to remove an executive officer. In her reading, the "best view" of this debate was that "the First Congress was 'deeply divided' on the President's removal power and 'never squarely addressed' the central issue here." Other decisions by Congress over the years to restrain presidential control of "financial regulators" indicated a historical record at odds with the majority's conclusion. Finally, prior decisions of the Court "accepted the role of independent agencies in our governmental system." She disagreed with the majority's (and concurrence's) understanding of *Humphrey's Executor* in the Court's jurisprudence. Nor did she agree with the Court's interpretation of the *Morrison* decision. Finally, Justice Kagan returned to the idea of judicial restraint.

In Section II Justice Kagan explained that "[a]pplying our longstanding precedent" made the CFPB's structure constitutional. It was similar to the FTC, which the Court held constitutional, as the CFPB "wields the same kind of power as the FTC and similar agencies." Justice Kagan rejected the Court's distinction between single and multimember commissions for several reasons. First, the two exceptions listed by the Court were "made up." Second, the single-director structure "has a fair bit of precedent behind it." Here, the Court and the dissent disagreed about the import of the four instances. Third, "novelty is not the test of constitutionality when it comes to structuring agencies."

COLLINS V. YELLEN, 594 U.S. ___, 141 S. Ct. 1761 (2021) — During the Great Recession, Congress adopted a law created the Federal Housing Finance Agency (FHFA). The FHFA was led by its Director, who was confirmed by the Senate. The Director could be removed from office by the President only "for cause." The FHFA was an "independent agency" given the authority to regulate the mortgage financing companies Fannie Mae and Freddie Mac. Both companies were placed into conservatorship by the Director. The Treasury department and the companies negotiated agreements on a loan, with the latter receiving dividends and preferred shares from the former. Some Freddie Mac shareholders sued, claiming the FHFA's structure permitting the Director's removal only for cause violates separation of powers. The Court, in an opinion by Justice Alito, agreed.

The Court found a "straightforward application of our reasoning in *Seila Law* dictates the result here." The Court focused on the importance of removing subordinates to undertake effectively the exercise of the President's power. "The removal power helps the President maintain a degree of control over the subordinates he needs to carry out his duties as the head of the Executive Branch, and it works to ensure that these subordinates serve the people effectively and in accordance with the policies that the people presumably elected the President to promote." Such power relatedly aided the people by promoting accountability in the President.

Justice Kagan concurred in the judgment on the separation of powers issue. She had dissented in *Seila Law*, but agreed with the Court that the present case was covered by *Seila Law*. She disagreed with the Court's reasoning in two respects: First, the Court's understanding of "how our government should work" was "deeply flawed." Accountability for the structure of an independent agency rested with Congress. Second, The Court extended the applicability of Seila Law to single-director agencies that did not wield significant executive power, resulting in her concurring only in the judgment.

Justice Sotomayor, joined by Justice Breyer, dissented on the separation of powers issue. She concluded the FHFA did not wield significant executive power, as was the case in *Seila Law*. Consequently, "this Court's decisions upholding for-cause removal provisions" should apply. The unusual position of the Director, regulating government-sponsored entities Fannie Mae and Freddie Mac, made it akin to the independent counsel, removable only for some causes, upheld in *Morrison v. Olson* (1988). Additionally, the FHFA's independence was "supported by historical tradition."

Insert in Chapter 3 § C. at page 245:

TRUMP V. VANCE, 591 U.S. ___, 140 S. Ct. 2412 (2020) — The Court began by noting "[t]his case involves — so far as we and the parties can tell — the first *state* criminal subpoena directed to a President." It unanimously held that neither the Supremacy Clause nor Article II forbids a state from issuing such a subpoena, nor does the Constitution require the state to show a heightened standard for issuing such a subpoena. The initial argument that the President enjoyed "absolute immunity from state criminal process" while in office was rejected. The Court extensively discussed the treason trial of Aaron Burr, including Burr's request for a subpoena *duces tecum* to President Thomas Jefferson. Chief Justice John Marshall, presiding at the treason trial, held the President was not immune from a subpoena. This precedent, the Court noted, had been followed ever since, including in *United States v. Nixon* and *Clinton v. Jones*. The Court then concluded that this *federal* precedent applied to *state* subpoenas as well. No heightened need standard was required before issuance of the subpoena because 1) this "would extend protection designed for official documents to the President's private papers," 2) no evidence of harassment interfering with the President's exercise of his duties was shown, and 3) "the public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence." Then, despite rejecting a heightened need standard, the Court discussed some ways in which the President differed from ordinary citizens. The President's Article II powers allowed him to make additional challenges to subpoenas unavailable to ordinary citizens. This reference implied a type of heightened need standard, even though such a standard had been formally rejected. The case was remanded for further proceedings.

Justice Kavanaugh concurred in the judgment, joined by Justice Gorsuch. He concurred because he would adopt the requirement in *United States v. Nixon* that the prosecutor demonstrate a specific need for the information.

Both Justices Thomas and Alito wrote what were denominated dissenting opinions, though both agreed that the President was not immune from state criminal processes while in office. Their dissents differed slightly. Justice Thomas's dissent focused on the President's entitlement to a remedy from enforcement of the subpoena. In his view, if the President met the legal standard in *Burr*, he was entitled to equitable relief from enforcement of the subpoena while in office. Justice Alito raised the stakes, noting that the questions of the extent of the operation of the state's criminal processes as applied to the President of the United States were "important questions that go to the very structure of the Government created by the Constitution." He concluded the President could not be prosecuted by a state executive officer, but a former President could. Justice Alito then discussed the slippery slope problem if a President was subject to state criminal processes. This led him to conclude that some heightened standard of need was required for the subpoena to issue.

TRUMP V. MAZARS USA, LLP, 591 U.S. ___, 140 S. Ct. 2019 (2020) — In a near companion case to *Trump v. Vance*, the Court held that subpoenas issued to the President, his children, and several affiliated businesses (including his accounting firm, Mazars) by several committees of the House of Representatives were too broad to be enforced. As the Court mentioned in *Vance*, this was an extraordinarily unusual case: "We have never addressed a congressional subpoena for the

President's information." That a congressional committee issued the subpoena to the President was "distinctive," and made an important difference from *Burr*, *Nixon*, *Clinton v. Jones*, and even *Vance*. Chief Justice Roberts's opinion noted that separation of powers disputes rarely "ended up in court." Instead, they were settled politically, and old and modern examples were offered. The Court rejected the *Nixon* "specific need" requirement, holding it inapt for "nonprivileged, private information." Unlike *Vance*, the Court held important the fact that the President was the subject of the subpoena. The separation of powers concerns made it impossible for the judiciary to defer to the House's claims; otherwise, there existed "essentially no limits on the congressional power to subpoena the President's personal records." That would alter the structural design of the Constitution. The Court then acknowledged the fact that the subpoenas were part of a "clash between rival branches of government over records of intense political interest for all involved." The result was a "balancing" test for courts, one that analyzed the "separation of powers principles at stake, including both the significant interests of Congress and the 'unique position of the President." Those considerations included 1) whether Congress's asserted legislative purpose warranted Presidential involvement, 2) a subpoena "no broader than reasonably necessary" to effectuate Congress's legislative goal, 3) assessment of the evidence offered to explain why the President's papers should be the subject of the subpoena, and 4) assessment of the burdens on the President in complying with the subpoena.

Justice Thomas dissented, concluding that "Congress has no power to issue legislative subpoenas for the President's private, nonofficial information." But it might "be able to obtain these documents as part of an investigation of the President" pursuant to its impeachment power. (President Trump had been impeached and acquitted, but not in relation to these subpoenas.) After an exhaustive discussion of the history of legislative subpoenas, he would overrule precedent and hold "the Committees have no constitutional authority to subpoena private, nonofficial documents." Instead, they should have used the House's impeachment power, which includes "a power to investigate and demand documents."

Insert in Chapter 3 § D.2. at page 246:

GUNDY V. UNITED STATES, 588 U.S. ___, 139 S. Ct. 2116 (2019) — Gundy was convicted of a sex crime in 2005, the year before Congress adopted the Sexual Offender Registration and Notification Act (SORNA). One provision of SORNA gives the Attorney General the authority to "specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter." It also allows the Attorney General to "prescribe rules for the registration of any such sex offenders . . . who are unable to comply with" the registration requirements. Gundy claimed this language violated the nondelegation doctrine. A plurality of four justices, in an opinion by Justice Kagan, held SORNA provided an "intelligible principle" to the Attorney General, thus meeting the requirements of the nondelegation doctrine.

Justice Alito concurred in the judgment, noting that "since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards." He then declared his willingness to reconsider this uniform rejection if a majority of the Court were inclined to do so. Because Justice Kavanaugh did not participate in this case, a possible majority for such action was lacking. Thus, Justice Alito concurred on the ground that "I cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years."

The three dissenters, in an opinion by Justice Gorsuch, concluded the authority accorded the Attorney General was "vast," that it gave the Attorney General "free rein" to adopt, withdraw, selectively apply, or not apply at all, registration of the approximately 500,000 pre-SORNA sex offenders. He concluded this grant of authority was so vast it violated the structure of the Constitution, which gave to the Congress, not the executive branch, legislative powers herein granted. A violation of the structure of the Constitution threatened the liberty of Americans by displacing accountability for making laws from Congress to the President. The test of when Congress had unconstitutionally violated the nondelegation doctrine should not be a mutated version of an "intelligible principle," for that "has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was [initially] plucked." The dissenters then suggested that a future majority would (and should) look at this issue differently.

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 has 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. 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 who did business in a state without also having a physical presence there. 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.

TENNESSEE WINE AND SPIRITS RETAILERS ASS'N V. THOMAS, 588 US. ___, 139 S. Ct. 2449 (2019) — The Court, in an opinion by Justice Alito, held discriminatory and thus violative of the dormant Commerce Clause a Tennessee law requiring any person desiring to open and operate a retail liquor store to have resided in the state for two years. Other regulations limited the operation of liquor stores based on additional residency requirements. The laws clearly discriminated based on state residency, which ordinarily would mean the law was subject to the "virtually *per se* rule of invalidity." The issue was whether such discrimination was permissible because of the Twenty-First Amendment. That amendment both ended prohibition and permitted states, in section 2, to regulate the transportation or importation into any state of intoxicating liquors in violation of state law. The Court held "the Commerce Clause did not permit the States to impose protectionist measures clothed as police-power regulations." Section 2 of the Twenty-

First Amendment did not give states the authority to violate the Commerce Clause's principle of nondiscrimination.

Insert in Chapter 5 §B.3. at page 351:

TIMBS V. INDIANA, 586 U.S. ___, 13? S. Ct. 682 (2019)—Timbs was convicted of dealing in a controlled substance and was sentenced to one year of home detention and a fine of $1,203. When he was arrested, his automobile was seized, and Indiana sought the forfeiture of Timbs's car, worth $42,000, in a civil *in rem* proceeding. The trial court refused to order forfeiture of the vehicle, because its $42,000 value was over four times the $10,000 maximum fine for Timbs's conviction, making the forfeiture "grossly disproportionate." The Indiana Supreme Court reversed. The Court reversed the Indiana Supreme Court and incorporated the Excessive Fines Clause of the Eighth Amendment into the Due Process Clause of the Fourteenth Amendment. In an opinion by Justice Ginsburg, the Court held there was "widespread" agreement that the Excessive Fines Clause was "fundamental." As the state of Indiana acknowledged, "all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality." Justice Ginsburg's opinion also justified its conclusion by noting the long history of the prohibition of excessive fines. The Court rejected Indiana's argument that the Clause did not apply to civil *in rem* forfeiture matters because the civil matter was "at least partially punitive." Finally, the Court concluded, "In considering whether the Fourteenth Amendment incorporates a protection contained in the Bill of Rights, we ask whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted." The protection against excessive fines was fundamental and deeply rooted, making irrelevant any question of its nature as particularly applied to civil *in rem* forfeiture proceedings.

RAMOS V. LOUISIANA, 590 U.S. ___, 140 S. Ct. 1390 (2020) — In a 6-3 decision in which a no majority existed in many parts of the case, the Court held the Sixth Amendment's guarantee of a right to a trial "by an impartial jury" implicitly includes a right to a unanimous verdict of guilty applicable to state criminal trials. This right to a unanimous verdict was one of the very few rights not earlier incorporated into the Due Process Clause of the Fourteenth Amendment. On whether a unanimous verdict was required to convict, the Court, in an opinion by Justice Gorsuch, held "the answer is unmistakable." As a matter of common law, state practices, and treatise writers (including Blackstone) at the time the Sixth Amendment was proposed and ratified (1789 and 1791, respectively), a person was guilty only if the jury unanimously agreed. The "original public meaning" of the Amendment was understood at the time and later to include unanimity within the phrase "by an impartial jury." The right to trial by an impartial jury applied to state criminal trials as well as federal trials because it was "'fundamental to the American scheme of justice.'" A plurality of the Court held that two badly split 1972 decisions, *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972), which did not apply the unanimity requirement to the only two states permitting non-unanimous convictions, were not controlling due to the unclear *ratio decidendi* of the cases. *Stare decisis* did not require continue application of *Apodaca* and *Johnson*, and a majority overruled them. The Court also noted at the beginning of its opinion that the adoption of non-unanimous jury verdicts in both the Louisiana (1898) and Oregon (1930s) were propelled by discrimination on the basis of race and religion.

Justice Thomas concurred in the judgment on the ground that precedent of more than a century declaring a right to a unanimous jury verdict was "not demonstrably erroneous" and thus subject to *stare decisis*. Justice Sotomayor largely concurred, focusing on why overruling was compelled, especially compared with other recent cases overruling precedent with which she disagreed. She also noted the "racially based origins of the Louisiana and Oregon laws uniquely matter here." Justice Kavanaugh concurred in part to emphasize why *stare decisis* did not prevent the Court from overruling *Apodaca*.

Justice Alito dissented, joined by Chief Justice Roberts and largely by Justice Kagan. He began by noting that both Louisiana and Oregon reaffirmed laws permitting non-unanimous criminal jury verdicts in non-racial terms. Thus, though its origins were "deplorable," they were irrelevant to the constitutional issue before the Court. Second, Justice Alito rejected the plurality's conclusion that *Apodaca* was not a precedent, citing other opinions of the Court citing *Apodaca* as precedent that unanimous criminal jury verdicts were not required in state cases. Third, he argued *Apodaca* was consistent with *stare decisis*.

Insert in Chapter 5 at § D.1. at page 362:

MANHATTAN COMM. ACCESS CORP. V. HALLECK, 587 U.S. ___, 139 S. Ct. 360 (2019) — Cable operating companies are required by New York law to set aside public access channels. These are to be operated by the company unless the local government chooses to operate it. New York City designated a private nonprofit corporation, Manhattan Neighborhood Network (MNN), to operate the public access channels. Two residents used the public access channels to air a film critical of MNN. The residents were later suspended from using MNN services and facilities. The Supreme Court held that MNN was a private actor and thus not subject to the First Amendment. In a 5-4 opinion written by Justice Kavanaugh, the Court concluded that MNN was not exercising a public function "traditionally reserved to the states," as required by *Jackson v. Metropolitan Edison Co.* The Court repeatedly noted that few functions are traditionally exclusively reserved to the states. Operating public access channels was neither traditionally nor exclusively reserved to state actors. It buttressed its conclusion by noting a variety of public access operators, both public and private, in the history of cable television. The Court rejected an effort to broaden the level of generality by claiming MNN was operating a public forum for speech. Hosting speech by others "is not a traditional, exclusive public function." And such hosting efforts did not transform a private entity into a public one. Additionally, the Court concluded that the City never had "any property interest in Time Warner's cable system, or in the public access channels on that system." Its agreement to allow Time Warner to use public rights of way to lay cable wires was similar to allowing private utility operators, such as Metropolitan Edison, to use public rights of way.

Justice Sotomayor's dissent noted that MNN was appointed by the local government to administer a public forum. This gave New York City a property interest in the cable access channels. By law those channels remained open to all. The City delegated to MNN the operation of these channels. MNN was an agent of the government and thus subject to the state action doctrine. The dissent also distinguished *Jackson*, on the ground that MNN is not a private entity like Metropolitan Edison.

Insert in Chapter 6 § A. at page 368:

BECKLES V. UNITED STATES, 580 U.S. ___, 137 S. Ct. 886 (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 the Court was unanimous, Justices Kennedy, Ginsburg, and Sotomayor each wrote opinions concurring in the judgment. 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. Because his conduct was clearly prohibited, Beckles was not permitted to complain on behalf of others. Justice Sotomayor's opinion concurring in the judgment 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 as 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. While serving a sentence after conviction and before its reversal on appeal, Nelson had some money in a state-held account. This money 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. He concluded once Nelson paid the state a sum of money as required by their sentence after conviction, it became public funds, and the Due Process Clause provided no substantive right to its return.

