

# CONSTITUTIONAL LAW: PRINCIPLES AND POLICY, CASES AND MATERIALS

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## **Chapter 1 JUDICIAL REVIEW: INSTRUMENT OF AMERICAN CONSTITUTIONALISM**

### **§ 1.03 JUDICIALLY IMPOSED LIMITS ON THE EXERCISE OF THE JUDICIAL REVIEW POWER: THE “POLITICAL QUESTION” DOCTRINE**

*Insert in p. 46:*

**7. *Rucho v. Common Cause*, 588 U.S.\_\_\_\_ (2019):** In a 5-4 decision, the Supreme Court held that the political question doctrine precludes the judiciary from ruling on the constitutionality of allegedly partisan gerrymandered congressional districting. The majority found that no judicially manageable standard exists by which to assess such claims. It distinguished its holding from *Baker v. Carr* by stressing that while the claim of population inequality among districts can be resolved by employing basic equal protection principles, no comparable standard exists in the partisan gerrymandering context. It further found that partisan gerrymandering claims differ from one-person, one-vote claims because the requirement that “each representative must be accountable to (approximately) the same number of constituents...does not extend to political parties.” Group representation, the majority reasoned, differs significantly from the form of representation protected by the one-person, one-vote principle.

Speaking for four justices in dissent, Justice Kagan criticized the majority for “promot[ing] partisanship above respect for popular will.” She expressed the view that there exist clear and manageable standards for courts to apply to adjudicate partisan gerrymandering claims. She rejected the majority’s reliance on historical practice, noting that racial gerrymandering and vote dilution, which are now held to be unconstitutional, also had well established historical pedigrees.

#### **[B] Foreign Affairs and Political Questions Add before**

##### **§ 1.03[C]:**

**4. Recognition of foreign states.** As *Goldwater* implies, by tradition one of the most inviolate of Presidential powers is the recognition of foreign governments. The power flows from the explicit grant of power to “receive Ambassadors,” an act that allows the President to pick which of competing claimants is the legitimate government of another nation. In *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), the Court confronted this in the unusual situation of the status of the city of Jerusalem.

In 2002, Congress adopted legislation dealing with placement of the U.S. Embassy in Jerusalem and providing that “[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel.”

The U.S. parents of a child born in Jerusalem requested that the child’s birth certificate and passport list Israel as the child’s place of birth. The Secretary instead listed Jerusalem as the place of birth and argued that the political question doctrine precluded judicial review since resolving

the claim on the merits would necessarily require a court to decide the political status of Jerusalem. The Court disagreed on the ground that it was up to the courts to determine whether the statute was constitutional. The Court remanded for the lower courts to make an initial assessment of whether the statute impermissibly interfered with the Executive power to recognize governments.

[B]ecause the parties do not dispute the interpretation of § 214(d), the only real question for the courts is whether the statute is constitutional. At least since *Marbury v. Madison*, we have recognized that when an Act of Congress is alleged to conflict with the Constitution, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” ... . In this case, determining the constitutionality of § 214(d) involves deciding whether the statute impermissibly intrudes upon Presidential powers under the Constitution. If so, the law must be invalidated and Zivotofsky’s case should be dismissed for failure to state a claim. If, on the other hand, the statute does not trench on the President’s powers, then the Secretary must be ordered to issue Zivotofsky a passport that complies with § 214(d). Either way, the political question doctrine is not implicated. “No policy underlying the political question doctrine suggests that Congress or the Executive ... can decide the constitutionality of a statute; that is a decision for the courts.”

The Secretary contends that “there is ‘a textually demonstrable constitutional commitment’ ” to the President of the sole power to recognize foreign sovereigns and, as a corollary, to determine whether an American born in Jerusalem may choose to have Israel listed as his place of birth on his passport. Perhaps. But there is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute. The Judicial Branch appropriately exercises that authority, including in a case such as this, where the question is whether Congress or the Executive is “aggrandizing its power at the expense of another branch.”

Our precedents have also found the political question doctrine implicated when there is “ ‘a lack of judicially discoverable and manageable standards for resolving’ ” the question before the court. Framing the issue as the lower courts did, in terms of whether the Judiciary may decide the political status of Jerusalem, certainly raises those concerns. They dissipate, however, when the issue is recognized to be the more focused one of the constitutionality of § 214(d).

Recitation of these arguments — which sound in familiar principles of constitutional interpretation — is enough to establish that this case does not “turn on standards that defy judicial application.” Resolution of Zivotofsky’s claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers. This is what courts do. The political question doctrine poses no bar to judicial review of this case.

***Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).** On remand, the D.C. Circuit held the statute unconstitutional. The Supreme Court agreed – see § 4.03[1] *infra*.

## Chapter 2 NATIONAL POWERS & FEDERALISM

### § 2.01 THE NATURE OF FEDERAL POWER

**Page 78: add before § 2.02:**

**13. *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015).** The Supreme Court, 5-4, per Justice Ginsburg, held that the Elections Clause of the U.S. Constitution, Art. I, §3, cl. 1, did not prevent Arizona voters from establishing by a ballot initiative, known as Proposition 106, the Arizona Independent Redistricting Commission (AIRC). The purpose of establishing the AIRC was to end “ ‘the practice of gerrymandering’ ” as well as to improve “ ‘voter and candidate participate in elections.’ ” Proposition 6 took away redistricting authority from the legislature and gave it to the AIRC. Pursuant to the 2010 Census, the AIRC adopted a redistricting map for both federal and state legislative districts.

The Arizona legislature challenged the redistricting map and contended that it violated the Elections Clause which states: “The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations.” The Arizona legislature brought suit before a three judge district court and argued that the reference to the state legislature in the Elections Clause precluded creating the AIRC and assigning it the redistricting authority which had previously belonged to the legislature. The three judge district court rejected the Arizona legislature’s Election Clause contentions.

The majority of the Supreme Court was no more sympathetic to the Arizona legislature’s reading of the Election Clause than the three judge district court had been. However, first, there was an issue as to whether the Arizona legislature had standing to bring suit. The Supreme Court ruled that the legislature had standing. By contending that Proposition 106 stripped it of its alleged constitutional prerogative to set legislature districts, the legislature had shown a concrete and particularized injury which was fairly traceable to the conduct complained of and which would be redressed by a favorable ruling. This was because Proposition 106 would completely prevent any vote by the legislature now or in a future time from adopting a redistricting plan.

On the merits, Justice Ginsburg said that the words “the Legislature” in the Constitution have different meanings depending upon the context in which the words are used. In the context of regulatory congressional elections, the words “the Legislature” included “the referendum and the governor’s veto.” The Court saw “no constitutional barrier” to a State’s “empowering of its people” by use of the referendum and the ballot initiative. The Court declared the dominant purpose of the Elections Clause “was to empower Congress to override state election rules, not to restrict the way States enact legislation.” Justice Ginsburg said that Arizona voters used the ballot initiative in order that the “ ‘voters should choose their representatives, not the other way around.’ ” The Supreme Court upheld the constitutionality of the AIRC and affirmed the judgment of the three judge district court.

Chief Justice Roberts, joined by Justices Scalia, Thomas and Alito dissented: “The people of Arizona have concerns about the process of congressional redistricting in their State.

For better or worse, the Elections Clause of the Constitution does not allow them to address those concerns by displacing their legislature. But it does allow them to seek relief from Congress, which can make or alter the regulations prescribed by the legislature.” Chief Justice Roberts said the people of Arizona could also use the constitutional amendment process to secure change. But, he cautioned, that “today’s decision will only discourage this democratic method of change.”

## § 2.02 THE COMMERCE POWER

### PAGE 151. Add Note 5 after the end of Note 4

5. In *Murphy v. National Collegiate Athletic Association*, (NCAA), 138 S. Ct. 1461\_\_ (2018), the Supreme Court, per Justice Alito, struck down, 7-2, a federal statute, the Professional and Amateur Sports Protection Act (PASPA), on the ground that it violated the anti-commandeering doctrine set forth in *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). Justice Alito defined the anti-commandeering doctrine as “the expression of a fundamental structural decision in the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States.”

The case that occasioned the application of this doctrine arose in the context of the regulation of sports gambling. PASPA made it unlawful for a State or its subdivisions “to sponsor, operate, advertise, promote, license, or authorize by law or compact” sports gambling schemes. 28 U.S.C. § 3702(1). PASPA also prohibits private actors from engaging in the foregoing on behalf of sports gambling schemes. 28 U.S.C. § 3702(2). PASPA empowers the Attorney General of the United States as well as sports organizations such as the NCAA to bring civil actions to enjoin violation of its provisions. In 2012, New Jersey enacted a law legalizing sports gambling schemes in Atlantic City as well as at horseracing tracks in the State. These activities had previously been unlawful in New Jersey. The NCAA and other major professional organizations brought an action in the federal district court against the Governor of New Jersey and other state officials requesting that the 2012 New Jersey law be enjoined because it was in violation of PASPA. New Jersey responded that PASPA was in violation of the anti-commandeering doctrine because it prevented a state from modifying or repealing New Jersey laws which prohibited sports gambling. Both the federal district court and the Third Circuit rejected this contention and upheld PASPA. The Supreme Court denied review.

In 2014, the New Jersey legislature decided to bring sports gambling to the State by undertaking a different course of action. In 2014, the New Jersey legislature enacted a law which, unlike its predecessor, did not affirmatively authorize sports gambling. Instead, the 2014 law simply repealed, with some minor exceptions, the state law provisions prohibiting sports gambling schemes. The NCAA and allied organizations brought suit in the federal district court challenging the 2014 New Jersey law and were unsuccessful once again. The Third Circuit affirmed and rejected the NCAA’s contention that PASPA violated the anti-commandeering doctrine. The Supreme Court granted review and reversed. [The United States appeared as an *amicus* in support of the respondents, the NCAA *et al.*]

Justice Alito ruled for the Court that PASPA was unconstitutional:

The PASPA provision at issue here – prohibiting state authorization of sports gambling – violates the anti-commandeering rule. That provision unequivocally dictates what a state legislature may and may not do... It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.

Neither respondents nor the United States contends that Congress can compel a State to enact legislation, but they say that prohibiting a State from enacting new laws is another matter. Noting that the laws challenged in *New York* and *Printz* “told states what they must do instead of what they must not do,” respondents contend that commandeering occurs “only when Congress goes beyond precluding state action and affirmatively commands it.”

This distinction is empty. It was a matter of happenstance that the laws challenged in *New York* and *Printz* commanded “affirmative” action as opposed to imposing a prohibition. The basic principle – that Congress cannot issue direct orders to state legislatures – applies in either event.

Respondents and the United States also failed in their effort to defend PASPA’s anti-authorization provision on the basis of preemption. Justice Alito said that for the preemption argument to be successful it must meet two requirements. “First, it must represent the exercise of a power conferred on Congress by the Constitution.” The preemption doctrine is grounded on the Supremacy Clause but it is not an “independent grant of legislative power to Congress.” The second requirement is that a federal law such as PASPA must regulate private actors not States. But the PASPA provision which prohibits state authorization of sports gambling cannot be understood as regulating private actors. PASPA neither confers federal rights on private sports gambling operators nor does it “impose any federal restrictions on private actors.” In short, PASPA’s anti-state authorization provision cannot be interpreted as anything but a “direct command to the States.” However, this is precisely “what the anti-commandeering rule does not allow.”

The Court also ruled that the statute was not severable and refused to sever the provisions of PASPA which would leave the States “free to authorize sports gambling in privately owned casinos.” Justice Alito said that the provision of PASPA dealing with States sponsorship, operation and advertising of sports gambling schemes, 28 U.S.C. § 3702 (1) and the provision of PASPA dealing with persons engaging in the same activity were “obviously meant to work together.” Justice Alito thought the two provisions were designed to effectuate a “coherent federal policy.” Justice Alito explained why severing and upholding § 3702(1) would frustrate that policy:

[I]f § 3702(2) is severed from § 3702(1), it implements a perverse policy that undermines whatever policy is favored by the people of a State. If the people of a State support the legalization of sports gambling, federal law would make the activity illegal. But if a State outlaws sports gambling, that activity would be lawful under § 3702(2). We do not think that Congress ever contemplated that such a weird result would come to pass.

The Court also held that the provisions of PASPA [See § 3702(1)-(2)] which prohibited the advertising of sports gambling were also not severable: “If these provision were allowed to stand, federal law would forbid the advertising of an activity that is legal under both federal and state law, and that is something that Congress has rarely done. For example, the advertising of cigarettes is

heavily regulated but not totally banned.”

Justice Thomas agreed “with the Court’s opinion in its entirety” but contended that the severability doctrine should be reconsidered on the ground that the doctrine required the judiciary “to make a ‘nebulous inquiry into hypothetical congressional intent.’” Justice Breyer agreed with the Court’s opinion except for its ruling that “3702(2) is [not] severable from the challenged portion of § 3702(1).” On that point, he agreed with Justice Ginsburg’s dissent.