Insert in Chapter 6. § B. at page 368:

UNITED STATES V. DAVIS, 588 U.S. ___, 139 S. Ct. 2319 (2019) — Davis and Glover were convicted of carrying a firearm to commit a crime of violence in federal district court. They were also charged with and convicted of unlawfully using or carrying a firearm to aid a conspiracy to commit a crime of violence. The statute under which they were convicted included as an element of the offense a definition of a crime of violence: it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." A residual clause in the statute defined an offense as a crime of violence if, "by its nature, [it] involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Under this residual clause, the punishment could be enhanced. The Court held this residual provision was unconstitutionally vague. In an opinion by Justice Gorsuch, the Court noted that vague laws "contravene the 'first essential of due process of law' that statutes must give people 'of common intelligence' fair notice of what the law demands of them." (The Court also noted that vague laws violate separation of power because such laws give authority to define crimes to government officials other than Congress, all of whom are unaccountable to the people who are required to live in accordance with the law.)

In dissent for four justices, Justice Kavanaugh argued that the provision requiring the trial court to apply a risk standard to assess the defendant's conduct is not impermissibly vague. He then noted the commonality of such standards in criminal laws, including laws that made it a federal crime to create "a substantial risk of serious bodily harm." He concluded by noting the "consequences of the Court's decision today will be severe."

Insert in Chapter 6 § C.5. at page 413 [alternatively, insert at new 6 § C.7., The End of Roe]:

Dobbs v. Jackson Women's Health Organization
597 U.S. ___, 142 S. Ct. 2228 (2022)

Justice Alito delivered the opinion of the Court.

Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of views about the particular restrictions that should be imposed.

For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens. Then, in 1973, this Court decided *Roe v. Wade*. Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim that American law or the common law had ever recognized such a right, and its survey of history ranged from the constitutionally irrelevant (*e.g.*, its discussion of abortion in antiquity) to the plainly incorrect (*e.g.*, its assertion that abortion was probably never a crime under the common law). After cataloging a wealth of other information having no bearing on the meaning of the Constitution, the opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature.

Under this scheme, each trimester of pregnancy was regulated differently, but the most critical line was drawn at roughly the end of the second trimester, which, at the time, corresponded to the point at which a fetus was thought to achieve "viability," *i.e.*, the ability to survive outside the womb. Although the Court acknowledged that States had a legitimate interest in protecting "potential life,"[1] it found that this interest could not justify any restriction on pre-viability abortions. The Court did not explain the basis for this line, and even abortion supporters have found it hard to defend *Roe*'s reasoning. One prominent constitutional scholar wrote that he "would vote for a statute very much like the one the Court end[ed] up drafting" if he were "a legislator," but his assessment of *Roe* was memorable and brutal: *Roe* was "not constitutional law" at all and gave "almost no sense of an obligation to try to be."

At the time of *Roe*, 30 States still prohibited abortion at all stages. In the years prior to that decision, about a third of the States had liberalized their laws, but *Roe* abruptly ended that political process. It imposed the same highly restrictive regime on the entire Nation, and it effectively struck down the abortion laws of every single State. As Justice Byron White aptly put it in his dissent, the decision represented the "exercise of raw judicial power," and it sparked a national controversy that has embittered our political culture for a half century.

Eventually, in *Planned Parenthood of Southeastern Pa. v. Casey*, the Court revisited *Roe*, but the Members of the Court split three ways. Two Justices expressed no desire to change *Roe* in any way. Four others wanted to overrule the decision in its entirety. And the three remaining Justices, who jointly signed the controlling opinion, took a third position. Their opinion did not endorse *Roe*'s reasoning, and it even hinted that one or more of its authors might have "reservations" about whether the Constitution protects a right to abortion. But the opinion concluded that *stare decisis* required adherence to what it called *Roe*'s "central holding"—that a State may not constitutionally protect fetal life before "viability"—even if that holding was wrong. Anything less would undermine respect for this Court and the rule of law.

Paradoxically, the judgment in *Casey* did a fair amount of overruling. Several important abortion decisions were overruled *in toto*, and *Roe* itself was overruled in part. *Casey* threw out *Roe*'s trimester scheme and substituted a new rule of uncertain origin under which States were forbidden to adopt any regulation that imposed an "undue burden" on a woman's right to have an abortion. [T]he three Justices who authored the controlling opinion "call[ed] the contending sides of a national controversy to end their national division" by treating the Court's decision as the final settlement of the question of the constitutional right to abortion.

Casey did not achieve that goal. Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly. Some have recently enacted laws allowing abortion, with few restrictions, at all stages of pregnancy. Others have tightly restricted abortion beginning well before viability. And in this case, 26 States have expressly asked this Court to overrule *Roe* and *Casey* and allow the States to regulate or prohibit pre-viability abortions.

Mississippi asks us to uphold the constitutionality of a law that generally prohibits an abortion after the 15th week of pregnancy—several weeks before the point at which a fetus is now regarded as "viable" outside the womb. In defending this law, the State's primary argument is that we should reconsider and overrule *Roe* and *Casey* and once again allow each State to regulate abortion as its citizens wish.

We hold that *Roe* and *Case*y must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg* (1997).

The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of "liberty." *Roe*'s defenders characterize the abortion right as similar to the rights recognized in past decisions involving

matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called "fetal life" and what the law now before us describes as an "unborn human being."

Stare decisis, on which *Casey*'s controlling opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.

It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. That is what the Constitution and the rule of law demand.

I

"Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform ... or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." [Mississippi's Gestational Age Act.]

[The parties] tell us that "no half-measures" are available: We must either reaffirm or overrule *Roe* and *Casey*.

II

We begin by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion. Skipping over that question, the controlling opinion in *Casey* reaffirmed *Roe* 's "central holding" based solely on the doctrine of *stare decisis*.

We therefore turn to the question that the *Casey* plurality did not consider. First, we explain the standard that our cases have used in determining whether the Fourteenth Amendment's reference to "liberty" protects a particular right. Second, we examine whether the right at issue in this case is rooted in our Nation's history and tradition and whether it is an essential component of what we have described as "ordered liberty." Finally, we consider whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents.

A

1

The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text.

Roe held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned. And that privacy right, *Roe* observed, had been found to spring from no fewer than five different constitutional provisions—the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

The Court's discussion left open at least three ways in which some combination of these provisions could protect the abortion right. One possibility was that the right was "founded ... in the Ninth Amendment's reservation of rights to the people." Another was that the right was rooted in the First, Fourth, or Fifth Amendment, or in some combination of those provisions, and that this right had been "incorporated" into the Due Process Clause of the Fourteenth Amendment just as many other Bill of Rights provisions had by then been incorporated. And a third path was that the First, Fourth, and Fifth Amendments played no role and that the right was simply a component of the "liberty" protected by the Fourteenth Amendment's Due Process Clause. *Roe* expressed the "feel[ing]" that the Fourteenth Amendment was the provision that did the work, but its message seemed to be that the abortion right could be found *somewhere* in the Constitution and that specifying its exact location was not of paramount importance. The *Casey* Court did not defend this unfocused analysis and instead grounded its decision solely on the theory that the right to obtain an abortion is part of the "liberty" protected by the Fourteenth Amendment's Due Process Clause.

W[e] turn to *Casey*'s bold assertion that the abortion right is an aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment.

2

The underlying theory on which this argument rests—that the Fourteenth Amendment's Due Process Clause provides substantive, as well as procedural, protection for "liberty"—has long been controversial. But our decisions have held that the Due Process Clause protects two categories of substantive rights.

The first consists of rights guaranteed by the first eight Amendments. [T]his Court has held that the Due Process Clause of the Fourteenth Amendment "incorporates" the great majority of those rights and thus makes them equally applicable to the States. The second category comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution.

In deciding whether a right falls into either of these categories, the Court has long asked whether the right is "deeply rooted in [our] history and tradition" and whether it is essential to our Nation's "scheme of ordered liberty." And in conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue.

Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the "liberty" protected by the Due Process Clause because the term "liberty" alone provides little guidance. "Liberty" is a capacious term.

In interpreting what is meant by the Fourteenth Amendment's reference to "liberty," we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been "reluctant" to recognize rights that are not mentioned in the Constitution. As the Court cautioned in *Glucksberg*, "[w]e must ... exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court."

On occasion, when the Court has ignored the "[a]ppropriate limits" imposed by "respect for the teachings of history," it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner*. The Court must not fall prey to such an unprincipled approach. Instead, guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, we must ask what the *Fourteenth Amendment* means by the term "liberty." When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.

B

1

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before *Roe*.

Not only was there no support for such a constitutional right until shortly before *Roe*, but abortion had long been a *crime* in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow.

Roe either ignored or misstated this history, and *Casey* declined to reconsider *Roe*'s faulty historical analysis. It is therefore important to set the record straight.

2

a

[The Court then offered a history of the criminalization of abortion in the English common law after "quickening" ("which usually occurs between the 16th and 18th week of pregnancy"), and concluded "even prequickening abortions" were not condoned under the common law.]

b

[The Court then turned to the legal history of abortion in America. It concluded abortion was a crime in the colonial era, and "by the 19th century, courts frequently explained that the common law made abortion of a quick child a crime."]

c

[The Court then discussed possible reasons for the common law's "distinction between pre- and post-quickening abortions." It noted the quickening rule "was abandoned in the 19th century." Also, "during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy," and that, in 1868, the year the Fourteenth Amendment was ratified, "three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening. Of the nine States that had not yet criminalized abortion at all stages, all but one did so by 1910."]

d

The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions.

3

Neither respondents nor the Solicitor General disputes the fact that by 1868 the vast majority of States criminalized abortion at all stages of pregnancy. Instead, respondents are forced to argue that it "does [not] matter that some States prohibited abortion at the time *Roe* was decided or when the Fourteenth Amendment was adopted."

Not only are respondents and their *amici* unable to show that a constitutional right to abortion was established when the Fourteenth Amendment was adopted, but they have found no support for the existence of an abortion right that predates the latter part of the 20th century—no state constitutional provision, no statute, no judicial decision, no learned treatise. The earliest sources called to our attention are a few district court and state court decisions decided shortly before *Roe* and a small number of law review articles from the same time period.

Roe relied largely on two articles by a pro-abortion advocate who claimed that Coke had intentionally misstated the common law because of his strong anti-abortion views. These articles have been discredited.

The Solicitor General suggests that history supports an abortion right because the common law's failure to criminalize abortion before quickening means that "at the Founding and for decades thereafter, women generally could terminate a pregnancy, at least in its early stages." But the insistence on quickening was not universal, and regardless, the fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that

anyone thought the States lacked the authority to do so. When legislatures began to exercise that authority as the century wore on, no one, as far as we are aware, argued that the laws they enacted violated a fundamental right. That is not surprising since common-law authorities had repeatedly condemned abortion and described it as an "unlawful" act without regard to whether it occurred before or after quickening.

C
1

Instead of seriously pressing the argument that the abortion right itself has deep roots, supporters of *Roe* and *Casey* contend that the abortion right is an integral part of a broader entrenched right. *Roe* termed this a right to privacy. *Casey* elaborated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."

The Court did not claim that this broadly framed right is absolute, and no such claim would be plausible. While individuals are certainly free *to think* and *to say* what they wish about "existence," "meaning," the "universe," and "the mystery of human life," they are not always free *to act* in accordance with those thoughts. License to act on the basis of such beliefs may correspond to one of the many understandings of "liberty," but it is certainly not "ordered liberty."

Ordered liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed "potential life." But the people of the various States may evaluate those interests differently. In some States, voters may believe that the abortion right should be even more extensive than the right that *Roe* and *Casey* recognized. Voters in other States may wish to impose tight restrictions. Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.

Nor does the right to obtain an abortion have a sound basis in precedent. *Casey* relied on cases involving the right to marry a person of a different race, *Loving*; the right to marry while in prison, *Turner v. Safley*; the right to obtain contraceptives, Griswold, Eisenstadt v. Baird, Carey v. Population Servics Int'l; the right to reside with relatives, *Moore v. East Cleveland*; the right to make decisions about the education of one's children, *Pierce*, *Meyer*; the right not to be sterilized without consent, *Skinner*; and the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures. Respondents also rely on post-*Casey* decisions like *Lawrence v. Texas* and *Obergefell v. Hodges*.

These attempts to justify abortion through appeals to a broader right to autonomy and to define one's "concept of existence" prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. None of these rights has any claim to being deeply rooted in history.

What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call "potential life" and what the law at issue in this case regards as the life of an "unborn human being." None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way.

2

In drawing this critical distinction between the abortion right and other rights, it is not necessary to dispute *Casey*'s claim (which we accept for the sake of argument) that "the specific practices of States at the time of the adoption of the Fourteenth Amendment" do not "mar[k] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." Abortion is nothing new. It has been addressed by lawmakers for centuries, and the fundamental moral question that it poses is ageless.

Defenders of *Roe* and *Casey* do not claim that any new scientific learning calls for a different answer to the underlying moral question, but they do contend that changes in society require the recognition of a constitutional right to obtain an abortion. Without the availability of abortion, they maintain, people will be inhibited from exercising their freedom to choose the types of relationships they desire, and women will be unable to compete with men in the workplace and in other endeavors.

Americans who believe that abortion should be restricted press countervailing arguments about modern developments.

Both sides make important policy arguments, but supporters of *Roe* and *Casey* must show that this Court has the authority to weigh those arguments and decide how abortion may be regulated in the States. They have failed to make that showing, and we thus return the power to weigh those arguments to the people and their elected representatives.

D

1

The dissent does not identify *any* pre-*Roe* authority that supports such a right—no state constitutional provision or statute, no federal or state judicial precedent, not even a scholarly treatise. Nor does the dissent dispute the fact that abortion was illegal at common law at least after quickening; that the 19th century saw a trend toward criminalization of pre-quickening abortions; that by 1868, a supermajority of States (at least 26 of 37) had enacted statutes criminalizing abortion at all stages of pregnancy; that by the late 1950s at least 46 States prohibited abortion "however and whenever performed" except if necessary to save "the life of the mother"; and that when *Roe* was decided in 1973 similar statutes were still in effect in 30 States.

The dissent suggests that we have focused only on "the legal status of abortion in the 19th century," but our review of this Nation's tradition extends well past that period. As explained, for more than a century after 1868—including "another half-century" after women gained the constitutional right to vote in 1920—it was firmly established that laws prohibiting abortion like the Texas law at issue in *Roe* were permissible exercises of state regulatory authority. And today, another half century later, more than half of the States have asked us to overrule *Roe* and *Casey*. The dissent cannot establish that a right to abortion has *ever* been part of this Nation's tradition.

2

Because the dissent cannot argue that the abortion right is rooted in this Nation's history and tradition, it contends that the "constitutional tradition" is "not captured whole at a single moment," and that its "meaning gains content from the long sweep of our history and from successive judicial precedents." This vague formulation imposes no clear restraints on what Justice White called the "exercise of raw judicial power," and while the dissent claims that its standard "does not mean anything goes," any real restraints are hard to discern.

The largely limitless reach of the dissenters' standard is illustrated by the way they apply it here. First, if the "long sweep of history" imposes any restraint on the recognition of unenumerated rights, then *Roe* was surely wrong, since abortion was never allowed (except to save the life of the mother) in a majority of States for over 100 years before that decision was handed down. Second, it is impossible to defend *Roe* based on prior precedent because all of the precedents *Roe* cited, including *Griswold* and *Eisenstadt*, were critically different for a reason that we have explained: None of those cases involved the destruction of what *Roe* called "potential life."

So without support in history or relevant precedent, *Roe*'s reasoning cannot be defended even under the dissent's proposed test, and the dissent is forced to rely solely on the fact that a constitutional right to abortion was recognized in *Roe* and later decisions that accepted *Roe*'s interpretation. Under the doctrine of *stare decisis*, those precedents are entitled to careful and respectful consideration. But adherence to precedent is not "an inexorable command." There are occasions when past decisions should be overruled, and this is one of them.

3

The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life. This is evident in the analogy that the dissent draws between the abortion right and the rights recognized in *Griswold* (contraception), *Eisenstadt* (same), *Lawrence* (sexual conduct with member of the same sex), and *Obergefell* (same-sex marriage). Perhaps this is designed to stoke unfounded fear that our decision will imperil those other rights, but the dissent's analogy is objectionable for a more important reason: what it reveals about the dissent's views on the protection of what *Roe* called "potential life." The exercise of the rights at issue in *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* does not destroy a "potential life," but an abortion has that effect. So if the rights at issue in those cases are fundamentally the same as the right recognized in *Roe* and *Casey*, the implication is clear: The

Constitution does not permit the States to regard the destruction of a "potential life" as a matter of any significance.

III

[The Court discussed whether "*stare decisis* counsels continued acceptance of *Roe* and *Casey*." It found a "high value" in getting constitutional matter "settled right," in part due to the difficulty of correcting an "erroneous constitutional decision." It then noted "[s]ome of our most important constitutional decisions have overruled prior precedents, citing *Brown v Board of Education* (1954), *West Coast Hotel v. Parrish* (1937), and *West Virginia Bd. of Ed. v. Barnette* (1943). It then referenced its footnote 48, which included a much larger list of such cases. The Court concluded, "Without these decisions, American constitutional law as we know it would be unrecognizable, and this would be a different country."

"In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."]

E

Reliance interests. We last consider whether overruling *Roe* and *Casey* will upend substantial reliance interests.

1

Traditional reliance interests arise "where advance planning of great precision is most obviously a necessity." In *Casey*, the controlling opinion conceded that those traditional reliance interests were not implicated because getting an abortion is generally "unplanned activity," and "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions." [W]e agree.

2

[T]he controlling opinion in *Casey* perceived a more intangible form of reliance. It wrote that "people [had] organized intimate relationships and made choices that define their views of themselves and their places in society ... in reliance on the availability of abortion in the event that contraception should fail" and that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." But this Court is ill-equipped to assess "generalized assertions about the national psyche." *Casey*'s notion of reliance thus finds little support in our cases.

[A]ssessing the novel and intangible form of reliance endorsed by the *Casey* plurality depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women. The

contending sides in this case make impassioned and conflicting arguments. This Court has neither the authority nor the expertise to adjudicate those disputes, and the *Casey* plurality's speculations and weighing of the relative importance of the fetus and mother represent a departure from the "original constitutional proposition" that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies."

Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office.

3

[T]he Solicitor General suggests that overruling those decisions would "threaten the Court's precedents holding that the Due Process Clause protects other rights." That is not correct for reasons we have already discussed. And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.

IV

[W]e must address one final argument: The American people's belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle, not "social and political pressures." There is a special danger that the public will perceive a decision as having been made for unprincipled reasons when the Court overrules a controversial "watershed" decision, such as *Roe*.

The *Casey* plurality was certainly right that it is important for the public to perceive that our decisions are based on principle. But we cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work. In suggesting otherwise, the *Casey* plurality went beyond this Court's role in our constitutional system.

The *Casey* plurality "call[ed] the contending sides of a national controversy to end their national division," and claimed the authority to impose a permanent settlement of the issue of a constitutional abortion right simply by saying that the matter was closed. That unprecedented claim exceeded the power vested in us by the Constitution. Our sole authority is to exercise "judgment"—which is to say, the authority to judge what the law means and how it should apply to the case at hand. The Court has no authority to decree that an erroneous precedent is *permanently* exempt from evaluation under traditional *stare decisis* principles. If the rule were otherwise, erroneous decisions like *Plessy* and *Lochner* would still be the law.

Roe certainly did not succeed in ending division on the issue of abortion. On the contrary, *Roe* "inflamed" a national issue that has remained bitterly divisive for the past half century. And for the past 30 years, *Casey* has done the same.

We do not pretend to know how our political system or society will respond to today's decision overruling *Roe* and *Casey*. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision.

We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled.

V
A
3

Finally, the dissent suggests that our decision calls into question *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*. But we have stated unequivocally that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." We have also explained why that is so: rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed "potential life." It is hard to see how we could be clearer.

VI
A

Under our precedents, rational-basis review is the appropriate standard for such challenges. [P]rocuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history.

It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies."

A law regulating abortion must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.

VII

Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.

Justice Thomas, concurring.

The Court today declines to disturb substantive due process jurisprudence generally or the doctrine's application in other, specific contexts. Cases like *Griswold*, *Lawrence*, and *Obergefell* are not at issue. The Court's abortion cases are unique, and no party has asked us to decide "whether our entire Fourteenth Amendment jurisprudence must be preserved or revised," Thus, I agree that "[n]othing in [the Court's] opinion should be understood to cast doubt on precedents that do not concern abortion."

For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment.

Justice Kavanaugh, concurring.

III

First is the question of how this decision will affect other precedents involving issues such as contraception and marriage—in particular, the decisions in *Griswold*; *Eisenstadt*; *Loving*; and *Obergefell*. Overruling *Roe* does *not* mean the overruling of those precedents, and does *not* threaten or cast doubt on those precedents.

Second, as I see it, some of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel. May a State retroactively impose liability or punishment for an abortion that occurred before today's decision takes effect? In my view, the answer is no based on the Due Process Clause or the *Ex Post Facto* Clause.

Chief Justice Roberts, concurring in the judgment.

[Omitted.]

Justice Breyer, Justice Sotomayor, and Justice Kagan, dissenting.

For half a century, *Roe* and *Casey* have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child. *Roe* held, and Casey reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life: It could not determine what the woman's future would be.

Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.

Roe and *Casey* well understood the difficulty and divisiveness of the abortion issue. The Court knew that Americans hold profoundly different views about the "moral[ity]" of "terminating a pregnancy, even in its earliest stage." And the Court recognized that "the State has legitimate interests from the outset of the pregnancy in protecting" the "life of the fetus that may become a child." So the Court struck a balance, as it often does when values and goals compete. It held that the State could prohibit abortions after fetal viability, so long as the ban contained exceptions to safeguard a woman's life or health. It held that even before viability, the State could regulate the abortion procedure in multiple and meaningful ways. But until the viability line was crossed, the Court held, a State could not impose a "substantial obstacle" on a woman's "right to elect the procedure" as she (not the government) thought proper, in light of all the circumstances and complexities of her own life.

Today, the Court discards that balance. It says that from the very moment of fertilization, a woman has no rights to speak of. A State can force her to bring a pregnancy to term, even at the steepest personal and familial costs. An abortion restriction, the majority holds, is permissible whenever rational, the lowest level of scrutiny known to the law. And because, as the Court has often stated, protecting fetal life is rational, States will feel free to enact all manner of restrictions. The Mississippi law at issue here bars abortions after the 15th week of pregnancy. Under the majority's ruling, though, another State's law could do so after ten weeks, or five or three or one—or, again, from the moment of fertilization. States have already passed such laws, in anticipation of today's ruling. More will follow. Some States have enacted laws extending to all forms of abortion procedure, including taking medication in one's own home. They have passed laws without any exceptions for when the woman is the victim of rape or incest. Under those laws, a woman will have to bear her rapist's child or a young girl her father's—no matter if doing so will destroy her life. So too, after today's ruling, some States may compel women to carry to term a fetus with severe physical anomalies—for example, one afflicted with Tay-Sachs disease, sure to die within a few years of birth. States may even argue that a prohibition on abortion need make no provision for protecting a woman from risk of death or physical harm. Across a vast array of circumstances, a State will be able to impose its moral choice on a woman and coerce her to give birth to a child.

Enforcement of all these draconian restrictions will also be left largely to the States' devices. A State can of course impose criminal penalties on abortion providers, including lengthy prison sentences. But some States will not stop there. Perhaps, in the wake of today's decision, a state law will criminalize the woman's conduct too, incarcerating or fining her for daring to seek or obtain an abortion.

Today's decision, the majority says, permits "each State" to address abortion as it pleases. That is cold comfort, of course, for the poor woman who cannot get the money to fly to a distant State for a procedure. In any event, interstate restrictions will also soon be in the offing. After this decision, some States may block women from traveling out of State to obtain abortions, or even

from receiving abortion medications from out of State. Some may criminalize efforts, including the provision of information or funding, to help women gain access to other States' abortion services. Most threatening of all, no language in today's decision stops the Federal Government from prohibiting abortions nationwide.

Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens. Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. And in thus safeguarding each woman's reproductive freedom, the Constitution also protected "[t]he ability of women to participate equally in [this Nation's] economic and social life." But no longer. As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. At the least, they will incur the cost of losing control of their lives.

And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. *Griswold*; *Eisenstadt*. In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. *Lawrence*; *Obergefell*. They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. The lone rationale for what the majority does today is that the right to elect an abortion is not "deeply rooted in history": Not until *Roe*, the majority argues, did people think abortion fell within the Constitution's guarantee of liberty. The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, "there was no support in American law for a constitutional right to obtain [contraceptives]." Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.

The majority has no good reason for the upheaval in law and society it sets off. *Roe* and *Casey* have been the law of the land for decades, shaping women's expectations of their choices when an unplanned pregnancy occurs. Women have relied on the availability of abortion both in structuring their relationships and in planning their lives. The legal framework *Roe* and *Casey* developed to balance the competing interests in this sphere has proved workable in courts across the country. No recent developments, in either law or fact, have eroded or cast doubt on those precedents. Nothing, in short, has changed. The Court reverses course today for one reason and one reason only: because the composition of this Court has changed. Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law. We dissent.

I

To hear the majority tell the tale, *Roe* and *Casey* are aberrations: They came from nowhere, went nowhere—and so are easy to excise from this Nation's constitutional law. That is not true. We believe in a Constitution that puts some issues off limits to majority rule. Even in the face of public opposition, we uphold the right of individuals—yes, including women—to make their own choices and chart their own futures. Or at least, we did once.

A

The *Roe* Court knew it was treading on difficult and disputed ground. [B]y a 7-to-2 vote, the Court held that in the earlier stages of pregnancy, that contested and contestable choice must belong to a woman, in consultation with her family and doctor. The Court explained that a long line of precedents, "founded in the Fourteenth Amendment's concept of personal liberty," protected individual decisionmaking related to "marriage, procreation, contraception, family relationships, and child rearing and education."

At the same time, though, the Court recognized "valid interest[s]" of the State "in regulating the abortion decision."

The Court therefore struck a balance, turning on the stage of the pregnancy at which the abortion would occur. [A]fter the fetus's viability—the point when the fetus "has the capability of meaningful life outside the mother's womb"—the State could ban abortions, except when necessary to preserve the woman's life or health.

[I]n *Casey*, the Court considered the matter anew, and again upheld *Roe*'s core precepts. The key thing now is the substantive aspect of the Court's considered conclusion that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."

Casey grounded that right in the Fourteenth Amendment's guarantee of "liberty." That guarantee encompasses realms of conduct not specifically referenced in the Constitution. "It is settled now," the Court said—though it was not always so—that "the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity." Especially important were those guaranteeing the right to contraception. Her decision about abortion was central, in the same way, to her capacity to chart her life's course.

Casey again struck a balance, differing from *Roe*'s in only incremental ways.

B

The majority makes this change based on a single question: Did the reproductive right recognized in *Roe* and *Casey* exist in "1868, the year when the Fourteenth Amendment was ratified"? The majority says (and with this much we agree) that the answer to this question is no.

[E]arly law in fact does provide some support for abortion rights. Common-law authorities did not treat abortion as a crime before "quickening"—the point when the fetus moved in the womb. And early American law followed the common-law rule. So the criminal law of that early time might be taken as roughly consonant with *Roe*'s and *Casey*'s different treatment of early and late abortions. Better, then, to move forward in time.

The majority's core legal postulate, then, is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. And that is indeed what the majority emphasizes over and over again. If the ratifiers did not understand something as central to freedom, then neither can we. If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist.

As an initial matter, note a mistake in the just preceding sentence. "[P]eople" did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation. Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase "We the People." In 1868, the first wave of American feminists were explicitly told—of course by men—that it was not their time to seek constitutional protections. To be sure, most women in 1868 also had a foreshortened view of their rights: If most men could not then imagine giving women control over their bodies, most women could not imagine having that kind of autonomy. Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights.

So how is it that, as *Casey* said, our Constitution, read now, grants rights to women, though it did not in 1868? How is it that our Constitution, through the Fourteenth Amendment's liberty clause, guarantees access to contraception (also not legally protected in 1868) so that women can decide for themselves whether and when to bear a child? How is it that until today, that same constitutional clause protected a woman's right, in the event contraception failed, to end a pregnancy in its earlier stages?

The answer is that this Court has rejected the majority's pinched view of how to read our Constitution. "The Founders," we recently wrote, "knew they were writing a document designed to apply to ever-changing circumstances over centuries." *NLRB v. Noel Canning* (2014). Or in the words of the great Chief Justice John Marshall, our Constitution is "intended to endure for ages to come," and must adapt itself to a future "seen dimly," if at all. *McCulloch v. Maryland*. That is indeed why our Constitution is written as it is. The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers' invitation.

Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the Fourteenth Amendment—the guarantees of "liberty" and "equality" for all. And nowhere has that approach produced prouder moments, for this country and the Court. Consider an example *Obergefell* used a few years ago. The Fourteenth Amendment's ratifiers did not think it gave black and white people a right to marry each other. To the contrary, contemporaneous practice deemed that act quite as unprotected as abortion. Yet the Court in *Loving* read the Fourteenth Amendment to embrace the Lovings' union. The Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply.

That does not mean anything goes. The majority wishes people to think there are but two alternatives: (1) accept the original applications of the Fourteenth Amendment and no others, or (2) surrender to judges' "own ardent views," ungrounded in law, about the "liberty that Americans should enjoy." [A]pplications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents. The second Justice Harlan [noted] the constitutional "tradition" of this country is not captured whole at a single moment. Rather, its meaning gains content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution's most fundamental commitments to new conditions.

"[T]he specific practices of States at the time of the adoption of the Fourteenth Amendment," do not "mark[ ] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." [*Casey*.] *Casey* could draw but one conclusion: Whatever was true in 1868, "[i]t is settled now, as it was when the Court heard arguments in *Roe* v. *Wade*, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood."

It was settled yesterday that the Constitution places limits on a State's power to assert control over an individual's body and most personal decisionmaking. A multitude of decisions supporting that principle led to *Roe*'s recognition and *Casey*'s reaffirmation of the right to choose; and *Roe* and *Casey* in turn supported additional protections for intimate and familial relations. The majority has embarrassingly little to say about those precedents. The Court's precedents about bodily autonomy, sexual and familial relations, and procreation are all interwoven—all part of the fabric of our constitutional law, and because that is so, of our lives. Especially women's lives, where they safeguard a right to self-determination.

Consider this Court's cases protecting "bodily integrity." Everyone, including women, owns their own bodies. So the Court has restricted the power of government to interfere with a person's medical decisions or compel her to undergo medical procedures or treatments.

Casey recognized the "doctrinal affinity" between those precedents and *Roe*. There are few greater incursions on a body than forcing a woman to complete a pregnancy and give birth.

Roe and *Casey* fit neatly into a long line of decisions protecting from government intrusion a wealth of private choices about family matters, child rearing, intimate relationships, and

procreation. [T]hey inevitably shape the nature and future course of a person's life (and often the lives of those closest to her). So, the Court held, those choices belong to the individual, and not the government. That is the essence of what liberty requires.

And liberty may require it, this Court has repeatedly said, even when those living in 1868 would not have recognized the claim—because they would not have seen the person making it as a full-fledged member of the community. Throughout our history, the sphere of protected liberty has expanded, bringing in individuals formerly excluded. In that way, the constitutional values of liberty and equality go hand in hand; they do not inhabit the hermetically sealed containers the majority portrays.

Casey made clear that the precedents *Roe* most closely tracked were those involving contraception.

Faced with all these connections between *Roe*/*Casey* and judicial decisions recognizing other constitutional rights, the majority tells everyone not to worry. Today's decision, the majority first says, "does not undermine" the decisions cited by *Roe* and *Casey*. [T]he majority depicts today's decision as "a restricted railroad ticket, good for this day and train only." Should the audience for these too-much-repeated protestations be duly satisfied? We think not.

The first problem with the majority's account comes from Justice Thomas's concurring opinion.

Even placing the concurrence to the side, the assurance in today's opinion still does not work. Or at least that is so if the majority is serious about its sole reason for overturning *Roe* and *Casey*: the legal status of abortion in the 19th century. Except in the places quoted above, the state interest in protecting fetal life plays no part in the majority's analysis. According to the majority, no liberty interest is present—because (and only because) the law offered no protection to the woman's choice in the 19th century. But here is the rub. The law also did not then (and would not for ages) protect a wealth of other things. It did not protect the rights recognized in *Lawrence* and *Obergefell* [or] *Loving* [or] *Griswold* [or] *Skinner*. So if the majority is right in its legal analysis, all those decisions were wrong, and all those matters properly belong to the States too—whatever the particular state interests involved. And if that is true, it is impossible to understand (as a matter of logic and principle) how the majority can say that its opinion today does not threaten—does not even "undermine"—any number of other constitutional rights.

Nor does it even help just to take the majority at its word. [T]he future significance of today's opinion will be decided in the future. And law often has a way of evolving without regard to original intentions. [W]hatever today's majority might say, one thing really does lead to another. We fervently hope that does not happen. But we cannot understand how anyone can be confident that today's opinion will be the last of its kind.