Justice Ginsburg, joined by Justice Sotomayor, and in part by Justice Breyer, dissented:

When a statute reveals a constitutional flaw, the Court ordinarily engages in a salvage rather than a demolition operation. In PASPA, shorn of the prohibition on modifying or repealing state law. Congress permissibly exercised its authority to regulate commerce by instructing the States and private parties to refrain from operating sports – gambling schemes. On no rational ground can it be concluded that Congress would have preferred no statute at all if it could not prohibit States from authorizing or licensing such schemes. Deleting the alleged “commandeering” directions would free the statute to accomplish just what Congress legitimately sought to achieve: stopping sports – gambling schemes regimes while making it clear that the stoppage is attributable to federal, not state action. I therefore dissent from the Court’s determination to destroy PASPA rather than salvage the statute.

## § 2.03 THE TAXING AND SPENDING POWERS

### [E] Conditional Grants with Regulatory Effects

**Page 199: Add before § 2.04:**

#### **NATIONAL FEDERATION OF INDEPENDENT BUSINESS v. SEBELIUS**

[HEALTH CARE CASE] 132 S. Ct.2566 (2012)

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

Today we resolve constitutional challenges to two provisions of the Patient Protection and Affordable Care Act of 2010: the individual mandate, which requires individuals to purchase a health insurance policy providing a minimum level of coverage; and the Medicaid expansion, which gives funds to the States on the condition that they provide specified health care to all citizens whose income falls below a certain threshold. We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation’s elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions.

This case concerns two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power. The Constitution authorizes Congress to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Our precedents read that to mean that Congress may regulate “the channels of interstate commerce,” “persons or things in interstate commerce,” and

“those activities that substantially affect interstate commerce.” *Morrison*. The power over activities that substantially affect interstate commerce can be expansive. That power has been held to authorize federal regulation of such seemingly local matters as a farmer’s decision to grow wheat for himself and his livestock, and a loan shark’s extortionate collections from a neighborhood butcher shop. See *Wickard v. Filburn*; *Perez v. United States*.

Congress may also “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” Put simply, Congress may tax and spend. This grant gives the Federal Government considerable influence even in areas where it cannot directly regulate. The Federal Government may enact a tax on an activity that it cannot authorize, forbid, or otherwise control. See, e.g., *License Tax Cases*, 72

462 (1867). And in exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions. See, e.g., *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666 (1999). These offers may well induce the States to adopt policies that the Federal Government itself could not impose. See, e.g., *South Dakota v. Dole*, 483 U. S. 203 (1987) (conditioning federal highway funds on States raising their drinking age to 21).

The reach of the Federal Government’s enumerated powers is broader still because the Constitution authorizes Congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.” Art. I, § 8, cl. 18. We have long read this provision to give Congress great latitude in exercising its powers: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *McCulloch*.

## I

In 2010, Congress enacted the Patient Protection and Affordable Care Act. The Act aims to increase the number of Americans covered by health insurance and decrease the cost of health care. The Act’s 10 titles stretch over 900 pages and contain hundreds of provisions. This case concerns constitutional challenges to two key provisions, commonly referred to as the individual mandate and the Medicaid expansion.

The individual mandate requires most Americans to maintain “minimum essential” health insurance coverage. 26 U. S. C. § 5000A. The mandate does not apply to some individuals, such as prisoners and undocumented aliens. Many individuals will receive the required coverage through their employer, or from a government program such as Medicaid or Medicare. But for individuals who are not exempt and do not receive health insurance through a third party, the means of satisfying the requirement is to purchase insurance from a private company.

Beginning in 2014, those who do not comply with the mandate must make a “[s]hared responsibility payment” to the Federal Government. That payment, which the Act describes as a “penalty,” is calculated as a percentage of household income, subject to a floor based on a specified dollar amount and a ceiling based on the average annual premium the individual would have to pay for qualifying private health insurance. In 2016, for example, the penalty will be 2.5 percent of an individual’s household income, but no less than \$695 and no more than the average yearly premium for insurance that covers 60 percent of the cost of 10 specified services (e.g., prescription drugs and hospitalization). The Act provides that the penalty will be paid to the Internal Revenue Service with an individual’s taxes, and “shall be assessed and collected in the same manner” as tax penalties, such as the penalty for claiming too large an income tax refund.

The Act, however, bars the IRS from using several of its normal enforcement tools, such as criminal prosecutions and levies. And some individuals who are subject to the mandate are nonetheless exempt from the penalty — for example, those with income below a certain threshold and members of Indian tribes.

The Court of Appeals for the Eleventh Circuit [held] that the individual mandate exceeds Congress’s power. The panel unanimously agreed that the individual mandate did not impose a tax, and thus could not be authorized by Congress’s power to “lay and collect Taxes.” A majority also held that the individual mandate was not supported by Congress’s power to “regulate Commerce ... among the several States.” According to the majority, the Commerce Clause does not empower the Federal Government to order individuals to engage in commerce, and the Government’s efforts to cast the individual mandate in a different light were unpersuasive. Judge Marcus dissented, reasoning that the individual mandate regulates economic activity that has a clear effect on interstate commerce.

Other Courts of Appeals have also heard challenges to the individual mandate. The Sixth Circuit and the D. C. Circuit upheld the mandate as a valid exercise of Congress’s commerce.<sup>1</sup>

The second provision of the Affordable Care Act directly challenged here is the Medicaid expansion. Enacted in 1965, Medicaid offers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care. See 42 U. S. C. § 1396a(a)(10). In order to receive that funding, States must comply with federal criteria governing matters such as who receives care and what services are provided at what cost. By 1982 every State had chosen to participate in Medicaid. Federal funds received through the Medicaid program have become a substantial part of state budgets, now constituting over 10 percent of most States’ total revenue.

The Affordable Care Act expands the scope of the Medicaid program and increases the number of individuals the States must cover. For example, the Act requires state programs to provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level, whereas many States now cover adults with children only if their income is considerably lower, and do not cover childless adults at all. The Act increases federal funding to cover the States’ costs in expanding Medicaid coverage, although States will bear a portion of the costs on their own. If a State does not comply with the Act’s new coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medicaid funds.

Along with their challenge to the individual mandate, the state plaintiffs in the Eleventh Circuit argued that the Medicaid expansion exceeds Congress’s constitutional powers. The Court of Appeals unanimously held that the Medicaid expansion is a valid exercise of Congress’s power under the Spending Clause. And the court rejected the States’ claim that the threatened loss of all federal Medicaid funding violates the Tenth Amendment by coercing them into complying with the Medicaid expansion.

We granted certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit with respect to both the individual mandate and the Medicaid expansion.

## II

Before turning to the merits, we need to be sure we have the authority to do so. The AntiInjunction Act provides that “no suit for the purpose of restraining the assessment or

collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.” 26 U. S. C. § 7421(a).

The penalty for not complying with the Affordable Care Act’s individual mandate first becomes enforceable in 2014. The present challenge to the mandate thus seeks to restrain the penalty’s future collection. *Amicus* contends that the Internal Revenue Code treats the penalty as a tax, and that the Anti-Injunction Act therefore bars this suit.

The text of the pertinent statutes suggests otherwise. The Anti-Injunction Act applies to suits “for the purpose of restraining the assessment or collection of any *tax*.” Congress, however, chose to describe the “[s]hared responsibility payment” imposed on those who forgo health insurance not as a “tax,” but as a “penalty.” There is no immediate reason to think that a statute applying to “any tax” would apply to a “penalty.”

Congress’s decision to label this exaction a “penalty” rather than a “tax” is significant because the Affordable Care Act describes many other exactions it creates as “taxes.” Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.

The Code contains many provisions treating taxes and assessable penalties as distinct terms. The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the Anti-Injunction Act. The AntiInjunction Act therefore does not apply to this suit, and we may proceed to the merits.

### III

The Government advances two theories for the proposition that Congress had constitutional authority to enact the individual mandate. First, the Government argues that Congress had the power to enact the mandate under the Commerce Clause. Under that theory, Congress may order individuals to buy health insurance because the failure to do so affects interstate commerce, and could undercut the Affordable Care Act’s other reforms. Second, the Government argues that if the commerce power does not support the mandate, we should nonetheless uphold it as an exercise of Congress’s power to tax. According to the Government, even if Congress lacks the power to direct individuals to buy insurance, the only effect of the individual mandate is to raise taxes on those who do not do so, and thus the law may be upheld as a tax.

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<sup>1</sup> [Ed. Note:] The Fourth Circuit held that the Anti-Injunction Act [AIA] precluded consideration of the argument that the mandate was a tax because the AIA forbids challenges to a tax before its assessment and collection. Chief Justice Roberts concluded, however, that the mandate was authorized By the taxing power of Congress did not fall within the meaning of Congress’ prohibition in the AIA.

## A

The Government's first argument is that the individual mandate is a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause. According to the Government, the health care market is characterized by a significant cost-shifting problem. Everyone will eventually need health care at a time and to an extent they cannot predict, but if they do not have insurance, they often will not be able to pay for it. Because state and federal laws nonetheless require hospitals to provide a certain degree of care to individuals without regard to their ability to pay, hospitals end up receiving compensation for only a portion of the services they provide. To recoup the losses, hospitals pass on the cost to insurers through higher rates, and insurers, in turn, pass on the cost to policy holders in the form of higher premiums. Congress estimated that the cost of uncompensated care raises family health insurance premiums, on average, by over \$1,000 per year.

In the Affordable Care Act, Congress addressed the problem of those who cannot obtain insurance coverage because of preexisting conditions or other health issues. It did so through the Act's "guaranteed-issue" and "community-rating" provisions. These provisions together prohibit insurance companies from denying coverage to those with such conditions or charging unhealthy individuals higher premiums than healthy individuals.

The guaranteed-issue and community-rating reforms do not, however, address the issue of healthy individuals who choose not to purchase insurance to cover potential health care needs. In fact, the reforms sharply exacerbate that problem, by providing an incentive for individuals to delay purchasing health insurance until they become sick, relying on the promise of guaranteed and affordable coverage. The reforms also threaten to impose massive new costs on insurers, who are required to accept unhealthy individuals but prohibited from charging them rates necessary to pay for their coverage. This will lead insurers to significantly increase premiums on everyone.

The individual mandate was Congress's solution to these problems. By requiring that individuals purchase health insurance, the mandate prevents cost-shifting by those who would otherwise go without it. In addition, the mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses. This allows insurers to subsidize the costs of covering the unhealthy individuals the reforms require them to accept. The Government claims that Congress has power under the Commerce and Necessary and Proper Clauses to enact this solution.

## 1

The Government contends that the individual mandate is within Congress's power because the failure to purchase insurance "has a substantial and deleterious effect on interstate commerce" by creating the cost-shifting problem. The path of our Commerce Clause decisions has not always run smooth, but it is now well established that Congress has broad authority under the Clause.

As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching "activity." It is nearly impossible to avoid the word when quoting them.

The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit

Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and under the Government's theory-empower Congress to make those decisions for him.

Applying the Government's logic to the familiar case of *Wickard v. Filburn* shows how far that logic would carry us from the notion of a government of limited powers. In *Wickard*, the Court famously upheld a federal penalty imposed on a farmer for growing wheat for consumption on his own farm.

The aggregated decisions of some consumers not to purchase wheat have a substantial effect on the price of wheat, just as decisions not to purchase health insurance have on the price of insurance. Congress can therefore command that those not buying wheat do so, just as it argues here that it may command that those not buying health insurance do so. The farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce. The Government's theory here would effectively override that limitation, by establishing that individuals may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do.

People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures — joined with the similar failures of others — can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.

To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers, who were "practical statesmen," not metaphysical philosophers. The Framers gave Congress the power to *regulate* commerce, not to *compel* it, and for over 200 years both our decisions and Congress's actions have reflected this understanding. There is no reason to depart from that understanding now.

The Government, however, claims that this does not matter. The Government regards it as sufficient to trigger Congress's authority that almost all those who are uninsured will, at some unknown point in the future, engage in a health care transaction. Asserting that "[t]here is no temporal limitation in the Commerce Clause," the Government argues that because "[e]veryone subject to this regulation is in or will be in the health care market," they can be "regulated in advance."

The Government argues that the individual mandate can be sustained as a sort of exception to this rule, because health insurance is a unique product. According to the Government, upholding the individual mandate would not justify mandatory purchases of items such as cars or broccoli because, as the Government puts it, "[h]ealth insurance is not purchased for its own sake like a car or broccoli; it is a means of financing health-care consumption and covering universal risks." But cars and broccoli are no more purchased for their "own sake" than health insurance. They are purchased to cover the need for transportation and food.

The Government next contends that Congress has the power under the Necessary and Proper Clause to enact the individual mandate because the mandate is an “integral part of a comprehensive scheme of economic regulation” the guaranteed-issue and community-rating insurance reforms. Under this argument, it is not necessary to consider the effect that an individual’s inactivity may have on interstate commerce; it is enough that Congress regulate commercial activity in a way that requires regulation of inactivity to be effective.

[T]he individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. For example, we have upheld provisions permitting continued confinement of those *already in federal custody* when they could not be safely released, *Comstock*; criminalizing bribes involving organizations *receiving federal funds*, *Sabri v. United States*, 541 U. S. 600 (2004); and tolling state statutes of limitations while cases are *pending in federal court*, *Jinks v. Richland County*, 538 U. S. 456 (2003). The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.

[Even if the individual mandate is “necessary” to the Act’s insurance reforms, such an expansion of federal power is not a “proper” means for making those reforms effective.

## B

That is not the end of the matter. Because the Commerce Clause does not support the individual mandate, it is necessary to turn to the Government’s second argument: that the mandate may be upheld as within Congress’s enumerated power to “lay and collect Taxes.” Art. I, § 8, cl. 1.

The Government’s tax power argument asks us to view the statute differently than we did in considering its commerce power theory. In making its Commerce Clause argument, the Government defended the mandate as a regulation requiring individuals to purchase health insurance. The Government does not claim that the taxing power allows Congress to issue such a command. Instead, the Government asks us to read the mandate not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy that product.

The text of a statute can sometimes have more than one possible meaning. To take a familiar example, a law that reads “no vehicles in the park” might, or might not, ban bicycles in the park. And it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so.

Under the mandate, if an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he pays his taxes. See § 5000A(b). That, according to the Government, means the mandate can be regarded as establishing a condition not owning health insurance that triggers a tax the required payment to the IRS. Under that theory, the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income. And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress’s constitutional power to tax.

## C

The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The “[s]hared responsibility payment,” as the statute entitles it, is paid into the Treasury by “taxpayer[s]” when they file their tax returns. It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status.

It is of course true that the Act describes the payment as a “penalty,” not a “tax.” But while that label is fatal to the application of the Anti-Injunction Act, it does not determine whether the payment may be viewed as an exercise of Congress’s taxing power. It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress’s choice of label on that question. That choice does not, however, control whether an exaction is within Congress’s constitutional power to tax.

None of this is to say that the payment is not intended to affect individual conduct. Although the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage. But taxes that seek to influence conduct are nothing new. Some of our earliest federal taxes sought to deter the purchase of imported manufactured goods in order to foster the growth of domestic industry. And we have upheld such obviously regulatory measures as taxes on selling marijuana and sawed-off shotguns.

Indeed, it is estimated that four million people each year will choose to pay the IRS rather than buy insurance. We would expect Congress to be troubled by that prospect if such conduct were unlawful. That Congress apparently regards such extensive failure to comply with the mandate as tolerable suggests that Congress did not think it was creating four million outlaws. It suggests instead that the shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance.

There may, however, be a more fundamental objection to a tax on those who lack health insurance. Even if only a tax, the payment under § 5000A(b) remains a burden that the Federal Government imposes for an omission, not an act. If it is troubling to interpret the Commerce Clause as authorizing Congress to regulate those who abstain from commerce, perhaps it should be similarly troubling to permit Congress to impose a tax for not doing something.

Three considerations allay this concern. First, and most importantly, it is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through inactivity. A capitation, after all, is a tax that everyone must pay simply for existing, and capitations are expressly contemplated by the Constitution.

Second, Congress’s ability to use its taxing power to influence conduct is not without limits. A few of our cases policed these limits aggressively, invalidating punitive exactions obviously designed to regulate behavior otherwise regarded at the time as beyond federal authority.

Third, although the breadth of Congress’s power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior. Once we recognize that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. Congress may simply command individuals to do as it directs. An individual who disobeys may be subjected to criminal sanctions.

Those sanctions can include not only fines and imprisonment, but all the attendant consequences of being branded a criminal: deprivation of otherwise protected civil rights, such as the right to bear arms or vote in elections; loss of employment opportunities; social stigma; and severe disabilities in other controversies, such as custody or immigration disputes.

By contrast, Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it. We do not make light of the severe burden that taxation — especially taxation motivated by a regulatory purpose — can impose. But imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice.

The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.

## D

The Federal Government does not have the power to order people to buy health insurance. Section 5000A would therefore be unconstitutional if read as a command. The Federal Government does have the power to impose a tax on those without health insurance. Section 5000A is therefore constitutional, because it can reasonably be read as a tax.

## IV A

The States also contend that the Medicaid expansion exceeds Congress's authority under the Spending Clause. They claim that Congress is coercing the States to adopt the changes it wants by threatening to withhold all of a State's Medicaid grants, unless the State accepts the new expanded funding and complies with the conditions that come with it. This, they argue, violates the basic principle that the "Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*.

There is no doubt that the Act dramatically increases state obligations under Medicaid. The current Medicaid program requires States to cover only certain discrete categories of needy individuals, pregnant women, children, needy families, the blind, the elderly, and the disabled. 42 U. S. C. § 1396a(a)(10). There is no mandatory coverage for most childless adults, and the States typically do not offer any such coverage. The States also enjoy considerable flexibility with respect to the coverage levels for parents of needy families. On average States cover only those unemployed parents who make less than 37 percent of the federal poverty level, and only those employed parents who make less than 63 percent of the poverty line.

The Medicaid provisions of the Affordable Care Act, in contrast, require States to expand their Medicaid programs by 2014 to cover *all* individuals under the age of 65 with incomes below 133 percent of the federal poverty line. The Act also establishes a new "[e]ssential health benefits" package, which States must provide to all new Medicaid recipients a level sufficient to satisfy a recipient's obligations under the individual mandate. The Affordable Care Act provides that the Federal Government will pay 100 percent of the costs of covering these newly eligible individuals through 2016. In the following years, the federal payment level gradually decreases, to a minimum of 90 percent. In light of the expansion in coverage mandated by the Act, the Federal Government

estimates that its Medicaid spending will increase by approximately \$100 billion per year, nearly 40 percent above current levels.

The Spending Clause grants Congress the power “to pay the Debts and provide for the ... general Welfare of the United States.” We have long recognized that Congress may use this power to grant federal funds to the States, and may condition such a grant upon the States’ “taking certain actions that Congress could not require them to take.” *College Savings Bank*, 527 U. S., at 686. Such measures “encourage a State to regulate in a particular way, [and] influenc[e] a State’s policy choices.” *New York*, *supra*, at 166. The conditions imposed by Congress ensure that the funds are used by the States to “provide for the ... general Welfare” in the manner Congress intended.

At the same time, our cases have recognized limits on Congress’s power under the Spending Clause to secure state compliance with federal objectives. “We have repeatedly characterized ... Spending Clause legislation as ‘much in the nature of a *contract*.’” The legitimacy of Congress’s exercise of the spending power “thus rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’ ” *Pennhurst*. Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system. That system “rests on what might at first seem a counter-intuitive insight, that ‘freedom is enhanced by the creation of two governments, not one.’ ”

That insight has led this Court to strike down federal legislation that commandeers a State’s legislative or administrative apparatus for federal purposes. See, *e.g.*, *Printz*; *New York*.

Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system. “[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.” Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer. But when the State has no choice, the Federal Government can achieve its objectives without accountability, just as in *New York* and *Printz*. Indeed, this danger is heightened when Congress acts under the Spending Clause, because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers.

Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds. In the typical case we look to the States to defend their prerogatives by adopting “the simple expedient of not yielding” to federal blandishments when they do not want to embrace the federal policies as their own. The States are separate and independent sovereigns. Sometimes they have to act like it.

The States, however, argue that the Medicaid expansion is far from the typical case. They object that Congress has “crossed the line distinguishing encouragement from coercion,” in the way it has structured the funding: Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States’ existing Medicaid funds. The States claim that this threat serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the Act.

Given the nature of the threat and the programs at issue here, we must agree. Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.

In *South Dakota v. Dole*, we considered a challenge to a federal law that threatened to withhold five percent of a State’s federal highway funds if the State did not raise its drinking age to 21. The Court found that the condition was “directly related to one of the main purposes for which highway funds are expended — safe interstate travel.” At the same time, the condition was not a restriction on how the highway funds — set aside for specific highway improvement and maintenance efforts — were to be used.

We accordingly asked whether “the financial inducement offered by Congress” was “so coercive as to pass the point at which ‘pressure turns into compulsion.’ ” We found that the inducement was not impermissibly coercive, because Congress was offering only “relatively mild encouragement to the States.” We observed that “all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5%” of her highway funds. In fact, the federal funds at stake constituted less than half of one percent of South Dakota’s budget at the time.

In this case, the financial “inducement” Congress has chosen is much more than “relatively mild encouragement” — it is a gun to the head. Section 1396c of the Medicaid Act provides that if a State’s Medicaid plan does not comply with the Act’s requirements, the Secretary of Health and Human Services may declare that “further payments will not be made to the State.” A State that opts out of the Affordable Care Act’s expansion in health care coverage thus stands to lose not merely “a relatively small percentage” of its existing Medicaid funding, but *all* of it. Medicaid spending accounts for over 20 percent of the average State’s total budget, with federal funds covering 50 to 83 percent of those costs. The Federal Government estimates that it will pay out approximately \$3.3 trillion between 2010 and 2019 in order to cover the costs of *pre*-expansion Medicaid. In addition, the States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid. It is easy to see how the *Dole* Court could conclude that the threatened loss of less than half of one percent of South Dakota’s budget left that State with a “prerogative” to reject Congress’s desired policy, “not merely in theory but in fact.” The threatened loss of over 10 percent of a State’s overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.

## B

Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.

That fully remedies the constitutional violation we have identified. The chapter of the United States Code that contains § 1396c includes a severability clause confirming that we need go no further. That clause specifies that “[i]f any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby.” Today’s holding does not affect the continued application of § 1396c to the existing Medicaid program.

Nor does it affect the Secretary's ability to withdraw funds provided under the Affordable Care Act if a State that has chosen to participate in the expansion fails to comply with the requirements of that Act.

The question remains whether today's holding affects other provisions of the Affordable Care Act. We are confident that Congress would have wanted to preserve the rest of the Act. It is fair to say that Congress assumed that every State would participate in the Medicaid expansion, given that States had no real choice but to do so. The States contend that Congress enacted the rest of the Act with such full participation in mind; they point out that Congress made Medicaid a means for satisfying the mandate, and enacted no other plan for providing coverage to many low-income individuals. According to the States, this means that the entire Act must fall.

We disagree. The Court today limits the financial pressure the Secretary may apply to induce States to accept the terms of the Medicaid expansion. As a practical matter, that means States may now choose to reject the expansion; that is the whole point. But that does not mean all or even any will. Some States may indeed decline to participate, either because they are unsure they will be able to afford their share of the new funding obligations, or because they are unwilling to commit the administrative resources necessary to support the expansion. Other States, however, may voluntarily sign up, finding the idea of expanding Medicaid coverage attractive, particularly given the level of federal funding the Act offers at the outset.

We have no way of knowing how many States will accept the terms of the expansion, but we do not believe Congress would have wanted the whole Act to fall, simply because some may choose not to participate. The other reforms Congress enacted, after all, will remain "fully operative as a law," and will still function in a way "consistent with Congress' basic objectives in enacting the statute." Confident that Congress would not have intended anything different, we conclude that the rest of the Act need not fall in light of our constitutional holding.

The Affordable Care Act is constitutional in part and unconstitutional in part. The individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it. In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress's power to tax.

As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding. The remedy for that constitutional violation is to preclude the Federal Government from imposing such a sanction. That remedy does not require striking down other portions of the Affordable Care Act.

The Framers created a Federal Government of limited powers, and assigned to this Court the duty of enforcing those limits. The Court does so today. But the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people.

The judgment of the Court of Appeals for the Eleventh Circuit is affirmed in part and reversed

in part.

*It is so ordered.*

**JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, and with whom JUSTICE BREYER and JUSTICE KAGAN join as to Parts I, II, III, and IV, concurring in part, concurring in the judgment in part, and dissenting in part. [Ed: the effect of these votes is that JUSTICES BREYER and KAGAN do not agree with JUSTICES GINSBURG and SOTOMAYOR over the Medicaid expansion. Thus, the majority for striking down the Medicaid provision includes those two along with the CHIEF JUSTICE and the four “dissenters” — SCALIA, KENNEDY, THOMAS, and ALITO.]**

I agree with THE CHIEF JUSTICE that the Anti-Injunction Act does not bar the Court’s consideration of this case, and that the minimum coverage provision is a proper exercise of Congress’ taxing power. I therefore join Parts I, II, and III-C of THE CHIEF JUSTICE’s opinion. Unlike THE CHIEF JUSTICE, however, I would hold, alternatively, that the Commerce Clause authorizes Congress to enact the minimum coverage provision. I would also hold that the Spending Clause permits the Medicaid expansion exactly as Congress enacted it.

## I

The provision of health care is today a concern of national dimension, just as the provision of old-age and survivors’ benefits was in the 1930s. In the Social Security Act, Congress installed a federal system to provide monthly benefits to retired wage earners and, eventually, to their survivors. Beyond question, Congress could have adopted a similar scheme for health care. Congress chose, instead, to preserve a central role for private insurers and state governments. According to THE CHIEF JUSTICE, the Commerce Clause does not permit that preservation. This rigid reading of the Clause makes scant sense and is stunningly retrogressive.

Since 1937, our precedent has recognized Congress’ large authority to set the Nation’s course in the economic and social welfare realm. THE CHIEF JUSTICE’s crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress’ efforts to regulate the national economy in the interest of those who labor to sustain it.