As a matter of constitutional method, the majority's commitment to replicate in 2022 every view about the meaning of liberty held in 1868 has precious little to recommend it.

As a matter of constitutional substance, the majority's opinion has all the flaws its method would suggest. Because laws in 1868 deprived women of any control over their bodies, the majority approves States doing so today. Because those laws prevented women from charting the course of their own lives, the majority says States can do the same again.

II

[The dissent then explains why *stare decisis* should lead to affirmance of *Roe* and *Casey*. First, the Court's references to other cases overruling precedent do not support its decision. Second, "no significant legal or factual change—supports overturning a half-century of settled law giving women control over their reproductive lives," for *Roe* and *Casey* were correct. Third, *stare decisis* principles counsel against the Court's decision. "[T]ens of millions of American women have relied, and continue to rely, on the right to choose." It then disagreed with the Court and concluded that the "undue burden" standard was a workable standard, as general standards are "ubiquitous in the law." That some judges disagreed in applying the undue burden standard was not unusual.

The dissent then responded to the Court's use of *Brown v. Board of Education* (overruling *Plessy v. Ferguson*) and *West Coast Hotel* (overruling *Adkins v. Children's Hospital*) as precedent permitting it to reverse *Roe*/*Casey*. Those cases, "unlike today's, responded to changed law and to changed facts and attitudes that had taken hold throughout society." The latter held constitutional state minimum wage laws, reversing precedent both for factual reasons (the Great Depression) and legal reasons ("the power of States to implement economic policies designed to enhance their citizens' economic well-being." As for *Brown*, "[b]y 1954 decades of Jim Crow had made clear what *Plessy*'s turn of phrase actually meant: "inherent[] [in]equal[ity]." "Changed facts and changed law required *Plessy*'s end." Additionally, *West Virginia Board of Education v. Barnette* (1943) (overruling *Minersville Sch. Dist. v. Gobitis* (1940)) and *Brown* "share another feature setting them apart from the Court's ruling today. They protected individual rights with a strong basis in the Constitution's most fundamental commitments; they did not, as the majority does here, take away a right that individuals have held, and relied on, for 50 years."

The dissent then declared, "*Roe* and *Casey* were the product of a profound and ongoing change in women's roles in the latter part of the 20th century. Only a dozen years before *Roe*, the Court described women as "the center of home and family life," with "special responsibilities" that precluded their full legal status under the Constitution.

The joint dissent concluded strong settled expectations and related reliance interests also supported retention of *Roe*/*Casey*, and it criticized the Court's "impoverished view of reliance," which was also an "unprecedented assertion" of "a radical claim to power." It was so because the Court "arrogates to itself the authority to overrule established legal principles without even acknowledging the costs of its decisions for the individuals who live under the law."

"Rescinding an individual right in its entirety and conferring it on the State, an action the Court takes today for the first time in history, affects all who have relied on our constitutional system of government and its structure of individual liberties protected from state oversight." Relatedly, "[t]he majority's refusal even to consider the life-altering consequences of reversing *Roe* and *Casey* is a stunning indictment of its decision."

Lastly, it criticized the majority for misstating *Casey*. In the joint dissent's view, "*Casey* applied traditional principles of *stare decisis*—which the majority today ignores—in reaffirming *Roe*. *Casey* assessed changed circumstances (none) and reliance interests (profound). It concluded: Weakening *stare decisis* threatens to upend bedrock legal doctrines, far beyond any single decision. Weakening *stare decisis* creates profound legal instability. And as *Casey* recognized, weakening *stare decisis* in a hotly contested case like this one calls into question this Court's commitment to legal principle. It makes the Court appear not restrained but aggressive, not modest but grasping. In all those ways, today's decision takes aim, we fear, at the rule of law."]

III

Roe has stood for fifty years. *Casey*, a precedent about precedent specifically confirming *Roe*, has stood for thirty. And the doctrine of *stare decisis*—a critical element of the rule of law—stands foursquare behind their continued existence. The right those decisions established and preserved is embedded in our constitutional law, both originating in and leading to other rights protecting bodily integrity, personal autonomy, and family relationships. The abortion right is also embedded in the lives of women—shaping their expectations, influencing their choices about relationships and work, supporting (as all reproductive rights do) their social and economic equality. Since the right's recognition (and affirmation), nothing has changed to support what the majority does today. Neither law nor facts nor attitudes have provided any new reasons to reach a different result than *Roe* and *Casey* did. All that has changed is this Court.

[The Court's decision] places in jeopardy other rights, from contraception to same-sex intimacy and marriage. And finally, it undermines the Court's legitimacy.

The American public should never conclude that its constitutional protections hung by a thread—that a new majority, adhering to a new "doctrinal school," could "by dint of numbers" alone expunge their rights. It is hard—no, it is impossible—to conclude that anything else has happened here. One of us once said that "[i]t is not often in the law that so few have so quickly changed so much." S. Breyer, Breaking the Promise of *Brown*: The Resegregation of America's Schools 30 (2022). For all of us, in our time on this Court, that has never been more true than today. In overruling *Roe* and *Casey*, this Court betrays its guiding principles.

With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent.

AFTERWORD

The Court concludes *Roe* was "egregiously wrong." That conclusion allows it to overrule *Roe*, and the *Casey* revision of *Roe*. The doctrine of *stare decisis* places a burden on those seeking to overrule precedent. There is general agreement that correcting a "wrong" decision, without more, is insufficient to overrule precedent. The most well-known "wrong" constitutional precedent is *The Slaughter-House Cases* (1873) (Chapter 5 § B.2.). The Court interpreted the Privileges or Immunities Clause of the Fourteenth Amendment very narrowly, making the Clause a near nullity. Most justices and scholars who have discussed the case believe it was wrongly decided (for example, Justice Thomas has repeatedly made this claim). But the Court has not revisited its decision, despite the urgings of Justice Thomas, and it seems unlikely it will do so.

A significant reason why *Roe* was egregiously wrong, the Court concluded, is that there existed no "deeply-rooted" right to choose whether to have an abortion (or, more generally, whether to bear or beget a child). The "deeply-rooted" standard was initially used in *Snyder v. Massachusetts* (1934), which declared that provisions of the Bill of Rights should be incorporated into the Due Process Clause of the Fourteenth Amendment if the right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." The deeply rooted standard has been both used and ignored by the Court in its substantive due process jurisprudence. For example, it was used in *Moore v. East Cleveland* but ignored in *Lawrence v. Texas* and *Obergefell v. Hodges*. The Court and joint dissent also disagreed on a related point: what is the correct level of generality to use in determining whether an unenumerated right is protected by the Due Process Clause. The Court opts for a relatively narrow level of generality, one akin to that adopted by Justice Scalia (for a plurality) in Michael H. v. Gerald D. The dissent adopts a broader level of generality, one closer to that often used by Justice Kennedy.

Both the Court and the joint dissent correctly note that *stare decisis* creates a lower bar to overruling precedent in constitutional than in non-constitutional cases. Instead of adopting a burden of proof to overrule precedent, the Court has looked at a number of factors, including the quality of the Court's reasoning, the workability of the precedent, its consistency, developments (legal and factual) since the decision was issued, and reliance on the precedent. See Janus v. AFSCME (2018) (Chapter 8 § E.3.) The Court somewhat amends these factors in *Dobbs*: "In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance." The dissent strongly disagrees with the Court's conclusion that no reliance interests support keeping *Roe*: "Rescinding an individual right in its entirety and conferring it on the State, an action the Court takes today for the first time in history, affects all who have relied on our constitutional system of government and its structure of individual liberties protected from state oversight." Relatedly, "[t]he majority's refusal even to consider the life-altering consequences of reversing *Roe* and *Casey* is a stunning indictment of its decision."

The joint dissent returns several times to the question "what's next?" Is *Dobbs* the beginning of a series of decisions limiting substantive due process claims? The Court attempts to allay those concerns by declaring, more than once, that "rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have

stressed) uniquely involves what *Roe* and *Casey* termed 'potential life.'" Justice Alito dissented in *Obergefell*. Is that fact relevant to the Court's statements in *Dobbs*? The concurrence by Justice Thomas indicates his willingness (no other Justice joined his opinion) to raze the doctrine of substantive due process. Justice Kavanaugh's concurrence heads in a different direction: *Dobbs* applies only to *Roe*/*Casey*, and nothing else. Is the reliance interest of couples who have married in light of *Obergefell*, and *Obergefell*'s workability and consistency with other law sufficient to leave it untouched by the Court?

The Court's opinion in *Dobbs* was leaked over six weeks before the opinion was released. Chief Justice Roberts acknowledged the genuineness of the draft opinion soon after it was published. The result of the leak limited the Court's options, if options were still under consideration. For example, if the draft opinion became a concurring (or less likely, a dissenting) opinion upon release, the Court had appeared (even if an inaccurate assumption) to have been influenced by the leak. That would have long-term deleterious consequences, as it would suggest the Court was deciding according to public opinion rather than the law. If members in the majority other than Justice Alito had proposed changes to the draft before the leak, whether to incorporate such changes after the leak might also have been inaccurately interpreted to indicate the Court "shifted" as a result of the leak. The leaked draft of early February 2022 might not have changed before publication even absent a leak. But it appears that the leak "froze" the draft, as both are substantially the same.

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." The regulations were found to cause a decrease in the value of the property of less than 10 percent, based on the assumption that the two lots were assessed 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 the concept of regulatory takings was part of the original meaning of the Takings Clause.

KNICK V. TOWNSHIP OF SCOTT, 588 U.S. ___, 139 S. Ct. 2162 (2019) — The Township of Scott, Pennsylvania, passed an ordinance regulating privately-owned properties in which cemeteries were located. The owner of the property was forbidden to bar access to the cemetery to the general public during daylight hours. The owner could also not charge any fee before allowing access to the cemetery. The ordinance also granted an agent of the Township to enter any property in its jurisdiction to determine if a cemetery was on the property. An agent of the Township entered Knick's property without a warrant and concluded certain stones on the property marked the location of graves. Knick sued in federal court, claiming an unconstitutional Fifth Amendment taking. Under earlier decisions of the Court, a person was unable to make a takings claim until all state-based claims were exhausted. Under this rule, Knick was required to initiate an inverse-condemnation proceeding and exhaust that legal pathway before starting a taking claim in federal court. Only then would the matter be ripe for federal adjudication. The difficulty with this legal rule was that, once a complainant failed to obtain just compensation from a state court, that decision precluded further litigation of the claim in federal court. The federal claim might finally

be ripe but the complainant's claim would be dismissed. The Court, in an opinion by Chief Justice Roberts, noted the plaintiff found herself in a legal Catch-22. The Court overruled precedent, holding it "imposes an unjustifiable burden on takings' plaintiffs." The Court held that the Taking Clause was self-executing, and thus once the taking occurred, a federal claim based on the Takings Clause immediately arose.

Justice Kagan, for four dissenters, argued that the Court's decision went too far in requiring the government to pay just compensation before taking property or be held to have violated the Takings Clause. By requiring advance payment, the Court overturned precedents that stretched over a century. Consequently, the Court's claim of a Catch-22 was inapt: a constitutional violation did not occur, past cases agreed, until the landowner failed to obtain just compensation. Finally, the Court's decision to overrule precedent was founded merely on its conclusion that the earlier case was wrong. That is not sufficient under *stare decisis* to overrule.

CEDAR POINT NURSERY V. HASSID, 594 U.S. ___, 141 S. Ct. 2063 (2021) — California law required agricultural employers to allow union organizers access to their property to solicit support or membership in a union, up to three hours (one hour before work, one hour during lunch, and one hour after work) for up to 120 days. The Court, in an opinion by Chief Justice Roberts, held the law unconstitutional, as a *per se* physical taking of the employer's property. The law constituted a physical taking because it "appropriates a right to invade the growers' property." The owners enjoyed a right "to exclude" others from their property, and the access requirement was a "government-authorized physical invasion[]" requiring just compensation. That access was limited to three hours per day for up to 120 days bore only on the amount of just compensation, not whether the taking was a physical or regulatory taking. It rejected the slippery slope argument that its decision would affect a host of other regulations of private business. For example, it concluded, "government health and safety inspections regimes will generally not constitute takings." A grant of a government benefit, such as a permit, conditioned on allowing access for police power interests, will ordinarily not be characterized as a taking.

The dissent by Justice Breyer, for himself and Justices Sotomayor and Kagan, argued the California access law was better understood as a regulation. California neither physically appropriated the property nor caused its permanent physical occupation by another. The law allowed merely a temporary invasion of property. That temporary invasion was a regulatory taking only if the temporary invasion went "too far," in Justice Holmes's famous conclusion in *Pennsylvania Coal Co. v. Mahon* (1922). California, on balance, had not gone too far, so the temporary invasion should be characterized as a regulation rather than a regulatory taking. The Court's contrary conclusion "threatens to make many ordinary forms of regulation unusually complex or impractical."

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 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.3. at page 659:

CITY OF AUSTIN V. REAGAN NAT'L ADVERTISING OF AUSTIN, 596 U.S. ___, 142 S. Ct. 1464 (2022)—The Court returned to the issue of defining when a law regulates the content of speech, and narrowed its 2016 interpretation in *Reed v. Gilbert*. The City of Austin, Texas regulated "off-premises" signs, which it defined as "a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." The Court, in an opinion by Justice Sotomayor, held the regulation was not subject to strict scrutiny, as it was not, on its face, a content based regulation.

The Court began by noting a more than century-long history of regulating outdoor advertisements. Regulations specifically focused on off-premises signs "proliferated following the enactment of the Highway Beautification Act of 1965." Austin's justification for its off-premises signs ordinance was to "protect the aesthetic value of the city and to protect public safety." Austin's off-premises ordinance "grandfathered" existing signs not conforming to the law with some limitations on altering such signs. The respondents, outdoor-advertising companies, were specifically prohibited from "digitizing" some off-premises billboards.

The Court noted *Reed's* rule, that "a regulation cannot be content neutral if it requires reading the sign at issue, is too extreme an interpretation of this Court's precedent." The Austin regulation required one to examine the speech (to read the sign) "only in service of drawing neutral, location-based lines. It is agnostic as to content. Thus, absent a content-based purpose or justification, the City's distinction is content neutral." The Court distinguished *Reed* by noting its "very different regulatory scheme." Additionally, unlike in *Reed*, the Austin regulatory scheme did "not single out any topic or subject matter for differential treatment." Instead, the regulation looked only at "location." The off-premises rule was analogous to a time, place, and manner regulation, and thus intermediate, not strict, scrutiny. It then extended its interpretation, concluding that, like constitutionally-permissible regulations on soliciting, the regulator could read or hear the speech before categorizing it as soliciting or as some more protected speech, such as religious or political speech. The Court thus adopted intermediate scrutiny, which required the regulation to be "narrowly tailored to serve a significant governmental interest." The case was remanded to the court of appeals for that assessment.

The concurrence by Justice Breyer criticized the "strict formalism" in *Reed*, though he concluded the regulation met its standard. Justice Breyer proposed an interpretation of the First Amendment based on its purposes, and adopt "rules of thumb" rather than "bright-line rules." Because the regulation "works no such disproportionate harm" to free speech interests, strict scrutiny was inapt. To follow *Reed's* formalistic approach would result in judicial overreach, as courts might declare unconstitutional "entirely reasonable" regulations. He would return to balancing the speaker's interests against the objectives of the regulation.

Justice Alito concurred in the judgment. He agreed the law was not facially unconstitutional, but believed strict scrutiny should be applied in some instances because the regulation allowed for "disparate treatment" of speech based on topic or subject matter.

The dissent by Justice Thomas, who wrote the Court's opinion in *Reed*, declared Austin's off-premises regulation was content based as interpreted by *Reed*, and could not meet strict scrutiny. "[T]he law is content based if it draws distinctions based in any way 'on the message a speaker conveys.'" Austin's definition of off-premises signs regulated speech depending on its "communicative content," which made it a content-based regulation. The majority's reliance on the sign's location to conclude the regulation was content neutral was wrong because the government official enforcing the regulation had to "know *what* the sign says."

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. He was prosecuted for and convicted of violating the act. The Court held the law violated the 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 had 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 capable of monitoring the physical locations their children visited than cyberspace locations. Further, it was easier for the public to visually observe a sex offender loitering in a public space than in 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 Americans of Asian descent. The PTO justified its decision on a federal statute prohibiting 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. The Court was unanimous that the speech regulated by federal law was private speech, not government speech. They agreed that 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. Justice Alito concluded the law unconstitutionally banned speech "on the ground that it expresses ideas that offend."

Two pluralities (Justice Gorsuch did not participate) differed on the justifications for this conclusion. Justice Alito concluded this case was unlike any case in which the government provided a cash subsidy or other financial support for the speech. He also rejected 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 a trademark was 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 judgment. 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."

IANCU V. BRUNETTI, 588 U.S. ___, 139 S. Ct. 782 (2019) — The Patent and Trademark Office (PTO) denied federal registration of FUCT, on the ground that its statutory authority permitted it to reject "immoral" or "scandalous" trademarks. The Court held the PTO's decision violated the Free Speech Clause. The decision was a sequel to *Matal v. Tam*. FUCT is a clothing line, and the company name was supposed to be spoken as four letters, F, U, C, T, not as a word. The provisions banning immoral or scandalous trademarks were deemed a type of explicit viewpoint discrimination by the government, which is banned by the First Amendment.

Dissenting in part, Chief Justice Roberts concluded that a future trademark registration system may, "under our precedents," ban "obscene, vulgar, or profane marks." Both Justices Breyer and Sotomayor, also dissenting in part, concluded that a narrow interpretation of the statute would permit a denial of the registration of FUCT on grounds that it is a scandalous mark, given the clothing line included children's clothes. The harm to First Amendment interests was slight, and the government possessed legitimate interests. As noted by Justice Sotomayor, a private company was not required to register a trademark in order to use it. Additionally, a trademark granted the holder a largely commercial benefit, making the plaintiff's First Amendment interests relatively modest. Both Breyer and Sotomayor concurred in part because they agreed with the conclusion that prohibiting "immoral" trademarks was unconstitutional.

MINNESOTA VOTERS ALLIANCE V. MANSKY, 585 U.S. ___, 138 S. Ct. 1876 (2018) — A Minnesota law banned voters (and others) from wearing any "political badge, political button, or other political insignia" in a polling location. Whether some apparel met this definition and was thus 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 "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 were required to post notices that the state of California provides free or low-cost abortions and include a phone number to call. Some centers which did not want to post such notices were "pro-life (largely Christian belief-based)." The Court held the notice requirement was content-based, and thus subject to strict scrutiny. The Ninth Circuit had 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 it 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, thought, and expression."

Justice Breyer dissented in an opinion joined by 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 § B.8. at page 776:

SHURTLEFF V. CITY OF BOSTON, 596 U.S. ___, 142 S. Ct. 1583 (2022)—The City of Boston refused to fly a Christian flag as requested by Harold Shurtleff after it had "approved hundreds of requests to raise dozens of flags." This event marked the first occasion in which the City refused to fly a flag at the request of a private citizen. The Court held the raising and flying of flags was not government speech, and the decision to refuse Shurtleff's request "based on its religious viewpoint" was unconstitutional. The Court, in an opinion by Justice Breyer, held Boston "may not exclude speech based on 'religious viewpoint.'"

The concurrence by Justice Kavanaugh noted the government did not violate the Nonestablishment Clause by treating "religious persons, organizations, and speech" "equally with secular" speech. But treating religious speech as "second-class" did violate the Constitution. Justice Gorsuch's opinion concurring in the judgment laid the City's mistaken notion of the demands of the Nonestablishment Clause on the Court's earlier cases, particularly *Lemon v. Kurtzman* (Chapter 9 § B).

KENNEDY V. BREMERTON SCH. DIST., 597 U.S. ___, 142 S. Ct. 2407 (2022)—The Court held a private prayer on the 50-yard line after football games by a public high school coach was protected by both the Free Exercise and Free Speech Clauses. The Court, in an opinion by Justice Gorsuch, concluded, "Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities. That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent."

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."

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 linedrawing 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.

AFTERWORD

The Court's decision emphasizes the deleterious consequences when the government compels a person to speak, or to be associated with ideas or beliefs with which an individual may disagree. Mark Janus wanted to be free from having to pay 78.06% of the full union dues as an agency fee, for the union is the sole recognized representative of the group of employees of the state of Illinois that includes Janus. Under *Abood* and subsequent cases, the agency fee was the amount the union spent on activities "germane" to collective bargaining. *Abood* also barred the union from charging Janus and others paying the agency fee for expenditures related to political and ideological activities, considered "non-germane." Janus argued that paying the agency fee linked him to the union and thus to ideological positions with which he disagreed. That he could contest expenditures he believed "non-germane" to collective bargaining under *Abood*, Janus claimed, was insufficient as a matter of First Amendment law.

The Court holds the agency fee arrangement is a "compelled subsidization of private speech [which] seriously impinges on First Amendment rights." Under a type of "exacting scrutiny" analogized to the commercial speech test, the Court holds that the requirement that public employees be required "to support the union irrespective of whether they share its views" is unconstitutional.

Abood held otherwise. Thus, the Court must overrule *Abood*, and it explains in § VI why *stare decisis* does not bar such action.

The dissent by Justice Kagan for four members of the Court, makes several claims in support of maintaining the *Abood* rule: *Abood* sensibly analyzed the costs and benefits of public unions, the interests of the government in operating its workplace, and the protection of free speech interests of government employees from governmental interference; *stare decisis*; and representation reinforcement as different states reach differing conclusions about whether to require non-union government employees to pay an agency fee. The dissent also raises the stakes of the case, suggesting the result will lead to a rash of "large-scale consequences."

AMERICANS FOR PROSPERITY FOUND. V. BONTA, 594 U.S. ___, 141 S. Ct. 2373 (2021) — California required charitable organizations annually to register and disclose the identities of their largest donors to solicit funds in the state. The Court, noting its decision in *NAACP v. Alabama ex rel. Patterson* (1958), held the California disclosure requirement unconstitutional on its face. Six members of the Court agreed with this conclusion, but divided on the standard of review. Chief Justice Roberts, writing for himself and Justices Kavanaugh and Coney Barrett, applied "exacting scrutiny," which required the government to prove (1) "a substantial relation between the disclosure requirement and a sufficiently important governmental interest" (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)), and (2) it used narrowly tailored means ("exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends") fitting the disclosure requirement to the sufficiently important governmental interest it promotes. The plurality concluded exacting scrutiny was "derived" from *NAACP v. Alabama*, as well as from "electoral disclosure regimes." California's interest in "preventing wrongdoing by charitable organizations was a substantial governmental interest. However, there existed a "dramatic mismatch" between that interest and the "disclosure regime ... implemented in service of that end." California did not use the disclosure of major donors as an "integral part" of detecting fraud in charitable organizations; the finding of fact by the lower court was that it never used those disclosure forms to detect fraud. Thus, the law was facially overbroad, because a "substantial number of its applications are unconstitutional, judged in relations to the statute's plainly legitimate sweep" (quoting United States v. Stevens, 559 U.S. 560, 473 (2010)). This "widespread burden," absent narrow tailoring of the disclosure requirement, was unconstitutional on its face. The Court indicated that a challenger to a disclosure regime "may be required to bear this evidentiary burden where the challenged regime is narrowly tailored to an important government interest." This suggests the burden may shift during the trial of the issue.

Justice Thomas concurred in part, for three reasons. First, he believed strict scrutiny was the proper standard of review in right of association cases. Second, he doubted the validity of overbreadth challenges. Third, and more generally, the Court lacks authority to declare a law unconstitutional in all applications. The concurring opinion by Justice Alito, joined by Justice Gorsuch, began by agreeing that exacting scrutiny "has real teeth," and that California failed to meet that standard. Justice Alito declared, "I am not prepared at this time to hold that a single standard applies to all disclosure requirements," but that exacting scrutiny was not the favored approach taken in prior cases.

The dissent by Justice Sotomayor, joined by Justices Breyer and Kagan, began by asserting that "typically," plaintiffs are required to "demonstrate an actual First Amendment burden before demanding that a law be narrowly tailored to the government's interest, never mind striking the law down in its entirety. For Justice Sotomayor, the actual risk of disclosure was a key component in understanding the breadth of the Court's protection, so an individual's privacy interest "depends on whether publicity will lead to reprisal." Thus, challengers must "demonstrate that a requirement [to disclose] is likely to expose their supporters to concrete repercussions in order to establish an actual burden." If challengers do not do so, narrowly tailoring should not apply "across the board." The rule before the Court's decision required the challenger to present some proof of a "reasonable possibility" of government reprisal. The challengers did not present evidence demonstrated their First Amendment rights were reasonably chilled.

Because rights to association were merely indirectly burdened by disclosure requirements, a more "flexible" version of exacting scrutiny was applicable. The Court wrongly concluded that, "no matter if the burdens on associational rights are slight, heavy, or nonexistent, disclosure regimes must always be narrowly tailored." The dissent decided the modesty of the burden on the associational rights of the challengers necessitated only a "modest showing that the means achieves its ends." This California did.

Insert in Chapter 9 § A.3. at page 827:

Kennedy v. Bremerton School District
597 U.S. ___, 142 S. Ct. 2407 (2022)

Justice Gorsuch delivered the opinion of the Court.

Joseph Kennedy lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks. Mr. Kennedy prayed during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters. He offered his prayers quietly while his students were otherwise occupied. Still, the Bremerton School District disciplined him anyway. It did so because it thought anything less could lead a reasonable observer to conclude (mistakenly) that it endorsed Mr. Kennedy's religious beliefs. That reasoning was misguided. Both the Free Exercise and Free Speech Clauses of the First Amendment protect expressions like Mr. Kennedy's. Nor does a proper understanding of the Amendment's Establishment Clause require the government to single out private religious speech for special disfavor. The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike.

I
A

Joseph Kennedy began working as a football coach at Bremerton High School in 2008. Mr. Kennedy offered his prayers after the players and coaches had shaken hands, by taking a knee at the 50-yard line and praying "quiet[ly]" for "approximately 30 seconds."

Initially, Mr. Kennedy prayed on his own. But over time, some players asked whether they could pray alongside him. Mr. Kennedy responded by saying, "'This is a free country. You can do what you want.'" The number of players who joined Mr. Kennedy eventually grew to include most of the team. Other times Mr. Kennedy still prayed alone. Eventually, Mr. Kennedy began incorporating short motivational speeches with his prayer when others were present. Separately, the team at times engaged in pregame or postgame prayers in the locker room.

For over seven years, no one complained. It seems the District's superintendent first learned of them only in September 2015, after an employee from another school commented positively on the school's practices to Bremerton's principal. [T]he District reacted quickly. On September 17, the superintendent sent Mr. Kennedy a letter. Mr. Kennedy had provided "inspirational talk[s]" that included "overtly religious references" likely constituting "prayer" with the students "at midfield following the completion of ... game[s]." Second, he had led "students and coaching staff in a prayer" in the locker-room tradition that "predated [his] involvement with the program."

The District instructed Mr. Kennedy to avoid any motivational "talks with students" that "include[d] religious expression, including prayer," and to avoid "suggest[ing], encourag[ing] (or

discourag[ing]), or supervis[ing]" any prayers of students, which students remained free to "engage in." The District also explained that any religious activity on Mr. Kennedy's part must be "nondemonstrative (*i.e.*, not outwardly discernible as religious activity)" if "students are also engaged in religious conduct" in order to "avoid the perception of endorsement."

After receiving the District's September 17 letter, Mr. Kennedy ended the tradition, predating him, of offering locker-room prayers. He also ended his practice of incorporating religious references or prayer into his postgame motivational talks to his team on the field.

On October 14, through counsel, Mr. Kennedy sent a letter to school officials informing them that, because of his "sincerely-held religious beliefs," he felt "compelled" to offer a "post-game personal prayer" of thanks at midfield. He asked the District to allow him to continue that "private religious expression" alone. Consistent with the District's policy, Mr. Kennedy explained that he "neither requests, encourages, nor discourages students from participating in" these prayers. He "told everybody" that it would be acceptable to him to pray "when the kids went away from [him]." He later clarified that this meant he was even willing to say his "prayer while the players were walking to the locker room" or "bus," and then catch up with his team. However, Mr. Kennedy objected to the logical implication of the District's September 17 letter, which he understood as banning him "from bowing his head" in the vicinity of students, and as requiring him to "flee the scene if students voluntarily [came] to the same area" where he was praying. After all, District policy prohibited him from "discourag[ing]" independent student decisions to pray.

On October 16, shortly before the game that day, the District responded with another letter. The District acknowledged that Mr. Kennedy "ha[d] complied" with the "directives" in its September 17 letter. Yet instead of accommodating Mr. Kennedy's request to offer a brief prayer on the field while students were busy with other activities—whether heading to the locker room, boarding the bus, or perhaps singing the school fight song—the District issued an ultimatum. It forbade Mr. Kennedy from engaging in "any overt actions" that could "appea[r] to a reasonable observer to endorse ... prayer ... while he is on duty as a District-paid coach." The District did so because it judged that anything less would lead it to violate the Establishment Clause.

B

After receiving this letter, Mr. Kennedy offered a brief prayer following the October 16 game. When he bowed his head at midfield after the game, "most [Bremerton] players were ... engaged in the traditional singing of the school fight song to the audience." Though Mr. Kennedy was alone when he began to pray, players from the other team and members of the community joined him before he finished his prayer.

This event spurred media coverage. Subsequently, the District superintendent explained in an October 20 email to the leader of a state association of school administrators that "the coach moved on from leading prayer with kids, to taking a silent prayer at the 50 yard line." The official with whom the superintendent corresponded acknowledged that the "use of a silent prayer changes the equation a bit."

On October 23, shortly before that evening's game, the District wrote Mr. Kennedy again. It expressed "appreciation" for his "efforts to comply" with the District's directives, including avoiding "on-the-job prayer with players in the ... football program, both in the locker room prior to games as well as on the field immediately following games." The letter also admitted that, during Mr. Kennedy's recent October 16 postgame prayer, his students were otherwise engaged and not praying with him, and that his prayer was "fleeting." Still, the District explained that a "reasonable observer" could think government endorsement of religion had occurred when a "District employee, on the field only by virtue of his employment with the District, still on duty" engaged in "overtly religious conduct." The District thus made clear that the only option it would offer Mr. Kennedy was to allow him to pray after a game in a "private location" behind closed doors and "not observable to students or the public."

After the October 23 game ended, Mr. Kennedy knelt at the 50-yard line, where "no one joined him," and bowed his head for a "brief, quiet prayer." The superintendent informed the District's board that this prayer "moved closer to what we want," but nevertheless remained "unconstitutional." After the final relevant football game on October 26, Mr. Kennedy again knelt alone to offer a brief prayer as the players engaged in postgame traditions. While he was praying, other adults gathered around him on the field.

C

Shortly after the October 26 game, the District placed Mr. Kennedy on paid administrative leave. [T]he superintendent criticized Mr. Kennedy for engaging in "public and demonstrative religious conduct while still on duty as an assistant coach" by offering a prayer following the games on October 16, 23, and 26. The letter acknowledged that his prayers took place while students were engaged in unrelated postgame activities. Additionally, the letter faulted Mr. Kennedy for not being willing to pray behind closed doors.

[T]he District admitted that it possessed "no evidence that students have been directly coerced to pray with Kennedy." [It] also acknowledged that Mr. Kennedy "ha[d] complied" with the District's instruction to refrain from his "prior practices of leading players in a pre-game prayer in the locker room or leading players in a post-game prayer immediately following games."

While Mr. Kennedy received "uniformly positive evaluations" every other year of his coaching career, after the 2015 season ended in November, the District gave him a poor performance evaluation. Mr. Kennedy did not return for the next season.

II

A

Kennedy sued in federal court, alleging that the District's actions violated the First Amendment's Free Speech and Free Exercise Clauses.

B

[T]he District Court found that the "sole reason" for the District's decision to suspend Mr. Kennedy was its perceived "risk of constitutional liability" under the Establishment Clause for his "religious conduct" after the October 16, 23, and 26 games. [The circuit court affirmed.]

III

Kennedy renews his argument that the District's conduct violated both the Free Exercise and Free Speech Clauses of the First Amendment. These Clauses work in tandem. Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities. That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent.

Under this Court's precedents, a plaintiff bears certain burdens to demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses. If the plaintiff carries these burdens, the focus then shifts to the defendant to show that its actions were nonetheless justified and tailored consistent with the demands of our case law.

A

The Free Exercise Clause protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through "the performance of (or abstention from) physical acts." *Employment Div. v. Smith*.

That Mr. Kennedy has discharged his burdens is effectively undisputed.

Nor does anyone question that, in forbidding Mr. Kennedy's brief prayer, the District failed to act pursuant to a neutral and generally applicable rule. A government policy will fail the general applicability requirement if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," or if it provides "a mechanism for individualized exemptions." *Fulton v. City of Philadelphia*. Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny. *Lukumi*.

In this case, the District's challenged policies were neither neutral nor generally applicable. By its own admission, the District sought to restrict Mr. Kennedy's actions at least in part because of their religious character. Prohibiting a religious practice was the District's unquestioned "object." The District candidly acknowledged as much below, conceding that its policies were "not neutral" toward religion.