## A

In enacting the Patient Protection and Affordable Care Act (ACA), Congress comprehensively reformed the national market for healthcare products and services. By any measure, that market is immense. Collectively, Americans spent \$2.5 trillion on health care in 2009, accounting for 17.6% of our Nation’s economy. Within the next decade, it is anticipated, spending on health care will nearly double.

The healthcare market’s size is not its only distinctive feature. Unlike the market for almost any other product or service, the market for medical care is one in which all individuals inevitably participate. Virtually every person residing in the United States, sooner or later, will visit a doctor or other health-care professional.

## B

The large number of individuals without health insurance, Congress found, heavily burdens the

national health-care market. As just noted, the cost of emergency care or treatment for a serious illness generally exceeds what an individual can afford to pay on her own. Unlike markets for most products, however, the inability to pay for care does not mean that an uninsured individual will receive no care. Federal and state law, as well as professional obligations and embedded social norms, require hospitals and physicians to provide care when it is most needed, regardless of the patient's ability to pay.

As a consequence, medical-care providers deliver significant amounts of care to the uninsured for which the providers receive no payment. In 2008, for example, hospitals, physicians, and other health-care professionals received no compensation for \$43 billion worth of the \$116 billion in care they administered to those without insurance.

Health-care providers do not absorb these bad debts. Instead, they raise their prices, passing along the cost of uncompensated care to those who do pay reliably: the government and private insurance companies. In response, private insurers increase their premiums, shifting the cost of the elevated bills from providers onto those who carry insurance. The net result: Those with health insurance subsidize the medical care of those without it. As economists would describe what happens, the uninsured “free ride” on those who pay for health insurance.

The size of this subsidy is considerable. Congress found that the cost-shifting just described “increases family [insurance] premiums by on average over \$1,000 a year.” Higher premiums, in turn, render health insurance less affordable, forcing more people to go without insurance and leading to further cost-shifting.

## C

States cannot resolve the problem of the uninsured on their own. Like Social Security benefits, a universal health-care system, if adopted by an individual State, would be “bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose.”

## D

Aware that a national solution was required, Congress could have taken over the health insurance market by establishing a tax-and-spend federal program like Social Security. Such a program, commonly referred to as a single-payer system (where the sole payer is the Federal Government), would have left little, if any, room for private enterprise or the States. Instead of going this route, Congress enacted the ACA, a solution that retains a robust role for private insurers and state governments. To make its chosen approach work, however, Congress had to use some new tools, including a requirement that most individuals obtain private health insurance coverage. As explained below, by employing these tools, Congress was able to achieve a practical, altogether reasonable, solution.

A central aim of the ACA is to reduce the number of uninsured U. S. residents. The minimum coverage provision advances this objective by giving potential recipients of health care a financial incentive to acquire insurance. Per the minimum coverage provision, an individual must either obtain insurance or pay a toll constructed as a tax penalty.

Congress comprehended that guaranteed-issue and community-rating laws alone will not work. When insurance companies are required to insure the sick at affordable prices, individuals can wait until they become ill to buy insurance. Pretty soon, those in need of immediate medical care — *i.e.*,

those who cost insurers the most — become the insurance companies’ main customers. This “adverse selection” problem leaves insurers with two choices: They can either raise premiums dramatically to cover their ever-increasing costs or they can exit the market. In the seven States that tried guaranteed-issue and community-rating requirements without a minimum coverage provision, that is precisely what insurance companies did.

Massachusetts, Congress was told, cracked the adverse selection problem. By requiring most residents to obtain insurance, the Commonwealth ensured that insurers would not be left with only the sick as customers. As a result, federal lawmakers observed, Massachusetts succeeded where other States had failed. In coupling the minimum coverage provision with guaranteed issue and community-rating prescriptions, Congress followed Massachusetts’ lead.

## **II**

### **A**

The Commerce Clause, it is widely acknowledged, “was the Framers’ response to the central problem that gave rise to the Constitution itself.” Under the Articles of Confederation, the Constitution’s precursor, the regulation of commerce was left to the States. This scheme proved unworkable, because the individual States, understandably focused on their own economic interests, often failed to take actions critical to the success of the Nation as a whole.

What was needed was a “national Government ... armed with a positive & complete authority in all cases where uniform measures are necessary.” The Framers’ solution was the Commerce Clause, which, as they perceived it, granted Congress the authority to enact economic legislation “in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent.”

### **B**

Until today, this Court’s pragmatic approach to judging whether Congress validly exercised its commerce power was guided by two familiar principles. First, Congress has the power to regulate economic activities “that substantially affect interstate commerce.” This capacious power extends even to local activities that, viewed in the aggregate, have a substantial impact on interstate commerce.

Second, we owe a large measure of respect to Congress when it frames and enacts economic and social legislation. In answering these questions, we presume the statute under review is constitutional and may strike it down only on a “plain showing” that Congress acted irrationally.

### **C**

Straightforward application of these principles would require the Court to hold that the minimum coverage provision is proper Commerce Clause legislation. Beyond dispute, Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce. Those without insurance consume billions of dollars of health-care products and services each year. Those goods are produced, sold, and delivered largely by national and regional companies who routinely transact business across state lines. The uninsured also cross state lines to receive care. Some have medical emergencies while away from home. Others, when sick, go to a neighboring State that provides better care for those who have not prepaid for care.

Not only do those without insurance consume a large amount of health care each year; critically, as earlier explained, their inability to pay for a significant portion of that consumption drives up market prices, foists costs on other consumers, and reduces market efficiency and stability. Given these far-reaching effects on interstate commerce, the decision to forgo insurance is hardly inconsequential or equivalent to “doing nothing;” it is, instead, an economic decision Congress has the authority to address under the Commerce Clause.

## D

Rather than evaluating the constitutionality of the minimum coverage provision in the manner established by our precedents, THE CHIEF JUSTICE relies on a newly minted constitutional doctrine. The commerce power does not, THE CHIEF JUSTICE announces, permit Congress to “compel[l] individuals to become active in commerce by purchasing a product.”

THE CHIEF JUSTICE’s novel constraint on Congress’ commerce power gains no force from our precedent and for that reason alone warrants disapprobation. But even assuming, for the moment, that Congress lacks authority under the Commerce Clause to “compel individuals not engaged in commerce to purchase an unwanted product,” such a limitation would be inapplicable here. Everyone will, at some point, consume health-care products and services. Thus, if THE CHIEF JUSTICE is correct that an insurance-purchase requirement can be applied only to those who “actively” consume health care, the minimum coverage provision fits the bill.

Maintaining that the uninsured are not active in the health-care market THE CHIEF JUSTICE draws an analogy to the car market. An individual “is not ‘active in the car market,’ ” THE CHIEF JUSTICE observes, simply because he or she may someday buy a car. The analogy is inapt. Although an individual *might* buy a car or a crown of broccoli one day, there is no certainty she will ever do so. And if she eventually wants a car or has a craving for broccoli, she will be obliged to pay at the counter before receiving the vehicle or nourishment. She will get no free ride or food, at the expense of another consumer forced to pay an inflated price.

THE CHIEF JUSTICE also calls the minimum coverage provision an illegitimate effort to make young, healthy individuals subsidize insurance premiums paid by the less hale and hardy. This complaint, too, is spurious. Under the current health-care system, healthy persons who lack insurance receive a benefit for which they do not pay: They are assured that, if they need it, emergency medical care will be available, although they cannot afford it. Those who have insurance bear the cost of this guarantee. By requiring the healthy uninsured to obtain insurance or pay a penalty structured as a tax, the minimum coverage provision ends the free ride these individuals currently enjoy.

In the fullness of time, moreover, today’s young and healthy will become society’s old and infirm. Viewed over a lifespan, the costs and benefits even out: The young who pay more than their fair share currently will pay less than their fair share when they become senior citizens. And even if, as undoubtedly will be the case, some individuals, over their lifespans, will pay more for health insurance than they receive in health services, they have little to complain about, for that is how insurance works. Every insured person receives protection against a catastrophic loss, even though only a subset of the covered class will ultimately need that protection.

It is not hard to show the difficulty courts (and Congress) would encounter in distinguishing statutes that regulate “activity” from those that regulate “inactivity.” As Judge Easterbrook

noted, “it is possible to restate most actions as corresponding inactions with the same effect.” *Archie v. Racine*, 847 F.2d 1211, 1213 (CA7 1988) (en banc). Take this case as an example. An individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance. (“No one is inactive when deciding how to pay for health care, as self-insurance and private insurance are two forms of action for addressing the same risk.”). The minimum coverage provision could therefore be described as regulating activists in the self-insurance market. *Wickard* is another example. Did the statute there at issue target activity (the growing of too much wheat) or inactivity (the farmer’s failure to purchase wheat in the marketplace)? If anything, the Court’s analysis suggested the latter.

At bottom, THE CHIEF JUSTICE’s and the joint dissenters’ “view that an individual cannot be subject to Commerce Clause regulation absent voluntary, affirmative acts that enter him or her into, or affect, the interstate market expresses a concern for individual liberty that [is] more redolent of Due Process Clause arguments.” Plaintiffs have abandoned any argument pinned to substantive due process, however, and now concede that the provisions here at issue do not offend the Due Process Clause.

## 2

Underlying THE CHIEF JUSTICE’s view that the Commerce Clause must be confined to the regulation of active participants in a commercial market is a fear that the commerce power would otherwise know no limits.

First, THE CHIEF JUSTICE could certainly uphold the individual mandate without giving Congress *carte blanche* to enact any and all purchase mandates. As several times noted, the unique attributes of the health-care market render everyone active in that market and give rise to a significant free-riding problem that does not occur in other markets.

Nor would the commerce power be unbridled, absent THE CHIEF JUSTICE’s “activity” limitation. Congress would remain unable to regulate noneconomic conduct that has only an attenuated effect on interstate commerce and is traditionally left to state law. See *Lopez*; *Morrison*.

Consider the chain of inferences the Court would have to accept to conclude that a vegetable purchase mandate was likely to have a substantial effect on the health-care costs borne by lithe Americans. The Court would have to believe that individuals forced to buy vegetables would then eat them (instead of throwing or giving them away), would prepare the vegetables in a healthy way (steamed or raw, not deep-fried), would cut back on unhealthy foods, and would not allow other factors (such as lack of exercise or little sleep) to trump the improved diet. Such “pil[ing of] inference upon inference” is just what the Court refused to do in *Lopez* and *Morrison*.

Other provisions of the Constitution also check congressional overreaching. A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause.

Supplementing these legal restraints is a formidable check on congressional power: the democratic process. As the controversy surrounding the passage of the Affordable Care Act attests, purchase mandates are likely to engender political resistance. This prospect is borne out by the behavior of state legislators. Despite their possession of unquestioned authority to impose mandates, state

governments have rarely done so.

### III

#### A

For the reasons explained above, the minimum coverage provision is valid Commerce Clause legislation. See *supra*, Part II. When viewed as a component of the entire ACA, the provision's constitutionality becomes even plainer.

The Necessary and Proper Clause “empowers Congress to enact laws in effectuation of its [commerce] powe[r] that are not within its authority to enact in isolation.” *Raich*, 545 U. S., at 39 (Scalia, J., concurring in judgment). Hence, “[a] complex regulatory program ... can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal.” “It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.” [See] *Raich*, 545 U. S., at 37 (Scalia, J., concurring in judgment) (“Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. The relevant question is simply whether the means chosen are ‘reasonably adapted’ to the attainment of a legitimate end under the commerce power.” (citation omitted)).

Recall that one of Congress’ goals in enacting the Affordable Care Act was to eliminate the insurance industry’s practice of charging higher prices or denying coverage to individuals with preexisting medical conditions. The commerce power allows Congress to ban this practice, a point no one disputes.

Congress knew, however, that simply barring insurance companies from relying on an applicant’s medical history would not work in practice. Without the individual mandate, Congress learned, guaranteed-issue and community-rating requirements would trigger an adverse-selection death-spiral in the health-insurance market: Insurance premiums would skyrocket, the number of uninsured would increase, and insurance companies would exit the market. When complemented by an insurance mandate, on the other hand, guaranteed issue and community rating would work as intended, increasing access to insurance and reducing uncompensated care. The minimum coverage provision is thus an “essential par[t] of a larger regulation of economic activity”; without the provision, “the regulatory scheme [w]ould be undercut.” *Raich*, 545 U. S., at 24–25 (internal quotation marks omitted). Put differently, the minimum coverage provision, together with the guaranteed-issue and community-rating requirements, is “‘reasonably adapted’ to the attainment of a legitimate end under the commerce power”: the elimination of pricing and sales practices that take an applicant’s medical history into account. See *id.*, at 37 (Scalia, J., concurring in judgment).

### IV

Ultimately, the Court upholds the individual mandate as a proper exercise of Congress’ power to tax and spend “for the ... general Welfare of the United States.” I concur in that determination, which makes THE CHIEF JUSTICE’s Commerce Clause essay all the more puzzling. Why should THE CHIEF JUSTICE strive so mightily to hem in Congress’ capacity to meet the new problems arising constantly in our ever developing modern economy? I find no satisfying response to that question in his opinion.

## V

The question posed by the 2010 Medicaid expansion is essentially this: To cover a notably larger population, must Congress take the repeal/reenact route, or may it achieve the same result by amending existing law? The answer should be that Congress may expand by amendment the classes of needy persons entitled to Medicaid benefits. A ritualistic requirement that Congress repeal and reenact spending legislation in order to enlarge the population served by a federally funded program would advance no constitutional principle and would scarcely serve the interests of federalism. To the contrary, such a requirement would rigidify Congress' efforts to empower States by partnering with them in the implementation of federal programs.

Medicaid is a prototypical example of federal-state cooperation in serving the Nation's general welfare. Rather than authorizing a federal agency to administer a uniform national health-care system for the poor, Congress offered States the opportunity to tailor Medicaid grants to their particular needs, so long as they remain within bounds set by federal law. In shaping Medicaid, Congress did not endeavor to fix permanently the terms participating states must meet; instead, Congress reserved the "right to alter, amend, or repeal" any provision of the Medicaid Act. States, for their part, agreed to amend their own Medicaid plans consistent with changes from time to time made in the federal law.

THE CHIEF JUSTICE ultimately asks whether "the financial inducement offered by Congress ... pass[ed] the point at which pressure turns into compulsion." When future Spending Clause challenges arrive, as they likely will in the wake of today's decision, how will litigants and judges assess whether "a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds"? Are courts to measure the number of dollars the Federal Government might withhold for noncompliance? The portion of the State's budget at stake? And which State's — or States' — budget is determinative: the lead plaintiff, all challenging States (26 in this case, many with quite different fiscal situations), or some national median? Does it matter that Florida, unlike most States, imposes no state income tax, and therefore might be able to replace foregone federal funds with new state revenue? Or that the coercion state officials in fact fear is punishment at the ballot box for turning down a politically popular federal grant?

The coercion inquiry, therefore, appears to involve political judgments that defy judicial calculation. See *Baker v. Carr*, 369 U. S. 186, 217 (1962). Even commentators sympathetic to robust enforcement of *Dole's* limitations have concluded that conceptions of "impermissible coercion" premised on States' perceived inability to decline federal funds "are just too amorphous to be judicially administrable." Baker & Berman, *Getting off the Dole*, 78 Ind. L. J. 459, 521, 522, n. 307 (2003) (citing, e.g., Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989)).

At bottom, my colleagues' position is that the States' reliance on federal funds limits Congress' authority to alter its spending programs. This gets things backwards: Congress, not the States, is tasked with spending federal money in service of the general welfare. And each successive Congress is empowered to appropriate funds as it sees fit. When the 110th Congress reached a conclusion about Medicaid funds that differed from its predecessors' view, it abridged no State's right to "existing," or "pre-existing," funds. For, in fact, there are no such funds. There is only money States *anticipate* receiving from future Congresses.

For the reasons stated, I agree with THE CHIEF JUSTICE that, as to the validity of the minimum

coverage provision, the judgment of the Court of Appeals for the Eleventh Circuit should be reversed. In my view, the provision encounters no constitutional obstruction. Further, I would uphold the Eleventh Circuit's decision that the Medicaid expansion is within Congress' spending power.

**JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE THOMAS, and JUSTICE ALITO, dissenting.**

Congress has set out to remedy the problem that the best health care is beyond the reach of many Americans who cannot afford it. It can assuredly do that, by exercising the powers accorded to it under the Constitution. The question in this case, however, is whether the complex structures and provisions of the Patient Protection and Affordable Care Act (Affordable Care Act or ACA) go beyond those powers. We conclude that they do.

This case is in one respect difficult: it presents two questions of first impression. The first of those is whether failure to engage in economic activity (the purchase of health insurance) is subject to regulation under the Commerce Clause. Failure to act does result in an effect on commerce, and hence might be said to come under this Court's "affecting commerce" criterion of Commerce Clause jurisprudence. But in none of its decisions has this Court extended the Clause that far. The second question is whether the congressional power to tax and spend permits the conditioning of a State's continued receipt of all funds under a massive state administered federal welfare program upon its acceptance of an expansion to that program. Several of our opinions have suggested that the power to tax and spend cannot be used to coerce state administration of a federal program, but we have never found a law enacted under the spending power to be coercive. Those questions are difficult.

The case is easy and straightforward, however, in another respect. What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power—upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States. Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs.

That clear principle carries the day here. The striking case of *Wickard v. Filburn*, which held that the economic activity of growing wheat, even for one's own consumption, affected commerce sufficiently that it could be regulated, always has been regarded as the *ne plus ultra* of expansive Commerce Clause jurisprudence. To go beyond that, and to say the *failure* to grow wheat (which is *not* an economic activity, or any activity at all) nonetheless affects commerce and therefore can be federally regulated, is to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity.

As for the constitutional power to tax and spend for the general welfare: The Court has long since expanded that beyond (what Madison thought it meant) taxing and spending for those aspects of the general welfare that were within the Federal Government's enumerated powers. Thus, we now have sizable federal Departments devoted to subjects not mentioned among Congress' enumerated powers, and only marginally related to commerce: the Department of Education, the Department of Health and Human Services, the Department of Housing and Urban Development. The principal practical obstacle that prevents Congress from using the tax- and-spend

power to assume all the general-welfare responsibilities traditionally exercised by the States is the sheer impossibility of managing a Federal Government large enough to administer such a system. That obstacle can be overcome by granting funds to the States, allowing them to administer the program. That is fair and constitutional enough when the States freely agree to have their powers employed and their employees enlisted in the federal scheme. But it is a blatant violation of the constitutional structure when the States have no choice.

The Act before us here exceeds federal power both in mandating the purchase of health insurance and in denying nonconsenting States all Medicaid funding. These parts of the Act are central to its design and operation, and all the Act's other provisions would not have been enacted without them. In our view it must follow that the entire statute is inoperative.

## I

### The Individual Mandate

Article I, § 8, of the Constitution gives Congress the power to “regulate Commerce ... among the several States.” The Individual Mandate in the Act commands that every “applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage.” If this provision “regulates” anything, it is the failure to maintain minimum essential coverage. One might argue that it regulates that failure by requiring it to be accompanied by payment of a penalty. But that failure—that abstention from commerce—is not “Commerce.” To be sure, purchasing insurance is “Commerce”; but one does not regulate commerce that does not exist by compelling its existence.

## II

### The Taxing Power

Congress has attempted to regulate beyond the scope of its Commerce Clause authority, and § 5000A is therefore invalid. The Government contends, however, as expressed in the caption to Part II of its brief, that “THE MINIMUM COVERAGE PROVISION IS INDEPENDENTLY AUTHORIZED BY CONGRESS’S TAXING POWER.” The phrase “independently authorized” suggests the existence of a creature never hitherto seen in the United States Reports: A penalty for constitutional purposes that is also a tax for constitutional purposes. In all our cases the two are mutually exclusive. The provision challenged under the Constitution is either a penalty or else a tax. Of course in many cases what was a regulatory mandate enforced by a penalty could have been imposed as a tax upon permissible action; or what was imposed as a tax upon permissible action could have been a regulatory mandate enforced by a penalty. But we know of no case, and the Government cites none, in which the imposition was, for constitutional purposes, both. The two are mutually exclusive. Thus, what the Government’s caption should have read was “ALTERNATIVELY, THE MINIMUM COVERAGE PROVISION IS NOT A MANDATE-WITH-PENALTY BUT A TAX.” It is important to bear this in mind in evaluating the tax argument of the Government and of those who support it: The issue is not whether Congress had the power to frame the minimum-coverage provision as a tax, but whether it did so.

Our cases establish a clear line between a tax and a penalty: “[A] tax is an enforced contribution to provide for the support of government; a penalty ... is an exaction imposed by statute as punishment for an unlawful act.” In a few cases, this Court has held that a “tax” imposed upon private conduct was so onerous as to be in effect a penalty. But we have never held —

*never* — that a penalty imposed for violation of the law was so trivial as to be in effect a tax. We have never held that any exaction imposed for violation of the law is an exercise of Congress’ taxing power—even when the statute calls it a tax, much less when (as here) the statute repeatedly calls it a penalty. When an act “adopt[s] the criteria of wrongdoing” and then imposes a monetary penalty as the “principal consequence on those who transgress its standard,” it creates a regulatory penalty, not a tax.

That § 5000A imposes not a simple tax but a mandate to which a penalty is attached is demonstrated by the fact that some are exempt from the tax who are not exempt from the mandate—a distinction that would make no sense if the mandate were not a mandate. Section 5000A(d) exempts three classes of people from the definition of “applicable individual” subject to the minimum coverage requirement: Those with religious objections or who participate in a “health care sharing ministry;” those who are “not lawfully present” in the United States; and those who are incarcerated. Section 5000A(e) then creates a separate set of exemptions, excusing from liability for the penalty certain individuals who are subject to the minimum coverage requirement: Those who cannot afford coverage; who earn too little income to require filing a tax return; who are members of an Indian tribe; who experience only short gaps in coverage; and who, in the judgment of the Secretary of Health and Human Services, “have suffered a hardship with respect to the capability to obtain coverage.” If § 5000A were a tax, these two classes of exemption would make no sense; there being no requirement, all the exemptions would attach to the penalty (renamed tax) alone.

## § 2.04 FEDERAL LEGISLATION IN AID OF CIVIL RIGHTS AND LIBERTIES

**Add before *City of Boerne v. Flores*:**

***Shelby County v. Holder*, 133 S. Ct. 2612 (2013):** Shelby County, Alabama, a covered jurisdiction under section 4 of the Voting Rights Act of 1965, brought suit against the Attorney General of the United States, seeking a declaratory judgment that sections 4(b) and 5 of the Act are facially unconstitutional. The Supreme Court found the coverage formula of section 4 (which determined to what states the requirements of section 5 applied) “unconstitutional in light of current conditions.” In an opinion by the Chief Justice, the Court found that the Voting Rights Act “sharply departs” from the basic principles of federalism, state sovereignty, and equal sovereignty among the states. Although the coverage formula made sense in 1964, “the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.” The formula of section 4 “looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both.” The Court held that this formulation could no longer be justified by current needs and the geographic distribution of discrimination, because “coverage today is based on decades-old data and eradicated practices.” The Court concluded that “today’s statistics tell an entirely different story.”

In dissent, Justice Ginsburg indicated that she would uphold Congress’s determination due to the continued necessity of the Voting Rights Act. In a footnote, she pointed out that “The Court purports to declare unconstitutional only the coverage formula set out in s 4(b). ... But without that formula, § 5 is immobilized.” She would have deferred to the exercise of congressional discretion: “With overwhelming support in both Houses, Congress concluded that, for two prime reasons, § 5 should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would guard against backsliding. Those assessments were well within Congress’ province to make and should elicit this Court’s

unstinting approbation.” The problems that spurred enactment of the Voting Rights Act in the first place remain, she argued, and “jurisdictions covered by the preclearance requirement continue[ ] to submit, in large numbers, proposed changes to voting laws that the Attorney General declined to approve, arguing that barriers to minority voting would quickly resurface were the preclearance remedy eliminated.” She believed that rational basis is the correct standard for reviewing the constitutionality of legislation implementing the Civil War amendments.

## **§ 2.05 THE ELEVENTH AMENDMENT**

**Add at end of page 215:**

In *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012), a unanimous Court distinguished *Hibbs* and held that the self-care provision of the Family and Medical Leave Act was not a valid abrogation of the States’ immunity from suit. Unlike the “family-care” provisions, the self-care provision obliged employers to permit unpaid leave for serious health conditions of the employee him- or herself. The Court found that the evidence before Congress when the FMLA was enacted was replete with evidence of sex distinctions in the application of leaves of absence for care of family members, but that there was no evidence of discrimination with regard to self-care. “Without widespread evidence of sex discrimination or sex stereotyping in the administration of sick leave, it is apparent that the congressional purpose in enacting the self-care provision is unrelated to” discrimination that could be addressed under the Fourteenth Amendment. Therefore, it failed to qualify under Section 5’s authorization of remedial measures for constitutional violations.

## **Chapter 3 STATE POWER IN AMERICAN FEDERALISM**

[see *Arizona State Legislature v. Arizona Independent Redistricting Commission*, § 2.01 *supra*]

### **§ 3.02 THE MODERN FOCUS**

#### **[D] Interstate Privileges and Immunities**

**Add at end of note 4:**

In *McBurney v. Young*, 133 S. Ct. 1709 (2013), the Court returned to the issue of what federally protected rights are “fundamental” for purposes of the Privileges and Immunities Clause. The case concerned the constitutionality of Virginia’s Freedom of Information Act, which provides that “all public records shall be open to inspection and copying by any citizens of the Commonwealth,” but failed to grant such rights to non-residents. Two out-of-state citizens who had been denied information under the Act challenged its constitutionality under, inter alia, the Privileges and Immunities Clause. The Supreme Court rejected the challenge, holding that the clause protected only “fundamental” rights and that none of the rights involved reached that level.