The District's challenged policies also fail the general applicability test. The District permitted other members of the coaching staff to forgo supervising students briefly after the game

to do things like visit with friends or take personal phone calls. Thus, any sort of postgame supervisory requirement was not applied in an evenhanded, across-the-board way. [T]he District conceded before the Ninth Circuit that its challenged directives were not "generally applicable."

B

[The Court concluded Kennedy's prayer "was private speech, not government speech."]

IV
A

[T]he District argues that its suspension of Mr. Kennedy was essential to avoid a violation of the Establishment Clause. [H]is rights were in "direct tension" with the competing demands of the Establishment Clause, [and] Kennedy's rights had to "yield."

But how could that be? It is true that this Court and others often refer to the "Establishment Clause," the "Free Exercise Clause," and the "Free Speech Clause" as separate units. But the three Clauses appear in the same sentence of the same Amendment. A natural reading of that sentence would seem to suggest the Clauses have "complementary" purposes, not warring ones where one Clause is always sure to prevail over the others. *Everson*.

Because a reasonable observer could (mistakenly) infer that by allowing the prayer the District endorsed Mr. Kennedy's message, the District felt it had to act, even if that meant suppressing otherwise protected First Amendment activities. [T]he District effectively created its own "vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other," placed itself in the middle, and then chose its preferred way out of its self-imposed trap. *Pinette*; *Shurtleff v. Boston* (Gorsuch, J., concurring in judgment).

To defend its approach, the District relied on *Lemon* and its progeny. [I]n *Lemon* this Court attempted a "grand unified theory" for assessing Establishment Clause claims. In time, the approach also came to involve estimations about whether a "reasonable observer" would consider the government's challenged action an "endorsement" of religion. *County of Allegheny v. ACLU*.

[T]he "shortcomings" associated with [*Lemon*] became so "apparent" that this Court long ago abandoned *Lemon* and its endorsement test offshoot. *American Legion*. An Establishment Clause violation does not automatically follow whenever a public school or other government entity "fail[s] to censor" private religious speech. Nor does the Clause "compel the government to purge from the public sphere" anything an objective observer could reasonably infer endorses or "partakes of the religious." *Van Orden v. Perry* (Breyer, J., concurring in judgment).

In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by "reference to historical practices and understandings." *Town of Greece* (plurality opinion); *American Legion* (plurality opinion). An analysis focused on original

meaning and history, this Court has stressed, has long represented the rule rather than some "'exception'" within the "Court's Establishment Clause jurisprudence."

B

To be sure, this Court has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, "make a religious observance compulsory." *Zorach v. Clauson*. No doubt, too, coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment. But in this case Mr. Kennedy's private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion.

Naturally, Mr. Kennedy's proposal to pray quietly by himself on the field would have meant some people would have seen his religious exercise. Those close at hand might have heard him too. But learning how to tolerate speech or prayer of all kinds is "part of learning how to live in a pluralistic society," a trait of character essential to "a tolerant citizenry." "[S]econdary school students are mature enough ... to understand that a school does not endorse," let alone coerce them to participate in, "speech that it merely permits on a nondiscriminatory basis." Of course, some will take offense to certain forms of speech or prayer they are sure to encounter in a society where those activities enjoy such robust constitutional protection. But "[o]ffense ... does not equate to coercion." *Town of Greece* (plurality opinion).

There is no indication in the record that anyone expressed any coercion concerns to the District about the quiet, postgame prayers that Mr. Kennedy asked to continue and that led to his suspension. Nor is there any record evidence that students felt pressured to participate in these prayers.

In the name of protecting religious liberty, the District would have us suppress it. Rather than respect the First Amendment's double protection for religious expression, it would have us preference secular activity. Not only could schools fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice. Under the District's rule, a school would be *required* to do so. It is a rule that would defy this Court's traditional understanding that permitting private speech is not the same thing as coercing others to participate in it.

V

Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to

ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination.

Reversed.

Justice Sotomayor, with whom Justice Breyer and Justice Kagan join, dissenting.

This case is about whether a public school must permit a school official to kneel, bow his head, and say a prayer at the center of a school event. The Constitution does not authorize, let alone require, public schools to embrace this conduct. Since *Engel v. Vitale* (1962), this Court consistently has recognized that school officials leading prayer is constitutionally impermissible.

The Court now charts a different path, yet again paying almost exclusive attention to the Free Exercise Clause's protection for individual religious exercise while giving short shrift to the Establishment Clause's prohibition on state establishment of religion. To the degree the Court portrays petitioner Joseph Kennedy's prayers as private and quiet, it misconstrues the facts. The record reveals that Kennedy had a longstanding practice of conducting demonstrative prayers on the 50-yard line of the football field. Kennedy consistently invited others to join his prayers and for years led student athletes in prayer at the same time and location. The Court ignores this history. The Court also ignores the severe disruption to school events caused by Kennedy's conduct, viewing it as irrelevant because the Bremerton School District (District) stated that it was suspending Kennedy to avoid it being viewed as endorsing religion. Under the Court's analysis, presumably this would be a different case if the District had cited Kennedy's repeated disruptions of school programming and violations of school policy regarding public access to the field as grounds for suspending him. It errs by assessing them divorced from the context and history of Kennedy's prayer practice.

[T]he Court overrules *Lemon*, and calls into question decades of subsequent precedents. [T]he Court rejects longstanding concerns surrounding government endorsement of religion and replaces the standard for reviewing such questions with a new “history and tradition” test. In addition, while the Court reaffirms that the Establishment Clause prohibits the government from coercing participation in religious exercise, it applies a nearly toothless version of the coercion analysis. I respectfully dissent.

I

A

The District first hired Kennedy in 2008, on a renewable annual contract, to serve as a part-time assistant coach for the varsity football team and head coach for the junior varsity team at Bremerton High School (BHS).

District coaches had to “[a]dhere to [District] policies and administrative regulations.” [T]he District’s policy on “Religious-Related Activities and Practices” provided that “[s]chool staff shall neither encourage or discourage a student from engaging in non-disruptive oral or silent

prayer or any other form of devotional activity" and that "[r]eligious services, programs or assemblies shall not be conducted in school facilities during school hours or in connection with any school sponsored or school related activity."

B

[S]ince his hiring in 2008, Kennedy had been kneeling on the 50-yard line to pray immediately after shaking hands with the opposing team. Kennedy recounted that he initially prayed alone and that he never asked any student to join him. Over time, however, a majority of the team came to join him. Kennedy's practice evolved into postgame talks in which Kennedy would hold aloft student helmets and deliver speeches with "overtly religious references," which Kennedy described as prayers, while the players kneeled around him. The District also learned that students had prayed in the past in the locker room prior to games, before Kennedy was hired, but that Kennedy subsequently began leading those prayers too.

[The District's] athletic director attended BHS' September 11, 2015, football game and told Kennedy that he should not be conducting prayers with players. After the game, while the athletic director watched, Kennedy led a prayer out loud, holding up a player's helmet as the players kneeled around him. While riding the bus home with the team, Kennedy posted on Facebook that he thought he might have just been fired for praying.

On September 17, the District's superintendent sent Kennedy a letter informing him that leading prayers with students on the field and in the locker room would likely be found to violate the Establishment Clause. The District acknowledged that Kennedy had "not actively encouraged, or required, participation" but emphasized that "school staff may not indirectly encourage students to engage in religious activity" or "endors[e]" religious activity. The District instructed Kennedy that any motivational talks to students must remain secular.

The District reiterated that "all District staff are free to engage in religious activity, including prayer, so long as it does not interfere with job responsibilities." [T]he District instructed that such activity must be nondemonstrative or conducted separately from students, away from student activities. The District expressed concern that Kennedy had continued his midfield prayer practice at two games after the District's athletic director and the varsity team's head coach had instructed him to stop.

Kennedy stopped participating in locker room prayers and, after a game the following day, gave a secular speech. He returned to pray in the stadium alone after his duties were over and everyone had left the stadium, to which the District had no objection. Kennedy then hired an attorney, who, on October 14, sent a letter explaining that Kennedy was "motivated by his sincerely-held religious beliefs to pray following each football game." The letter further announced that Kennedy would resume his 50-yard-line prayer practice the next day after the October 16 homecoming game.

Kennedy made multiple media appearances to publicize his plans to pray at the 50-yard line. In the wake of this media coverage, the District began receiving a large number of emails, letters, and calls, many of them threatening.

The District responded to Kennedy's letter. For instance, Kennedy's letter asserted that he had not invited anyone to pray with him; the District noted that that might be true of Kennedy's September 17 [sic] prayer specifically, but that Kennedy had acknowledged inviting others to join him on many previous occasions. The District's September 17 letter had explained that Kennedy traditionally held up helmets from the BHS and opposing teams while players from each team kneeled around him. [T]he District pointed out that Kennedy "remain[ed] on duty" when his prayers occurred "immediately following completion of the football game, when students are still on the football field, in uniform, under the stadium lights, with the audience still in attendance, and while Mr. Kennedy is still in his District-issued and District-logoed attire." (emphasis deleted).

The District stated that it had no objection to Kennedy returning to the stadium when he was off duty to pray at the 50-yard line, nor with Kennedy praying while on duty if it did not interfere with his job duties or suggest the District's endorsement of religion. The District explained that its establishment concerns were motivated by the specific facts at issue, because engaging in prayer on the 50-yard line immediately after the game finished would appear to be an extension of Kennedy's "prior, long-standing and well-known history of leading students in prayer" on the 50-yard line after games. The District therefore reaffirmed its prior directives to Kennedy.

On October 16 Kennedy shook hands with the opposing team, and as advertised, knelt to pray while most BHS players were singing the school's fight song. He quickly was joined by coaches and players from the opposing team. Members of the public rushed the field to join Kennedy, jumping fences to access the field and knocking over student band members. After the game, the District received calls from Satanists who "'intended to conduct ceremonies on the field after football games if others were allowed to.'" [T]he District was forced to make security arrangements with the local police and to post signs near the field and place robocalls to parents reiterating that the field was not open to the public.

The District sent Kennedy another letter on October 23, explaining that his conduct at the October 16 game was inconsistent with the District's requirements for two reasons. First, it "drew [him] away from [his] work." Second, his conduct raised Establishment Clause concerns.

Again, the District emphasized that it was happy to accommodate Kennedy's desire to pray on the job in a way that did not interfere with his duties or risk perceptions of endorsement. [I]t invited Kennedy to reach out to discuss accommodations that might be mutually satisfactory, offering proposed accommodations and inviting Kennedy to raise others.

Kennedy did not directly respond or suggest a satisfactory accommodation. Instead, his attorneys told the media that he would accept only demonstrative prayer on the 50-yard line immediately after games. During the October 23 and October 26 games, Kennedy again prayed at the 50-yard line immediately following the game, while postgame activities were still ongoing. At

the October 23 game, Kennedy kneeled on the field alone with players standing nearby. At the October 26 game, Kennedy prayed surrounded by members of the public.

In an October 28 letter, the District notified Kennedy that it was placing him on paid administrative leave for violating its directives. The District stressed that it remained willing to discuss possible accommodations if Kennedy was willing.

II

[T]his case is not about the limits on an individual's ability to engage in private prayer at work. This case is about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched. A school district is not required to permit such conduct; in fact, the Establishment Clause prohibits it from doing so.

A

Taken together, these two Clauses (the Religion Clauses) express the view, foundational to our constitutional system, "that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." Instead, "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere."

The Establishment Clause protects this freedom by "command[ing] a separation of church and state." At its core, this means forbidding "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n*. In the context of public schools, it means that a State cannot use "its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals." *Illinois ex rel. McCollum v. Board of Ed.* (1948).

Indeed, "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*.

First, government neutrality toward religion is particularly important in the public school context given the role public schools play in our society.

Second, schools face a higher risk of unconstitutionally "coerc[ing] ... support or participat[ion] in religion or its exercise" than other government entities. Children are particularly vulnerable to coercion because of their "emulation of teachers as role models" and "susceptibility to peer pressure." Given the twin Establishment Clause concerns of endorsement and coercion, it is unsurprising that the Court has consistently held integrating prayer into public school activities to be unconstitutional, including when student participation is not a formal requirement or prayer is silent.

B

Under these precedents, the Establishment Clause violation at hand is clear. This Court has held that a "[s]tate officia[l] direct[ing] the performance of a formal religious exercise" as a part of the "ceremon[y]" of a school event "conflicts with settled rules pertaining to prayer exercises for students." Kennedy was on the job as a school official "on government property" when he incorporated a public, demonstrative prayer into "government-sponsored school-related events" as a regularly scheduled feature of those events.

Kennedy's tradition of a 50-yard line prayer thus strikes at the heart of the Establishment Clause's concerns about endorsement. For students and community members at the game, Coach Kennedy was the face and the voice of the District during football games. The timing and location Kennedy selected for his prayers were "clothed in the traditional indicia of school sporting events." Kennedy spoke from the playing field, which was accessible only to students and school employees, not to the general public. Although the football game itself had ended, the football game events had not; Kennedy himself acknowledged that his responsibilities continued until the players went home. Kennedy's postgame responsibilities were what placed Kennedy on the 50-yard line in the first place; that was, after all, where he met the opposing team to shake hands after the game. Permitting a school coach to lead students and others he invited onto the field in prayer at a predictable time after each game could only be viewed as a postgame tradition occurring "with the approval of the school administration."

Kennedy's prayer practice also implicated the coercion concerns at the center of this Court's Establishment Clause jurisprudence. The reasons for fearing this pressure are self-evident. This Court has recognized that students face immense social pressure. Students look up to their teachers and coaches as role models and seek their approval. Students also depend on this approval for tangible benefits. Players recognize that gaining the coach's approval may pay dividends small and large, from extra playing time to a stronger letter of recommendation to additional support in college athletic recruiting. In addition to these pressures to please their coaches, this Court has recognized that players face "immense social pressure" from their peers in the "extracurricular event that is American high school football."

The District Court found that some students reported joining Kennedy's prayer because they felt social pressure to follow their coach and teammates. Kennedy told the District that he began his prayers alone and that players followed each other over time until a majority of the team joined him, an evolution showing coercive pressure at work.

Kennedy does not defend his longstanding practice of leading the team in prayer. Instead, he responds, and the Court accepts, that his highly visible and demonstrative prayer at the last three games before his suspension did not violate the Establishment Clause because these prayers were quiet and thus private. This Court's precedents, however, do not permit isolating government actions from their context in determining whether they violate the Establishment Clause. Establishment Clause inquiries are fact specific and require careful consideration of the origins and practical reality of the specific practice at issue. The Court held that "inquiry into this question

not only can, but must, include an examination of the circumstances surrounding" the change in policy, the "long-established tradition" before the change, and the "'unique circumstances'" of the school in question. *Santa Fe*.

Kennedy's "changed" prayers at these last three games were a clear continuation of a "long-established tradition of sanctioning" school official involvement in student prayers. That BHS students did not join Kennedy in these last three specific prayers did not make those events compliant with the Establishment Clause. The coercion to do so was evident.

Finally, Kennedy stresses that he never formally required students to join him in his prayers. But existing precedents do not require coercion to be explicit, particularly when children are involved. [T]he Court has held that the Establishment Clause "will not permit" a school "'to exact religious conformity from a student as the price' of joining her classmates at a varsity football game." To uphold a coach's integration of prayer into the ceremony of a football game, in the context of an established history of the coach inviting student involvement in prayer, is to exact precisely this price from students.

C

The particular tensions at issue in this case, between the speech interests of the government and its employees and between public institutions' religious neutrality and private individuals' religious exercise, are far from novel. This Court's settled precedents offer guidance to assist courts, governments, and the public in navigating these tensions. Under these precedents, the District's interest in avoiding an Establishment Clause violation justified both its time and place restrictions on Kennedy's speech and his exercise of religion.

[T]he District has a strong argument that Kennedy's speech, formally integrated into the center of a District event, was speech in his official capacity as an employee that is not entitled to First Amendment protections at all. [E]ven assuming that Kennedy's speech was in his capacity as a private citizen, the District's responsibilities under the Establishment Clause provided "adequate justification" for restricting it.

Similarly, Kennedy's free exercise claim must be considered in light of the fact that he is a school official and, as such, his participation in religious exercise can create Establishment Clause conflicts. [H]is right to pray at any time and in any manner he wishes while exercising his professional duties is not absolute.

[T]he District's directive prohibiting Kennedy's demonstrative speech at the 50-yard line was narrowly tailored to avoid an Establishment Clause violation. The District's suspension of Kennedy followed a long history. The last three games proved that Kennedy did not intend to pray silently, but to thrust the District into incorporating a religious ceremony into its events. Notably, the District repeatedly sought to work with Kennedy to develop an accommodation to permit him to engage in religious exercise during or after his game-related responsibilities. Kennedy, however, ultimately refused to respond to the District's suggestions and declined to communicate with the

District, except through media appearances. Because the District's valid Establishment Clause concerns satisfy strict scrutiny, Kennedy's free exercise claim fails as well.