Plaintiffs argued that the Virginia statute violated four fundamental rights: “the opportunity to pursue a common calling, the ability to own and transfer property, access to Virginia courts, and access to public information.” The Court acknowledged that the first three are in fact fundamental but found that they had not been violated. Rather, Virginia had enacted the statute to give citizens access to public records so they could hold their elected officials accountable and not to “provide a competitive economic advantage for Virginia citizens. Laws violate the right to a common calling, the Court stated, “only when those laws were enacted for the protectionist purpose of burdening out-of-state citizens,” which clearly was not the case here. Rather, the statute unquestionably has the non-protectionist aim of helping Virginia citizens hold their elected officials accountable. As for the second claim, the Court noted that property records are available through means other than a Freedom of Information Act request — for example, through the courts or online. As for the third claim, the Court held that Freedom of Information Act requests were unnecessary to assure equal access to Virginia’s courts, because “Virginia’s rules of civil procedure provide for both discovery ... and subpoenas *duces tecum*.”

The Court refused to find access to public information to constitute a fundamental right, on the grounds that the right is too broad, has no basis in historical tradition, and is not “basic to the maintenance or well-being of the Union.”

### **§ 3.03 WHEN CONGRESS SPEAKS**

#### **[B] Preemption by Federal Statute**

**Add at end of section:**

*Arizona v. United States*, 132 S. Ct. 2492 (2012). Arizona made major national waves with its 2010 legislation addressing immigration. The essence of the immigration debate is that some states feel threatened by numbers of persons either entering the country illegally or overstaying visas and working illegally. At the same time, federal law does not provide for work visas addressing many of the lower-paying labor-force jobs that foreign workers seem more willing to take than do U.S. citizens. The Arizona law addressing some of the issues was challenged by the federal government on preemption grounds for reasons similar to *Hines v. Davidowitz*. According to Justice Kennedy's majority opinion:

Four provisions of the law are at issue here. Two create new state offenses. Section 3 makes failure to comply with federal alien-registration requirements a state misdemeanor. Section 5, in relevant part, makes it a misdemeanor for an unauthorized alien to seek or engage in work in the State. Two other provisions give specific arrest authority and investigative duties with respect to certain aliens to state and local law enforcement officers. Section 6 authorizes officers to arrest without a warrant a person "the officer has probable cause to believe ... has committed any public offense that makes the person removable from the United States." Section 2(B) provides that officers who conduct a stop, detention, or arrest must in some circumstances make efforts to verify the person's immigration status with the Federal Government.

The majority of the Court upheld section 2(B) (verifying the immigration status of detainees) but struck the remaining three provisions: making it a crime under state law for aliens to fail to register under federal law, making it a crime for aliens to work without federal permission, and providing arrest authority when police have probable cause to believe a person would be deportable under federal law.

All three of the stricken provisions were held to interfere with the discretion afforded to Congress under the immigration and naturalization provisions of the Constitution, as elaborated in *Hines*. The majority emphasized that it is federal policy to determine when and whether to remove a person from the country or to enforce criminal sanctions, and the state law interfered with that discretion.

Justice Scalia dissented from the striking of the three provisions on the ground that the state should have "sovereign" authority to prosecute violations of federal law. Justice Thomas dissented on statutory grounds, finding that there was "no conflict between the ordinary meaning of the relevant federal laws and the provisions of Arizona law at issue here." Justice Alito agreed that, consistent with *Hines*, Arizona could not make a separate state crime of failure to comply with registration requirements but found that the other two provisions did not conflict with federal policy in any significant degree.

Justice Scalia's lengthy review of pre-Constitution history elaborated a view that the States had inherent sovereign authority to guard their own borders and to exclude undesirable aliens. Unless the State directly conflicted with federal law by allowing someone the feds would exclude or excluding someone the feds would allow, the State in his view was free to enforce its law consistent with federal law of who should be allowed to remain. He then created a bit of

controversy by expressing his opinion regarding an executive initiative that could reach the Court at some point in the future: “The President said at a news conference that the new program is “the right thing to do” in light of Congress’s failure to pass the Administration’s proposed revision of the Immigration Act. Perhaps it is, though Arizona may not think so. But to say, as the Court does, that Arizona contradicts federal law by enforcing applications of the Immigration Act that the President declines to enforce boggles the mind.”

## **Chapter 4 EXECUTIVE AND CONGRESSIONAL RELATIONS: SEPARATION OF POWERS**

### **§ 4.02 ALLOCATING THE LAW MAKING POWER**

*Insert in p. 309, at the end of note 4:*

In *Gundy v. United States*, 588 U.S. \_\_ (2019), the Court held that a provision of the Sex Offender Registration and Notification Act (SORNA) did not violate the nondelegation doctrine. The provision in question references the applicability of certain sex offender registry requirements (described in detail in SORNA’s other provisions) to offenders convicted prior to SORNA’s enactment. More specifically, the provision assigns to the Attorney General the power to “specify the applicability” of these SORNA requirements to pre-Act offenders and to “prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with the provision requiring sex offenders to register prior to their release from prison. The Attorney General had declared that SORNA’s registration requirements would apply in full to pre-Act offenders. The delegation of such discretionary authority to the Attorney General was challenged as an unconstitutional delegation of legislative power.

The Court held that the provision did not violate the nondelegation doctrine, because it dictates a limit on the Attorney General’s discretion by requiring him to apply the relevant SORNA directives to pre-Act offenders “as soon as possible.” Justice Kagan, speaking for the four-justice plurality, reiterated the “intelligible principle” standard. The provision, the plurality concluded, satisfies that standard because the grant of authority to the Attorney General is not “unchecked” or “unguided”.

Justice Gorsuch, speaking for three justices, dissented. In so doing, he differed with the plurality’s construction of the statutory provision in question. The provision, in his view, “purports to endow the nation’s chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens.” He attacked the “intelligible principle” test, arguing that its history reveal that it was originally meant to comport with the traditional interpretation of separation of powers principles but that, over time, courts have stretched it too far.

#### **Add after *Free Enterprise Fund* etc. on p. 344 before [b] Sentencing Commission Recess Appointments:**

*NLRB v. Canning*, 134 S. Ct. 2550 (2014). In 2012 Noel Canning, a Pepsi-Cola distributor was ordered by the National Labor Relations Board (NLRB) to execute a collective bargaining agreement with a labor union and make whole the employees who were harmed by his initial delay in doing so. Instead of complying with the order, Canning filed suit in the U.S. Court of Appeals for the District of Columbia, alleging the order was invalid because three of the five Board members were not validly appointed. The three members of the Board who were being challenged had been appointed by President Obama on January 4, 2012, under authority granted to him by the Recess Appointment Clause. The Senate had adjourned on December 17 for a series “of brief recesses,” where it held *pro forma* sessions every Tuesday and Friday until it returned to regular business on January 23. Canning claimed that the three day recess during which President Obama appointed the three directors was not long enough to trigger the President’s power under the Recess Appointment Clause. The Court of Appeals ruled that the three appointments at issue were outside the authority granted to the President under the Recess Appointments Clause. The

Supreme Court affirmed on different grounds.

Justice Breyer delivered the opinion of the Court. He summarized the relevant constitutional text:

Ordinarily, the President must obtain “the Advice and Consent of “the Senate” before appointing an “Office[r] of the United States.” U.S. Const. Art. II, 52, cl. 2. But the Recess Appointments clause creates an exception. it gives the President alone the power “to fill up all vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the end of their next session.” Art. II, Sec. 2, cl. 3.

The Court said it would address three questions raised by the Recess Appointments Clause. They concern the meaning of the phrase “recess of the Senate.” The first question is whether that phrase refers “only to an inter-session recess (*i.e.*, a break between formal sessions of Congress) or does it also include an intra-session recess, such as a summer recess in the midst of a session?” the court concluded that the phrase embraced “both kinds of recess.” The second question involved the meaning of the words “vacancies that may happen.” The issue was whether those words “refer only to vacancies that first come into existence during a recess.” Or did it “also include vacancies that arise prior to a recess but continue to exist during the recess.” The Court concluded that the Clause applied both “kinds of vacancy.” The third question concerned the “calculation of the length of a ‘recess.’” Justice Breyer pointed out the appointments at issue occurred when “the Senate was in the midst of a 3-day recess. Three days is too short a time to bring a recess within the scope of the Clause.” The Court concluded that the Recess Appointments Clause did not authorize the President “to make the recess appointments here at issue.”

Before explaining the Court’s rationale for resolving the foregoing three issues, Justice Breyer said there were two relevant background considerations: “First, the Recess Appointments Clause sets forth a subsidiary, not a primary method for appointing officers of the United States. Second, in interpreting the Clause we put significant weight upon historical practice.”

Turning to the first question, the Court reasoned that the Recess Appointment Clause allows the President to make appointments during *intra* and *inter* session recesses because that interpretation best follows the purpose of the Clause and is consistent with historical practice. The purpose of the clause is to allow the President to make appointments while Congress is away. Justice Breyer notes that Congress is “equally away during both an inter-session and an intra-session recess.” Justice Breyer noted that during the first substantial intra-session recess, President Andrew Johnson made “dozens” of appointments. With the increase of intra-session breaks after WWII, Presidents have made “thousands” of intra-session appointments. Disagreeing with Justice Scalia’s concurrence, Justice Breyer did not accept that because there were no intra-session recesses at the Founding, the Constitution forbids recess appointments during intra-sessions. Because the Constitution is a document designed to apply to “ever-changing” circumstances, it is likely the founders “did intend the Clause to apply to a new circumstance that so clearly falls within its essential purpose.” The majority also rejects Justice Scalia’s critique that its decision introduces “vagueness to a Clause which was otherwise clear.” Justice Scalia contends that because the text of the Clause does not articulate how long a recess must be for the President’s Recess Appointment powers to be triggered, it must therefore only apply to inter-session recess. But Justice Breyer pointed out in response: “The Senate is equally away during both an inter-session and an intra-session recess, and its capacity to participate in the appointments process has nothing to do with the words it uses to signal its departure.” Furthermore, Justice

Breyer noted that “to the extent that the Senate or a Senate committee has expressed a view, that view has favored a functional ‘recess,’ and a functional definition encompasses intra-session recesses.” The real “interpretive problem” was “to determine how long a recess must be to fall within the Clause.” Resorting to history, Justice Breyer observed: “And though Congress has taken short breaks for almost 200 years, and there have been many thousands of recess appointments in that time, we have not found a single example of a recess appointment made during an intra-session recess that was shorter than 10 days.” In light of this history, the Court concluded: “[A] recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause.” A national catastrophe of course might necessitate a “shorter break.” Furthermore, “the phrase ‘the recess’ applies to both intra-session and inter-session recesses.”

Moving to the second question, the Court found that the Appointment Clause applies to both vacancies that arise during a recess as well as vacancies which initially occur before a recess begins. The Clause states that all “vacancies that may happen during the recess of the Senate” may be filled by the President. Justice Breyer admits that the language “does not naturally favor” a broad interpretation, but he reasons that the language is ambiguous. In view of the potentially negative consequences of a narrow reading and the historical usage of the Clause, he concludes vacancies which occur before and during a recess are covered. Several negative consequences would flow if the President could only appoint vacancies that occur during a recess. The goal of the Clause is to permit the President to “obtain the assistance of subordinate officers.” A narrow interpretation would defeat the purpose of the Clause by denying the President the aid of his subordinates no matter “how dire the need, no matter how uncontroversial the appointment, and no matter how late in the session the office fell vacant.”

The Court relied on the historical usage of the Clause to support its argument. James Madison filled several vacancies that arose before a recess without the advice and confirmation of the Senate. President James Monroe’s Attorney General advised him that he had such power and “nearly every subsequent Attorney General to consider the question throughout the nation’s history has thought the same.” The Senate has passed laws refusing to pay Presidential appointees who are appointed during a recess, but “the overwhelming mass of actual practice supports the President’s interpretation.” Even the Senators passing this legislation acknowledged the “President has authority to make a recess appointment[s] to fill *any* vacancy.”

The Court concluded:

The upshot is that the President has consistently and frequently interpreted the Recess Appointments Clause to apply to vacancies that initially occur before, but continue to exist during, a recess of the Senate. The Senate as a body has not countered this practice for nearly three-quarters of a century, perhaps longer. See A. Amar, *The Unwritten Constitution* 576-577, n. 16 (2012) (for nearly 200 years “the overwhelming mass of actual practice” supports the President’s interpretation); *Mistretta v. United States*, (1989) (a “200-year tradition” can ‘give meaning’ to the Constitution” (quoting *Youngstown*, (Frankfurter, J., concurring))). The tradition is long enough to entitle the practice “to great regard in determining the true construction” of the constitutional provision. *The Pocket Veto Case*. And we are reluctant to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long. In light of some linguistic ambiguity, the basic purpose of the Clause, and the historical practice we have described, we conclude that the phrase “all vacancies” includes vacancies that come into existence while the Senate is in session.

The third question “concerned the calculation of the length of the Senate’s ‘recess’” with respect to this case:

The third question concerns the calculation of the length of the Senate’s “recess.” On December 17, 2011, the Senate by unanimous consent adopted a resolution to convene “*pro forma* session[s] only, with “no business ... transacted,” on every Tuesday and Friday from December 20, 2011, through January 20, 2012. 2011 S. J. 923. At the end of each *pro forma* session, the Senate would “adjourn until” the following *pro forma* session. During that period, the Senate convened and adjourned as agreed. It held *pro forma* sessions on December 20, 23, 27, and 30, and on January 3, 6, 10, 13, 17, and 20; and at the end of each *pro forma* session, it adjourned until the time and date of the next.

We must determine the significance of these sessions—that is, whether, for purposes of the Clause, we should treat them as periods when the Senate was in session or as periods when it was in recess. If the former, the period between January 3 and January 6 was a 3-day recess, which is too short to trigger the President’s recess-appointment power. If the latter, however, then the 3-day period was part of a much longer recess during which the President did have the power to make recess appointments. see *idid*.

The Solicitor General argued that the *pro forma* sessions should be treated “as periods of recess” because these sessions “were sessions in name only because the Senate was in recess as a *functional* matter.” Basically, nothing happened during these *pro forma* sessions. The Court disagreed: “In our view, however, the *pro forma* sessions count as sessions, not as periods of recess. We hold that, for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business. The Senate met that standard here.” Because the Senate was in session during its *pro forma* meetings, and therefore the recess where President Obama made the appointments was only three days long, the recess was not long enough to authorize use of the President’s recess appointment powers. Therefore, the three NLRB appointees were not properly appointed.

The Court concluded its opinion with an analysis of the role the Recess Appointments Clause plays in the American constitutional system:

The Recess Appointments Clause responds to a structural difference between the Executive and Legislative Branches. The Executive Branch is perpetually in operation, while the Legislature only acts in intervals separated by recesses. The purpose of the Clause is to allow the Executive to continue operating while the Senate is unavailable. We believe that the Clause’s text, standing alone, is ambiguous. It does not resolve whether the President may make appointments during intra-session recesses, or whether he may fill pre-recess vacancies. But the broader reading better serves the Clause’s structural function. Moreover, that broader reading is reinforced by centuries of history, which we are hesitant to disturb. We thus hold that the Constitution empowers the President to fill any existing vacancy during any recess—intra-session or inter-session—of sufficient length.

JUSTICE SCALIA would render illegitimate thousands of recesses appointments reaching all the way back to the founding era. More than that: Calling the Clause

an “anachronism,” he would basically read it out of the Constitution. He performs this act of judicial excision in the name of liberty. We fail to see how excising the Recess Appointments Clause preserves freedom. In fact, Alexander Hamilton observed in the very first Federalist Paper that “the vigor of government is essential to the security of liberty.” The Federalist No. 1, at 5. And the Framers included the Recess Appointments Clause to preserve the “vigour of government” at times when an important organ of Government, the United States Senate, is in recess. JUSTICE SCALIA’s interpretation of the Clause would defeat the power of the Clause to achieve that objective.

The foregoing discussion should refute JUSTICE SCALIA’s claim that we have “embraced[d]” an “adverse-possession theory of executive power.” Instead, as in all cases, we interpret the Constitution in light of its text, purposes, and “our whole experience” as a nation. *Missouri v. Holland*, (1920). And we look to the actual practice of Government to inform our interpretation.

Given our answer to the last question before us, we conclude that the Recess Appointments Clause does not give the President the constitutional authority to make the appointments here at issue. Because the Court of Appeals reached the same ultimate conclusion (though for reasons we reject), its judgment is affirmed.

Justice Scalia, with whom the Chief Justice, Justice Thomas and Justice Alito join, did not join the Court’s opinion but concurred in the judgment only. Justice Scalia notes that the Constitution “cabins” the President’s recess appointment powers by only allowing appointments in the “intermission between two formal sessions of Congress” and only allowing appointments for vacancies which arise during the time Congress is away. This limitation is “clear from the Constitution’s text and structure, and both were well understood at the founding.”

Justice Scalia begins by reminding the majority of the importance of the judiciary’s responsibility to “say what the law is.” The “government-structuring provisions” are just as important as the Bill of Rights, and the Court should not “defer to the other branches’ resolution of such controversies.” Therefore, prior history of the “self-aggrandizing” executive branch use of the Clause is of limited value in constitutional interpretation in this context. The plain meaning of the Clause, Justice Scalia contend is that “the Recess” is not a Senate break longer than ten days but instead is exclusively the period between two of the Senate’s formal sessions. The very language of “the Recess” indicates a single recess as opposed to several. Because the Court reads “the Recess” colloquially and separates it from its original meaning, it no longer has a textual basis to determine how long a recess must be before the President is allowed to use the Recess Appointments Clause. Although Justice Scalia believes the historical practices of the two political branches are “irrelevant when the Constitution is clear,” he proceeds to outline why the historical practices do not support the majority’s conclusions. Intra-session recess appointments “were virtually unheard of for the first 130 years of the Republic,” were not “made in significant numbers until after WWII,” and bipartisan groups of Senators have criticized the appointments as unconstitutional.

Justice Scalia also contends that recess appointments may only be used to fill vacancies that arise during a recess and not those which already exist. No “reasonable reader” could read the constitutional language, (vacancies which “happen during the Recess of the Senate”) and conclude it meant to include vacancies which happen before the Recess. He points out that the 1<sup>st</sup> and 3<sup>rd</sup> Congress specifically allowed the President to fill vacancies without their advice and

consent if they were at recess. This would “have been superfluous” if that power was granted specifically to the President by the Constitution. Justice Scalia stresses the importance of the Senate as a check on Executive power. This check which would be wiped out if a President could merely appoint officials for all vacancies when Congress was at recess. Looking to the historical practice, Justice Scalia notes that the majority’s interpretation did not gain acceptance until “the mid-19<sup>th</sup> Century.” But this was only in the executive branch. In response to President Abraham Lincoln using the Appointment Clause to fill a vacancy which existed prior to a recess, a Senate Committee in 1863 stated quite clearly that a vacancy “must have its inception point after one session has closed and before another session has begun.” The Senate then passed the Pay Act, which refused to pay the salaries of officials who were not appointed in this way. Justice Scalia concludes that the historical practice of recess appointments outside of those which arise during an inter-session recess is “ambiguous at best.” However, this ambiguous record cannot overcome the “clear text” of the Constitution.

Justice Scalia concluded his concurrence as follows:

The majority replaces the Constitution’s text with a new set of judge-made rules to govern recess appointments.

The real tragedy of today’s decision is not simply the abolition of the Constitution’s limits on the recess appointment power and the substitution of a novel framework invented by this Court. It is the damage done to our separation-of-powers jurisprudence more generally. It is not every day that we encounter a proper case or controversy requiring interpretation of the Constitution’s structural provisions. Most of the time, the interpretation of those provisions is left to the political branches—which, in deciding how much respect to afford the constitutional text, often take their cues from this Court. We should therefore take every opportunity to affirm the primacy of the Constitution’s enduring principles over the politics of the moment. Our failure to do so today will resonate well beyond the particular dispute at hand. Sad, but true: The Court’s embrace of the adverse-possession theory of executive power (a characterization the majority resists but does not refute) will be cited in diverse contexts including those presently unimagined, and will have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining respect for the separation of powers.

#### **Add right after *NLRB v. Canning* and just before Sec. 4.03 The Foreign Arena**

In ***Lucia v. Securities and Exchange Commission***, 138 S. Ct. 2044 (2018), the Supreme Court, per Justice Kagan, held that the administrative law judges of the Securities and Exchange Commission were “Officers of the United States” under the Appointment Clause and that their appointments were invalid since they were not appointed by the Commission itself but instead by SEC staff employees.

Raymond Lucia was charged by the Securities and Exchange Commission with violating a federal securities law, the Investment Advisers Act. The case was assigned to one of the five SEC Administrative Law Judges, ALJ Cameron Elliott. He held a hearing and found that Lucia had violated the Investment Advisers Act. Judge Elliot imposed sanctions including a civil penalty of \$300,000 and a prohibition for his lifetime from participating in the investment industry. Lucia appealed Judge Elliott’s decision to the SEC contending that the proceeding was not valid because Judge Elliott lacked a constitutional appointment.

Lucia argued that Elliott’s appointment as an SEC ALJ was in violation of the Appointments Clause of the U.S. Constitution, Art. II, Sec. 2, cl. 2, because as an SEC ALJ he was an “Officer of the United States.” The Appointments Clause provides that “Officers of the United States” can only be appointed by the President, “Courts of Law,” or “Heads of Departments.” SEC Commissioners were “Heads of Departments” but they did not appoint SEC ALJs. Instead, they were appointed by SEC staff employees. The SEC and the D.C. Circuit rejected Lucia's argument and held that SEC ALJs like Cameron Elliott were not “Officers of the United States” but were instead just SEC employees.

The Supreme Court reversed the decision of the United States Court of Appeals for the D.C. Circuit and ruled that the SEC ALJs are “Officers of the United States.” Under Supreme Court case law, an “Officer of the United States” must meet two requirements to be properly appointed under the Appointments Clause. The first requirement was set forth in *U.S. v. Germaine*, 99 U.S. 508 (1879), which held that to be an “Officer of the United States” one had to hold a continuing position established by law. The second requirement was set forth in *Buckley v. Valeo*, 424 U.S. 1 (1976), which held that an “Officer of the United States” “must exercise significant authority pursuant to the laws of the United States.” The Court strongly relied on *Freytag v. Commission*, 501 U.S. 868 (1991), for its analysis. *Freytag* held that the “special trial judges [STJs] of the U.S. Tax Court were “Officers of the United States.” Justice Kagan summarized *Freytag* as follows:

*Freytag* says everything necessary to decide this case. To begin, the [SEC] Commission ALJs, like the Tax Court’s STJs, hold a continuing office established by law... Still more the Commission ALJs exercise the same “important functions” as STJs do. Both sets of officials have all the authority needed to ensure fair and orderly adversarial hearings – indeed, nearly all tools of federal trial judges.

Justice Kagan concluded her opinion by discussing the appropriate relief: [T]he appropriate remedy for an adjudication tainted with appointments violation is a new “hearing before a properly appointed “official... That official cannot be Judge Elliott even if he has by now received (or receives sometime in the future) a constitutional appointment... He cannot be expected to consider the matter as though he had not adjudicated it before. To cure the constitutional error, another ALJ (on the Commission itself) must hold the new hearing to which Lucia is entitled.

Justice Sotomayor, joined by Justice Ginsburg, dissented:

I would hold that Commission ALJs are not officers because they lack final decision making authority. As the Commission explained below, the Commission retains plenary authority over the course of [its] administrative proceedings and the rulings of [its] law judges. Commission ALJs can issue only “initial” decisions.

#### **§ 4.03 THE FOREIGN ARENA**

##### **[A] The Foreign Affairs Power**

##### **[1] Presidential Authority**

**Page 356 before § 4.03[2]:**

*Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015). Ever since President Truman recognized the sovereignty of Israel in 1948, Presidents have refused to recognize any country's sovereignty over Jerusalem, taking the position that "the status of Jerusalem . . . should be decided not unilaterally but in consultation with all concerned." Pursuant to that policy, the State Department lists Jerusalem, rather than Israel, as the place of birth on the passports of United States citizens born in Jerusalem. In 2002, Congress declared that "for purposes of . . . issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." Zivotofsky's parents so requested but the State Department followed presidential policy and issued the passport with place of birth as Jerusalem.

Plaintiffs contended in this lawsuit that Congress' control over matters of immigration and naturalization would include power over the nature of passports, a position that the Court conceded was relevant. Justice Kennedy's majority opinion, however, reiterated the long-standing position that the President has the exclusive power to recognize the legitimate government of a territory,

The formal act of recognition is an executive power that Congress may not qualify. If the President is to be effective in negotiations over a formal recognition determination, it must be evident to his counterparts abroad that he speaks for the Nation on that precise question.

A clear rule that the formal power to recognize a foreign government subsists in the President therefore serves a necessary purpose in diplomatic relations. All this, of course, underscores that Congress has an important role in other aspects of foreign policy, and the President may be bound by any number of laws Congress enacts. In this way ambition counters ambition, ensuring that the democratic will of the people is observed and respected in foreign affairs as in the domestic realm.

Chief Justice Roberts stated in dissent: "Today's decision is a first. Never before has this court accepted a president's direct defiance of an act of Congress in the field of foreign affairs." The Chief Justice disputed the majority's reading of text, history, and structure of the Constitution and added that this dispute was actually just about how someone is identified on his or her passport, maybe not a matter of global significance. "But even if the President does have exclusive recognition power, he still cannot prevail in this case, because the statute at issue does not implicate recognition."

Justice Scalia, generally regarded as a staunch proponent of strong Executive power, announced his dissent from the bench and added these oral comments: "A principle that the nation must have a single foreign policy, which elevates efficiency above the text and structure of the Constitution, will systematically favor the president at the expense of Congress. It is possible that it will make for more effective foreign policy, perhaps as effective as that of Bismarck or King George. But it is certain that, in the long run, it will erode the structure of equal and separated powers that the people established for the protection of their liberty." Adam Liptak, "Supreme Court Backs White House on Jerusalem Passport Dispute," <http://www.nytimes.com/2015/06/09/us/politics/supreme-court-backs-white-house-on-jerusalem-passport-dispute.html> (June 8, 2015).