III

Despite the overwhelming precedents establishing that school officials leading prayer violates the Establishment Clause, the Court today holds that Kennedy's midfield prayer practice did not violate the Establishment Clause. This decision rests on an erroneous understanding of the Religion Clauses. It also disregards the balance this Court's cases strike among the rights conferred by the Clauses. The Court relies on an assortment of pluralities, concurrences, and dissents by Members of the current majority to effect fundamental changes in this Court's Religion Clauses jurisprudence, all the while proclaiming that nothing has changed at all.

A

First, the Court describes the Free Exercise and Free Speech Clauses as "work[ing] in tandem" to "provid[e] overlapping protection for expressive religious activities," leaving religious speech "doubly protect[ed]." This narrative noticeably (and improperly) sets the Establishment Clause to the side. The Court is correct that certain expressive religious activities may fall within the ambit of both the Free Speech Clause and the Free Exercise Clause. The First Amendment protects speech "by ensuring its full expression even when the government participates." Its "method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse," however, based on the understanding that "the government is not a prime participant" in "religious debate or expression," whereas government is the "object of some of our most important speech." Therefore, while our Constitution "counsel[s] mutual respect and tolerance," the Constitution's vision of how to achieve this end does in fact involve some "singl[ing] out" of religious speech by the government. This is consistent with "the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce."

Second, the Court has long recognized that these two Clauses, while "express[ing] complementary values," "often exert conflicting pressures."

The proper response where tension arises between the two Clauses is not to ignore it, which effectively silently elevates one party's right above others. The proper response is to identify the tension and balance the interests based on a careful analysis of "whether [the] particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Walz*. [P]ermitting Kennedy's desired religious practice at the time and place of his choosing, without regard to the legitimate needs of his employer, violates the Establishment Clause in the particular context at issue here.

B

For decades, the Court has recognized that, in determining whether a school has violated the Establishment Clause, "one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the [practice], would perceive it as a state endorsement of prayer in public schools." *Santa Fe*. The Court now says for the first time that endorsement simply does not matter, and completely repudiates the test established in *Lemon*. Both of these moves are erroneous and, despite the Court's assurances, novel.

Start with endorsement. The Court reserves particular criticism for the longstanding understanding that government action that appears to endorse religion violates the Establishment Clause, which it describes as an "offshoot" of *Lemon*. This is a strawman. Precedent long has recognized that endorsement concerns under the Establishment Clause, properly understood, bear no relation to a "heckler's veto." The endorsement inquiry considers the perspective not of just any hypothetical or uninformed observer experiencing subjective discomfort, but of "the reasonable observer" who is "aware of the history and context of the community and forum in which the religious [speech takes place]."

Given this concern for the political community, it is unsurprising that the Court has long prioritized endorsement concerns in the context of public education. No subsequent decisions in other contexts, including the cases about monuments and legislative meetings on which the Court relies, have so much as questioned the application of this core Establishment Clause concern in the context of public schools.

Paying heed to these precedents would not "'purge from the public sphere' anything an observer could reasonably infer endorses" religion. To the contrary, the Court has recognized that "there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." In short, the endorsement inquiry dictated by precedent is a measured, practical, and administrable one, designed to account for the competing interests present within any given community.

[T]he Court claims that it "long ago abandoned" both the "endorsement test" and this Court's decision in *Lemon*. The Court chiefly cites the plurality opinion in *American Legion* to support this contention. All the Court in *American Legion* ultimately held, however, was that application of the *Lemon* test to "longstanding monuments, symbols, and practices" was ill-advised for reasons specific to those contexts.

The Court now goes much further, overruling *Lemon* entirely and in all contexts. It is wrong to do so. *Lemon* summarized "the cumulative criteria developed by the Court over many years" of experience "draw[ing] lines" as to when government engagement with religion violated the Establishment Clause. It is true "that rigid application of the *Lemon* test does not solve every Establishment Clause problem," but that does not mean that the test has no value.

To put it plainly, the purposes and effects of a government action matter in evaluating whether that action violates the Establishment Clause.

C

Upon overruling one "grand unified theory," the Court introduces another: It holds that courts must interpret whether an Establishment Clause violation has occurred mainly "by 'reference to historical practices and understandings.'" [T]he Court professes that nothing has changed. In fact, while the Court has long referred to historical practice as one element of the analysis in specific Establishment Clause cases, the Court has never announced this as a general test or exclusive focus.

The Court reserves any meaningful explanation of its history-and-tradition test for another day, content for now to disguise it as established law and move on. It should not escape notice, however, that the effects of the majority's new rule could be profound. The problems with elevating history and tradition over purpose and precedent are well documented.

For now, it suffices to say that the Court's history-and-tradition test offers essentially no guidance for school administrators. If even judges and Justices, with full adversarial briefing and argument tailored to precise legal issues, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt? How will school administrators exercise their responsibilities to manage school curriculum and events when the Court appears to elevate individuals' rights to religious exercise above all else? Today's opinion provides little in the way of answers; the Court simply sets the stage for future legal changes that will inevitably follow the Court's choice today to upset longstanding rules.

D

Finally, the Court acknowledges that the Establishment Clause prohibits the government from coercing people to engage in religion practice, but its analysis of coercion misconstrues both the record and this Court's precedents.

The Court's suggestion that coercion must be "direc[t]" to be cognizable under the Establishment Clause is contrary to long-established precedent. The Court repeatedly has recognized that indirect coercion may raise serious establishment concerns. Tellingly, *none* of this Court's major cases involving school prayer concerned school practices that required students to do any more than listen silently to prayers, and some did not even formally require students to listen, instead providing that attendance was not mandatory. Nevertheless, the Court concluded that the practices were coercive as a constitutional matter.

Kennedy's prayers did not need to be broadcast. His actions spoke louder than his words. His prayers were intentionally, visually demonstrative to an audience aware of their history and no less captive than the audience in *Santa Fe*, with spectators watching and some players perhaps engaged in a song, but all waiting to rejoin their coach for a postgame talk. Moreover, Kennedy's prayers had a greater coercive potential because they were delivered not by a student, but by their coach, who was still on active duty for postgame events.

In addition, despite the direct record evidence that students felt coerced to participate in Kennedy's prayers, the Court nonetheless concludes that coercion was not present in any event. But nowhere does the Court engage with the unique coercive power of a coach's actions on his adolescent players.

In any event, the Court makes this assertion only by drawing a bright line between Kennedy's yearslong practice of leading student prayers, which the Court does not defend, and Kennedy's final three prayers, which BHS students did not join, but student peers from the other teams did. This Court's precedents require a more nuanced inquiry into the realities of coercion in the specific school context concerned than the majority recognizes today. The question before the Court is not whether a coach taking a knee to pray on the field would constitute an Establishment Clause violation in any and all circumstances. It is whether permitting Kennedy to continue a demonstrative prayer practice at the center of the football field after years of inappropriately leading students in prayer in the same spot, at that same time, and in the same manner, which led students to feel compelled to join him, violates the Establishment Clause. It does.

[T]he Court finds Kennedy's three-game practice distinguishable from precedent because the prayers were "quie[t]" and the students were otherwise "occupied." The record contradicts this narrative. [A]t two of the three games on which the Court focuses, players witnessed student peers from the other team and other authority figures surrounding Kennedy and joining him in prayer. The coercive pressures inherent in such a situation are obvious.

[No one] has contended that a coach may never visibly pray on the field. Kennedy continued to initiate prayers visible to students, while still on duty during school events, under the exact same circumstances as his past practice of leading student prayer. It is unprecedented for the Court to hold that this conduct, taken as a whole, did not raise cognizable coercion concerns.

* * *

The Free Exercise Clause and Establishment Clause are equally integral in protecting religious freedom in our society.

Today, the Court elevates one individual's interest in personal religious exercise, in the exact time and place of that individual's choosing, over society's interest in protecting the separation between church and state, eroding the protections for religious liberty for all. [T]he Court sets us further down a perilous path in forcing States to entangle themselves with religion, with all of our rights hanging in the balance. As much as the Court protests otherwise, today's decision is no victory for religious liberty. I respectfully dissent.

AFTERWORD

The Court's decision that Kennedy's prayers constituted private speech leads ineluctably to its conclusion. It uses prior cases holding private religious speech is fully protected by the Free Speech Clause to announce that "the Free Speech Clause provides overlapping protection for

expressive religious activities," protection, that is, overlapping the Free Exercise Clause. Kennedy demonstrated that the School District's actions burdened both of those First Amendment rights. Then it reframed the relationship of the Clauses: "[T]his Court and others often refer to the 'Establishment Clause,' the 'Free Exercise Clause,' and the 'Free Speech Clause' as separate units. But the three Clauses appear in the same sentence of the same Amendment. A natural reading of that sentence would seem to suggest the Clauses have 'complementary' purposes, not warring ones where one Clause is always sure to prevail over the others." With that framework in mind, did the Nonestablishment Clause provide a compelling governmental interest for the government to act as it did? No, for the lower courts applied the wrong tests, the *Lemon* and "endorsement" tests, neither of which properly interpreted the Clause. "An Establishment Clause violation does not automatically follow whenever a public school or other government entity "fail[s] to censor" private religious speech." Instead, courts were to refer "to historical practices and understandings." No historical practice or understanding barred private prayer by a government employee when he was not acting on behalf of the government at the time of the prayer. Further, no evidence was offered that Kennedy used his governmental position to coerce any student/football player to pray. That "some will take offense to certain forms of speech or prayer they are sure to encounter in a society where those activities enjoy such robust constitutional protection" is to be expected. But "[o]ffense ... does not equate to coercion." The rule proposed by the District and lower courts "would have us prefer[] secular activity. Not only could schools fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice. Under the District's rule, a school would be *required* to do so."

The dissent by Justice Sotomayor first offers a broader understanding of the dispute between Kennedy and the School District than presented by the Court. She noted that "Kennedy had acknowledged inviting others to join him on many previous occasions" to the September 11 post-game prayer that triggered the September 17 letter informing Kennedy that "leading prayers with students on the field and in the locker room would likely be found to violate the Establishment Clause." Justice Sotomayor then noted Kennedy, not the School, raised the stakes of the disagreement by refusing to make any accommodations regarding where and when he would pray after games.

The dissent then alternately stated the constitutional issue: "T]his case is not about the limits on an individual's ability to engage in private prayer at work. This case is about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched. A school district is not required to permit such conduct; in fact, the Establishment Clause prohibits it from doing so." The initial sentence is intended to persuade the reader that it is not the case that a public school may (or must) fire a teacher who says a prayer before lunch or wears a yarmulke while teaching. Second, she makes Kennedy's prayer part of a "school event." Third, she concludes Kennedy is "ministering religion to students as the public watched," a type of endorsement argument. Finally, Justice Sotomayor, who believes the Nonestablishment Clause requires the Court to re-build a "wall of separation" between church and

state. That, in turn, requires the Court more actively to monitor the actions of governments and their employees to diminish the wall of separation.

The dissent initially argues the Nonestablishment Clause does single out for differential treatment "religious speech by the government." Thus, Justice Sotomayor has decided that Kennedy's prayer is speech properly attributable to the government, and is not simply private prayer. Next, she suggests the "conflicting pressures" of the Free Exercise and Nonestablishment Clauses require courts to "identify the tension and balance the interests based on a careful analysis of 'whether [the] particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so.'" The Court should have taken into account "the legitimate needs of his employer" in asking Kennedy to pray later or elsewhere. In her view, the balance that should have been struck between Kennedy's demands and the School's meant that granting the former's claim "violates the Establishment Clause in the particular context at issue."

Justice Sotomayor uses both the endorsement inquiry and the *Lemon* test to reach her conclusion. Finally, Kennedy's actions throughout his time as a public high school football coach demonstrated that he had in fact coerced students to pray, because he had engaged in a "yearslong practice of leading student prayers." Even the majority accepted the idea that a government employee could not use his position to coerce any student to pray.

Insert in Chapter 9 § B at page 869:

KENNEDY V. BREMERTON SCH. DIST., 597 U.S. ___, 142 S. Ct. 2407 (2022)—The Court explicitly interred the three-part Nonestablishment Clause "test" of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as well as its "endorsement" test, first proposed by Justice O'Connor and largely based on *Lemon*'s second prong (is the "primary effect" to advance or inhibit religion?). Joseph Kennedy was an assistant public high school football coach. After games he would go to the 50-yard line and pray. The Court found that his post-game prayer was private, not government speech, and the Nonestablishment Clause did not require the school to order him not to pray after the game. The Court stated the test for whether the Nonestablishment Clause was violated was an "analysis focused on original meaning and history."

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 the world's nations. Most of the citizens of those countries were Muslims, and the Proclamation was challenged 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 unpopular group, in part due to the Proclamation's language speaking not of Muslims or Islam but of nations. The Proclamation was based on a "legitimate grounding in national security concerns." It was thus constitutional under rational basis scrutiny.

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 in support of their request for an injunction. The dissent went into great detail concerning the anti-Muslim public 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 on rational basis review, for only anti-Muslim animus explained its issuance.

AMERICAN LEGION V. AMERICAN HUMANIST ASSN, 588 U.S. ___, 139 S. Ct. 451 (2019) — The Court held constitutional the presence and governmental maintenance of the Bladensburg Peace Cross (Cross) on public land in Maryland, rejecting a Nonestablishment Clause challenge. Justice Alito wrote an opinion for the Court in part and a plurality opinion in part. The Cross was erected in the 1920s to commemorate the lives of American soldiers from the Prince George's County area who died in World War I. The Cross was an explicitly Christian symbol, but also symbolized more: Plain white crosses marked the graves in Europe of American soldiers, a reminder of the terrible cost of the War. Thus, viewed in its historical context, the Cross "expressed the community's grief at the loss of the young men who perished, its thanks for their sacrifice, and its dedication to the ideals for which they fought." In this context, removal, not its presence, would signal a hostility toward religion.

In Section II-A, joined only by a plurality, Justice Alito noted the limitations, indeed the inapplicability, of the *Lemon* test to historic symbols and monuments on public grounds. Although inapt in this case, the plurality did not reject *Lemon* as possibly applicable in other cases. Section II-B concluded for a majority that the passage of time, in the case of the Cross 94 years, "gives rise to a strong presumption of constitutionality." Section II-D, again part of a plurality opinion, made the broad statement that "categories of monuments, symbols, and practices with a longstanding history" are constitutional.

In a brief concurring opinion, Justice Breyer concluded the evidence demonstrated "the Peace Cross poses no real threat to the values that the Establishment Clause serves." Justice Kavanaugh's concurring opinion sought to go further, first by discarding the *Lemon* test and second, by suggesting governmental practices that are not coercive, are rooted in history, treat religious people comparably to secular persons, and are permissible legislative accommodations, are constitutional. Justice Thomas concurred in the judgment because the Court "does not adequately clarify the appropriate standard for Establishment Clause cases." Unlike the Court, he urged eliminating the *Lemon* test. Justice Gorsuch's opinion concurring in the judgment concluded the plaintiff American Humanist Association lacked standing.

Justice Ginsburg, joined by Justice Sotomayor, dissented. She reiterated her view that separation was the best lens through which to assess Nonestablishment Clause cases. And separation required the government to remain neutral between religion and nonreligion. The Cross was a statement that Maryland impermissibly "elevates Christianity over other faiths." The presence of the Cross on public land led to a presumption that Maryland "endorsed its religious content." Though a presumption rather than a conclusion, the history of the Latin cross was such that Maryland supported religion over nonreligion and more specifically, Christianity over other religions.

Insert in Chapter 9 § C. at page 892:

OUR LADY OF GUADALUPE SCHOOL V. MORRISSEY-BERRU, 591 U.S. ___, 140 S. Ct. 2049 (2020) — The Court, in a 7-2 opinion by Justice Alito, held the "ministerial exception" of *Hosanna-Tabor* applied to the claims of employment discrimination of two teachers at Roman Catholic elementary schools. The Court discussed the four indicia it listed in *Hosanna-Tabor*; instead of using them as a "checklist" or as a "rigid test," the Court concluded, "What matters, at bottom, is what an employee does." In each of these cases, it concluded, both teachers "performed vital religious duties." Though they were not "called" ministers as was the teacher in *Hosanna-Tabor*, "their core responsibilities as teachers of religion were essentially the same."

Justice Thomas concurred, joined by Justice Gorsuch. Justice Thomas reiterated his argument in *Hosanna-Tabor* that courts should defer to the good faith claims of religious organizations that the work of their employees is ministerial. This was essential for the government to avoid entangling itself in religious matters.

Justice Sotomayor, joined by Justice Ginsburg, dissented. Justice Sotomayor noted that both teachers "primarily taught secular subjects, lacked substantial religious titles, and were not even required to be Catholic." She concluded the Court's new approach was too deferential to the religious schools. She began by favorably citing *Employment Division v. Smith*, that religious bodies are subject to generally applicable laws like any other entity. When the Court "first recognized" the "judge-made" ministerial exception in *Hosanna-Tabor*, it generated an "extraordinarily potent" option giving religious employers "free rein to discriminate." The Court's decision was an outlier; indeed, its decision took the *Hosanna-Tabor* factors and "traded legal analysis for a rubber stamp." The Court's decision was both ripe for abuse and "portends grave consequences."

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.[3]

C

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

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

[3] This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.

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 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.

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. Both excluded religious organizations from receiving state funds for reasons of the state's Nonestablishment Clause. The difference was that the Court held 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*). It was different because the law challenged in *Locke* 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 concludes that the Missouri constitution violates the Free Exercise Clause. It also holds that the federal Nonestablishment Clause does not require Missouri or other states to distinguish among those who receive funds based on secular criteria.

Justice Gorsuch's opinion concurring in part notes the difficulty in distinguishing between status and use. One might be a Hindu, or one might be a person who engages in Hindu religious practices. The Court's distinction of Trinity Lutheran's case (discrimination based on the status of being a religious organization is unconstitutional) from Joshua Davey's case (discrimination on the basis that Davey wishes to use the scholarship funds to pursue a degree in devotional theology) is thus unhelpful to him.

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 directly to fund Trinity Lutheran's 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 Nonestablishment Clause should justify the state's refusal to award any funds to Trinity Lutheran (see § II). In II 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 argued about this seeming paradox in the 1960s and 1970s. 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 the source of the problem, not the provisions themselves. Justice Sotomayor's dissent argues 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" of the Free Exercise and Nonestablishment Clauses. This historical argument raises the stakes, suggesting that the Court is headed down a dangerously incorrect path. The play in the joints argument additionally analogizes this case to *Locke*. The possible dangers to liberty if religions can take aid from the state to evangelize allows states to create a "prophylactic rule" limiting who may receive state aid. This 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 Free Exercise and Nonestablishment Clause interests. It cleverly uses the *Hosanna-Tabor* case as one urging caution. This is doubly clever, first because Chief Justice Roberts wrote the Court's opinion in that case, and second because *Hosanna-Tabor*, which broadly protected Free Exercise, is used to promote Nonestablishment Clause interests instead of Free Exercise interests.

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." The Blaine Amendment 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. Their arguments that Catholic students should be permitted to read from the Catholic Bible rather than the King James Bible were rejected. Catholics then created their own schools in major cities such as New York, Philadelphia, and Boston, and later, throughout the nation.

Though the Blaine Amendment failed in the Senate, it was introduced each session of Congress through 1907. 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

to avoid aiding any church directly or indirectly. Thus, no Catholic school could ever be categorized as a public school and receive state funds. Public schools would continue to use the King James Bible (a Bible used by Protestants, but not by Catholics) as a reader. This Blaine Amendment provision was part of Washington's Constitution and the subject of *Locke*. Missouri entered the Union well before this time, but its 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." That language is quite similar 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. The dissent does not, however, mention this history in discussing the foundations of Nonestablishment Clause doctrine.

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. That decision was affirmed by the Colorado Court of Appeals. The Supreme Court reversed, in an opinion by Justice Kennedy. The Court noted that a balance had to be struck between ensuring that gay couples are protected in the exercise of their civil rights and in protecting the rights of religious organizations and believers "in some instances" to engage in protected forms of expression, including expression disapproving of same-sex marriage. The Court noted that in 2012 Colorado did not legally recognize "gay marriages." 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 an effort, 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 offered 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. Justice Kagan concurred in the result because, in this case, the Commission showed hostility to religion.

Justice Gorsuch wrote a concurring opinion, specifically to rebut the concurrence of Justice Kagan and Justice Ginsburg's dissent. Regarding the latter, Justice Gorsuch declared that concluding a constitutional difference exists between a wedding cake that includes "words" and one lacking words is an "irrational" distinction, for no one can "reasonably doubt that a wedding cake without words conveys a message." Because those supporting and opposing the extension of marriage beyond opposite sex couples wanted bakers to make cakes that conveyed a message, the Commission owed a duty to use the same analysis for any baker who refused to make a cake with a message with which the baker disagreed. Justice Gorsuch criticized Justice Kagan's concurring opinion, arguing it 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 concurred in part and in the judgment. His opinion discussed the free speech claim of Phillips, which the Court avoided discussing. 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 suggest a kind of hostility to religion that would 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 inevitably another such case arises, the Court will have to determine how best to categorize the action possessing an expressive component. When creating a cake, 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 an American flag), is this activity better understood as protected free speech or expression, or as a commercial act or conduct ordinarily 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?

ESPINOZA V. MONTANA DEP'T of REVENUE, 591 U.S. ___, 140 S. Ct. 2246 (2020)—In a 5-4 decision, the Court held unconstitutional a Montana regulatory provision prohibiting families receiving scholarship monies from using those funds to attend religiously-affiliated private schools. The Montana legislature adopted a "school choice" plan allowing its taxpayers to receive a tax credit of up to $150 for donating money to a "school scholarship organization." When a child was awarded a school scholarship, the child's family notified the scholarship organization (Big Sky Scholarships was the sole entity engaged in granting scholarships) and the organization sent the scholarship funds directly to the school. Montana funded the tax credits. The Montana Constitution and state law forbid direct aid ("no-aid") to religiously-affiliated schools. In light of this law and in administering the school choice program, the Montana Department of Revenue issued Rule 1, forbidding the school scholarship organization (Big Sky) from directing any of its scholarship funds to any school "owned or controlled in whole or in part by any church, religious sect, or denomination." Parents of schoolchildren who received scholarship funds, or who were eligible for such funds, sued, claiming Rule 1 was contrary to the school choice statute, not required by the Montana Constitution, and violative of the Free Exercise Clause. In the Supreme Court the parties agreed that the scholarship program did not violate the Nonestablishment Clause of the First Amendment. The issue was whether the no-aid provision of the state constitution and law violated the Free Exercise Clause. The Court held it did: "Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools." Because this provision "plainly excludes schools from government aid solely because of religious status," it was unconstitutional. The Court cited *Trinity Lutheran* as on point. Like *Trinity Lutheran*, this case "turns expressly on religious status and not religious use." And the "Montana Constitution discriminates based on religious status just like the Missouri policy in *Trinity Lutheran*." The Court rejected the Department of Revenue's argument that the benefit in *Trinity Lutheran* was "completely non-religious," while the scholarship aid "could be used for religious ends by some recipients." It did so by characterizing the Montana Supreme Court's decision as applying the no-aid provision "solely on religious status."

As was also the case in *Trinity Lutheran*, the applicability of *Locke v. Davey* was raised. The Court held *Locke* inapposite. It offered two reasons for its conclusion. First, Davey was denied the scholarship "because of what he proposed to *do*." Second, the *Locke* Court looked at a "historic and substantial" state interest lacking in the present case: opposition to funding the training of

clergy, because of the American tradition opposing such state support. No such interest existed in this case: Unlike the opposition to paying for the training of clergy, many states in the late 18th and early 19th centuries "provided financial support to private schools, including denominational ones." This, of course, was in part because no public ("common") schools then existed. Further, any "tradition" of no-aid to religious organizations from the 1870s on was marked by anti-Catholic bigotry. The requirement that newly-created states adopt a "no-aid" provision in their constitutions, called state Blaine Amendments, was due largely to religious prejudice. That Montana re-adopted its no-aid provision in the 1970s, when no such bigotry existed, was not enough to equate its laws with the facts in *Locke*. Applying strict scrutiny, the no-aid provision was unconstitutional.

The concurrence of Justice Thomas, joined by Justice Gorsuch, urged a reconsideration of the Court's Nonestablishment Clause jurisprudence, which "continues to hamper free exercise rights." That reconsideration included an understanding that the Clause should not have been incorporated into the Due Process Clause of the Fourteenth Amendment, or, even if it somehow could be incorporated, was given a "far broader test than the Clause's original meaning." That reconsideration should lead the Court to overturn *Locke*, which "incorrectly interpreted the Establishment Clause and should not impact free exercise challenges." Justice Alito wrote only to provide a history of Montana's no-aid provision. The no-aid provision was "modeled on the failed Blaine Amendment," which "was prompted by virulent prejudice against immigrants, particularly Catholic immigrants." Justice Gorsuch's concurrence returned to his concurrence in *Trinity Lutheran*, arguing that the distinction between religious status and religious use was "destined to yield more questions than answers:" "Does Montana seek to prevent religious parents and schools from participating in a public benefits program (status)? Or does the State aim to bar public benefits from being employed to support religious education?" More importantly, the Free Exercise Clause itself indicated actions, not merely status, as would be the case in which the "right to conscience" rather than the right to free exercise was protected.

Justice Ginsburg dissented, arguing the decision of the Montana Supreme Court did not discriminate, because it abolished the school choice program in its entirety, thus affecting religious and secular public schools in the same fashion. Justice Breyer also dissented. He assumed an "inherent tension between the Establishment and Free Exercise Clauses." To remedy that tension, he would allow states to exercise "room for play in the joints." (This is from *Walz v. Tax Comm'n*, 387 U.S. 664, 669 (1970), a case in which New York's decision not to tax religious institutions was held constitutional against a Nonestablishment Clause challenge.) Some state actions would be neither forbidden by the Nonestablishment Clause nor required by the Free Exercise Clause. And this is one of those discretionary cases in which the state may choose whether or not to provide financial aid to parents to send their children to religiously affiliated schools. Justice Breyer concluded that this case was more similar to *Locke* than *Trinity Lutheran*, because the issue was closer to "an essentially religious endeavor." Justice Sotomayor's dissent first concluded that the "Court fails to heed Article III principles." Then she concluded the Court got the substantive answer wrong. As she dissented in *Trinity Lutheran*, she dissented in *Espinoza* for similar reasons.

FULTON V. CITY OF PHILADELPHIA, 593 U.S. ___, 141 S. Ct. 1868 (2021) — The Court continued its trend of declaring violative of the Free Exercise Clause state action treating disparately a religious entity compared with similar secular entities. The City of Philadelphia stopped referring children to Catholic Social Services (CSS), a foster care agency, after it learned CSS would not certify same-sex couples as foster parents due to CSS's "religious beliefs about marriage." The Court unanimously held Philadelphia's actions violated CSS's free exercise of religion.

Chief Justice Roberts's opinion for the Court chose not to revisit the Court's decision in *Employment Div. v. Smith* (1990), which applied rational basis scrutiny to neutral and generally applicable laws that burdened the free exercise of religion. The Court concluded Philadelphia had "burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable." The Court suggested Philadelphia had not acted neutrally, but relied on the City's failure to act in a generally applicable manner to declare its actions unconstitutional. The City included a "mechanism for individualized exemptions" from the City's foster care contracts. Such exemptions must be extended to religious persons or entities unless the City possesses a compelling reason not to do so. A second type of lack of general applicability is to prohibit religious conduct while permitting similar secular conduct that allegedly undermines the state's asserted interests. The City's foster care contract permitted its Commissioner, at his sole discretion, to grant exemption from the foster care contract. That included the provision requiring all foster care agencies to serve same-sex couples. Such "individualized" discretionary authority triggered strict scrutiny review. In assessing the City's claim of compelling interests not to grant CSS an exemption, the Court focused on stated the proper level of generality. "The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS." On that narrower level of generality, the City's claim of a compelling interest failed.

A concurring opinion by Justice Barrett began by suggesting *Employment Div. v. Smith* had likely been wrongly decided. "As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the first Amendment freedoms—offers nothing more than protection from discrimination." What she did not decide was "what should replace *Smith*?" She rejected "categorical" regimes requiring either deference (*Smith*) or strict scrutiny (*Sherbert v. Verner*). Because the City's actions allowed individualized exemptions, strict scrutiny applied, and "all nine Justices agree that the City cannot satisfy strict scrutiny." It was thus not the day to revisit *Smith*.

Justice Alito, joined by Justices Thomas and Gorsuch, strongly disagreed. In a very lengthy opinion concurring in the judgment, Justice Alito concluded *Smith* should be revisited, as one of the questions the Court accepted for review, and overruled. Though written by Justice Scalia, a constitutional originalist, *Smith* "paid shockingly little attention to the text of the Free Exercise Clause." A textual interpretation of the Free Exercise Clause barred government from "forbidding or hindering unrestrained religious practices or worship." This "straightforward understanding is a far cry from the interpretation adopted in *Smith*." In particular, this understanding "gives a specific group of people (those who wish to engaged in the 'exercise of religion') the right to do

so without hindrance." Relatedly, it was not an "equal treatment" (*i.e.*, non-discrimination) provision. The opinion then extensively reviews the history of religious liberty and the Free Exercise Clause and concludes *Smith* is inconsistent with that history, as well as with its text. It then used the Court's multi-factor test (also used in *Janus v. AFSCME* (2018)) to conclude *Smith* "was wrong decided," "threatens a fundamental freedom," and should be overruled. It should be replaced by the rule that a "law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling interest." Such a rule might be "rephrased or supplemented with specific rules" in the future.

AFTERWORD

The Court followed up its decisions in *Trinity Lutheran* and *Espinoza* in *Carson v. Makin*, 596 U.S. ___, 142 S. Ct. 1987 (2022). It held Maine's tuition assistance program, which paid the tuition for parents who lived in school districts which did not operate a high school or contract with another school district to educate those children, was unconstitutional. Maine's decision to pay tuition for all parents who sent their children to "nonsectarian" private schools (as well as to public schools), but not to those parents who sought to enroll their children at religiously-affiliated schools violated the Free Exercise Clause. The Court, in an opinion by Chief Justice Roberts, held those cases "suffice to resolve this case." The Court again narrowed the holding in *Locke v. Davey*. It was solely a case of using state funds "to prepare for the ministry." Justice Breyer dissented by arguing for "play in the joints" between the Free Exercise and Nonestablishment Clauses. Justice Sotomayor also dissented, returning to her "separationist" approach in dissent in *Trinity Lutheran*.

The Court is divided into several distinctive groups regarding the Free Exercise Clause, which has a spillover effect on the Court's interpretation of the Nonestablishment Clause. Justices Gorsuch and Thomas would interpret the Free Exercise Clause broadly, which is why they emphasize the Clause protects religious "use" or "actions," not simply being religious ("status"). In Justice Thomas's case, his interest is in massively reducing the constitutional footprint of the Nonestablishment Clause. That would in turn allow, in his view, a greater flourishing of Free Exercise Clause liberty. Justice Alito appears close to this position, although he often assesses Free Exercise Clause claims in light of history. And in *Espinoza*, the specific history of the Blaine Amendment, which Congress required Western states to include in their constitutions when applying for admission to the Union, demonstrates a large anti-Catholic prejudice. That prejudice makes those state Blaine Amendment provisions a target for constitutional challenges. A second group is led by Chief Justice Roberts. He is ready to carve out additional Free Exercise protections without making large changes in existing Religion Clause jurisprudence. The Court's opinion by Chief Justice Roberts restricts the impact of *Locke v. Davey*. It can do so first, by limiting *Locke* to a type of "use" case, as it did in *Trinity Lutheran*. Thus, when the discrimination (as occurred in both *Trinity Lutheran* and *Espinoza*) is characterized as "status" discrimination (who you are v. what you do), that makes *Locke* inapt. Second, the Court further limits *Locke* by noting the historic importance of the state's interest in not funding the training the clergy. One problem with this second limitation on *Locke* is its level of generality. Although the historical record is quite complex, it's clear that some states in the early national era wanted to be out of the business of

aiding religion, not merely out of the business of aiding the training of clergy. That former level of generality is closer to the no-aid principle.

The now-retired Justice Breyer offered another approach. He preferred a relatively modest Free Exercise Clause joined by a modest Nonestablishment Clause. That would leave state governments with large swaths of discretion to allow or prohibit certain interactions with religion. That is the reason for the emphasis on the "play in the joints." Justice Kagan appears similarly inclined. The late Justice Ginsburg and Justice Sotomayor argued for a limited Free Exercise Clause joined by a broad Nonestablishment Clause.

The Roberts Court has been able to avoid any re-assessment of *Employment Division v. Smith* (again, which applies to laws characterized as neutral and generally applicable) because it characterizes the government's actions as discriminatory (*Trinity Lutheran*, *Masterpiece Cakeshop*, and *Espinoza*) or as an exceptional (*Hosanna-Tabor* and *Our Lady of Guadalupe School* ministerial exception). As a result, the Court has not attempted any transformational changes to the Free Exercise Clause. Thus, the contours of the Clause remain substantially undefined.

CHART 9-2