*In Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court, per Chief Justice Roberts, upheld 5-4, a Proclamation issued by President Trump banning or restricting entry to the United States by nationals from seven nations. Most of the nations affected had Muslim majorities. The Court held that the travel ban was authorized by the Immigration and Naturalization Act [INA] and that it did not violate the Establishment Clause of the First Amendment. In the fall of 2017 President Trump issued a Proclamation designed in the interest of national security to improve vetting procedures for foreign nationals seeking to enter the U.S. Accordingly, the State Department and the Department of Homeland Security developed a risk assessment baseline “which evaluated data for all foreign governments” and then identified those which had unsatisfactory information-sharing practices *vis-à-vis* national security as well as those which were deemed to be “at risk” in terms of meeting the risk-assessment baseline.

After a 50-day period the Acting Secretary of DHS determined the security procedures of eight countries were deficient—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela and Yemen. The Acting Secretary recommended entry restrictions on certain nationals who came from those countries with the exception of Iraq. Iraq was removed from the ban because of its history of cooperation with the U.S. However, Somalia was added to the list of countries subject to the entry restrictions due to the large terrorist contingent in that country. President Trump accepted the recommendation of the Acting Secretary of DHS and issued a Proclamation based on her authority under two provisions of federal law, 8 U.S.C. Sec. 1182(f) and Sec. 1185 (a) of the INA. The Proclamation imposed country-specific entry restrictions based on the distinct circumstances that existed in each of the eight countries.

The Proclamation exempted lawful residents and in addition provided for the granting of case-by-case waivers depending on the circumstances. DHS was directed to provide an on-going assessment of the entry restrictions in order to determine whether the restrictions should be modified or retained. Indeed, after the first review period it was determined that Chad had improved its security practices and it was removed from the list of countries whose nationals were subject to entry restrictions.

A group of plaintiffs brought suit in the federal district court of Hawaii challenging the Proclamation (except as applied to North Korea and Venezuela) on two grounds. First, they contended the Proclamation was in violation of provisions of the INA and, second, the Proclamation violated the Establishment Clause of the First Amendment. The plaintiffs alleged that the Proclamation violated the Establishment Clause because “it was motivated not by concerns pertaining to national security but by animus toward Islam.” The plaintiffs consisted of the State of Hawaii, three individuals and the Muslim Association of Hawaii which operates a Mosque in Hawaii. The State of Hawaii operates the University of Hawaii, a state-wide system. The three individual plaintiffs were either U.S. citizens or lawful permanent residents who have relatives from Iran, Syria, and Yemen applying for immigrant or nonimmigrant visas.

The federal district court granted a nationwide preliminary injunction barring enforcement of the entry restrictions. The federal government sought a stay of the district court ruling from the Ninth Circuit. That court granted a partial stay, permitting enforcement of the Proclamation with respect to foreign nations lacking a *bona fide* relationship with the U.S. The Supreme Court stayed the injunction pending disposition of the government’s appeal. The Ninth Circuit affirmed the federal district court’s ruling. The Ninth Circuit like the district court relied on statutory grounds for its ruling. The Ninth Circuit did not consider the plaintiffs’ Establishment Clause Claim.

The Supreme Court assumed without deciding that plaintiffs’ statutory claims were reviewable. The Court then engaged in an extensive analysis of 8 U.S.C. Sec. 1182(f). That provision states:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by

proclamation and for such period, as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or non-immigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

Chief Justice Roberts summarized the Court’s view of Sec. 1182(f):

By terms, Sec. 1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry (“[w]henver [he] finds that the entry of aliens would be detrimental” to the national interest); whose entry to suspend (“all aliens or any class of aliens”) for how long (“for such period as he shall deem necessary”); and on what conditions (“any restrictions he may deem to be appropriate”). It is therefore unsurprising that we have previously observed that Sec. 1182(f) vests the President with “ample power” to impose entry restrictions in addition to those elsewhere enumerated.

The Court next turned to the plaintiffs’ claim that the Proclamation was based on an unconstitutional purpose – to exclude Muslims. Before considering this contention the Court first considered whether the plaintiffs had constitutional standing to raise the constitutional objection. The plaintiffs argued that the Proclamation “establishes a disfavored faith – Islam. The plaintiffs asserted their right to be free from federal religious establishments and that their injury in this regard was “spiritual and dignitary.” The Court responded that it was not necessary to consider whether “the claimed dignitary interest” was an “adequate ground for standing.” The three individual plaintiffs assert a more concrete injury, “the alleged real-world effect” that the Proclamation has in separating them from certain relatives who wish to enter the U. S.: “We agree that a person’s interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact.”

The plaintiffs relied on a principle stated in *Larson v. Valente*, 456 U.S. 228 (1982): “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” Yet, they contend, the Proclamation targets Muslims “for disfavored treatment because it functions as a ‘religious gerrymander.’” Most of the nations mentioned in the Proclamation have “Muslim-majority populations.” Furthermore, the plaintiffs assert that the government’s concerns about vetting and national security were just “pretexts for discriminating against Muslims.” The plaintiffs noted that Presidential-candidate Trump called for a “a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.” Indeed, they pointed to many other anti-Muslim statements by President Trump justifying a travel ban on Muslims.

Chief Justice Roberts for the Court responded to the significance of these comments as follows:

Plaintiffs argue that this President’s words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statement of a particular President, but also the authority of the President itself.

Chief Justice Roberts pointed out that foreign nationals have no constitutional right to entry to the United States. In *Kleindienst v. Mandel*, 408 U.S. 753 (1972), a “Belgian journalist and self-described ‘revolutionary Marxist’” who had been invited to speak at Stanford University was denied admission to the U.S. The Supreme Court upheld the denial and limited its review to whether the Executive Branch had given a “facially legitimate and bona fide” rationale for its denial. The

Court reasoned that *Mandel's* narrow standard of review has great weight in immigration and naturalization cases which overlap weight national security considerations. Rules of constitutional law which would limit Presidential flexibility to adapt to a world in flux should be approached with great caution. Therefore, the Court assumes that it can “look behind the fact of the Proclamation to the extent of applying rational basis review.” This standard of review asks whether “the entry policy” is reasonably related to the “Government’s stated objective to protect the country and improve vetting processes.” The plaintiffs’ “extrinsic evidence will be considered” but the government policy will be upheld if it “can reasonably be understood to result from justification independent of unconstitutional grounds.”

Chief Justice Roberts declared that if “there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility. We must accept that independent justification.” Unlike this case, the state constitutional amendment struck down in *Romer v. Evans*, 577 U.S. 620 (1996) had no relationship to any factual context related to a “legitimate state interest.” The breadth of the amendment was so discontinuous with the reasons offered by State to support it that it was “inexplicable by anything but animus.” This is not true of the Proclamation:

The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion.

Furthermore, there are three additional reasons for the government’s claim that the Proclamation serves a legitimate national security interest. First, since entry restrictions were first introduced on January 2017, three countries have been removed from the list of countries covered by the Proclamation: Iraq, Sudan and Chad. Second, countries subject to entry restrictions under the Proclamation are granted significant exceptions for some categories of foreign nationals. One such exception is that nationals of nearly every covered country are permitted to travel to the U.S. “on a variety of nonimmigrant visas.” Third, the Proclamation establishes a waiver program that is “open to all covered nationals seeking entry as immigrants or nonimmigrants.”

Chief Justice Roberts then rejected the argument of the dissenters that this case paralleled *Korematsu v. United States*, 323 U.S. 214 (1944). Chief Justice Roberts denied that *Korematsu* has anything to do with this case: “[I]t is wholly inapt to liken [the] morally repugnant order [in *Korematsu*] to a facially neutral policy denying certain foreign nationals the privilege of admission.” However, Chief Justice Roberts said that the reference of the dissenters to *Korematsu* provides the Court with the opportunity to declare that “*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history and – to be clear – “has no place in law under the Constitution.”

The Court ruled that the Government has set forth a “sufficient national security justification to survive rational basis review.” While expressing no view “on the soundness of the policy,” the Court held plaintiffs had failed to demonstrate “a likelihood of success on the merits of their claims.” Therefore, the Court reversed the grant of the preliminary injunction below as an “abuse of discretion.” Because the Court was reversing the Court of Appeals and remanding the case, it was not necessary to consider “the propriety of the nationwide scope of the injunction issued by the federal district court.”

Justice Breyer, joined by Justice Kagan, dissenting, contended that the question of whether the President’s Proclamation was lawful depended on the answers to two questions. If the Proclamation or its content was significantly motivated by religious animus against Muslims, then it would violate both the statute at issue as well as the First Amendment. If, however, the sole *ratio decidendi* behind the Proclamation was national security, “then it would be unlikely to violate either the statute or the Constitution.” Justice Breyer noted that the Proclamation’s “elaborate system of exemptions and

waivers” and the Government’s response to it might help provide an answer to these questions. However, on the basis of available data he observed that very few waivers and exemptions had been granted to nationals from the affected countries:

[I]f the Government is not applying the Proclamation’s exemption and waiver system, the claim that the Proclamation is a “Muslim ban,” rather than a “security-based” ban becomes much stronger.

However, with respect to this data, the Government has not “had an opportunity to respond” nor has a court “had an opportunity to decide.” Assurance is needed that the Proclamation is not in fact a “Muslim ban.” Therefore, Justice Breyer would remand the case to the district court so that it could examine the “exemption and waiver” issues. Furthermore, he would leave the injunction in effect. He observed that the Court’s decision “leaves the District Court free to explore these issues on remand.” If there is no further litigation, he would find the “evidence of antireligious bias” such as the President’s anti-Muslim statements set forth in Justice Sotomayor’s dissent “a sufficient basis to set the Proclamation aside.”

Justice Sotomayor, joined by Justice Ginsburg, dissenting, set forth a great many public statements by President Trump “from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith.” She noted that President Trump “has never disavowed any of his prior statements about Islam.” Instead, he has persisted in “making remarks that a reasonable observer would view as an unrelenting attack on the Muslim religion and its followers.”

Justice Sotomayor protested the Court’s decision to apply rational-basis scrutiny in its review of the Proclamation. In the light of *McCreary County v. ACLU*, 545 U.S. 844 (2005) and *Larson v. Valetne*, 456 U.S. 228 (1982), where the Court applied a “more stringent standard of review” in Establishment Clause cases, she found the Court’s approach to be perplexing. Under a heightened standard of review, “the Proclamation is plainly unconstitutional. “She noted that unlike *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 2018), where the “state commissioners’ statements about religion” were found to be “pervasive evidence of unconstitutional government action,” here the majority completely treats the President’s “charged statements about Muslims as irrelevant.” Furthermore, she asserted that in the majority’s reasoning in this case and that of the Court in *Korematsu*, “there was strong evidence that impermissible hostility and animus motivated the Government’s policy.” Although Justice Sotomayor applauded the Court’s long overdue overdue overruling of *Korematsu*, that does not make the Court’s decision here acceptable:

By blindly accepting the government’s misguided invitation to sanction discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underling *Korematsu* and merely replaced one “gravely wrong” decision with another.

Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments. Because the Court’s decision today has failed in that respect, with profound regret, I dissent.

## [2] Treaties and Executives Agreements Page 367:

### Add after note 3:

4. *Bond v. United States*, 134 S. Ct. 2077 (2014). In 1997 the United States ratified the

Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction. The goal of the Treaty was the “general and complete disarmament...of all types of weapons of mass destruction.” The Treaty itself was not self-executing. Therefore, Congress was required to pass a bill give legal force to the Treaty in the United States. It did so by passing the Chemical Weapons Convention Implementation Act in 1998. The relevant portions of the act make it illegal to “to develop, produce, otherwise acquire...own, possess, or use, or threaten to use any chemical weapon.” The Act defines chemical weapons as “toxic chemicals” which are in turn defined as “any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm...regardless of their origin or of their method of production.”

Carol Anne Bond was working as a microbiologist in Pennsylvania in 2006 when she discovered her best friend, Myrlinda Haynes was pregnant with her husband’s child. Seeking revenge, Bond stole an arsenic based compound from her employer and ordered potassium dichromate from Amazon. These chemicals are toxic to humans and lethal in high enough doses, however it was undisputed that Carol Anne did not intend to kill Myrlinda Haynes, merely hurt her. Bond was arrested by United States Postal Service Police after surveillance cameras caught Bond spreading chemicals on Haynes’ mailbox and stealing an envelope. She was charged, *inter alia*, with using and possessing a chemical weapon. Bond was convicted by the federal district court but appealed her conviction for using and possessing a chemical weapon. The Third Circuit rejected her appeal.

In the Supreme Court, Bond made two arguments. First, she argued that the Implementation Act is an overreach of federal authority and unconstitutionally impinges on the police powers reserved to the states by the 10<sup>th</sup> Amendment. Second, she argued that her conduct, spreading a chemical on Ms. Haynes’ mailbox, was not covered by the Implementation Act, as the Act looked to cover “war-like” conduct and not “purely local crimes.” The Court, per Chief Justice Roberts, agreed with Ms. Bond’s second argument and did not reach the more controversial first issue.

The majority opinion holds that the Implementation Act does not apply to Bond’s case because the Court insists “on a clear indication” that such a law meant to reach “purely local” crimes. The rules of statutory interpretation require the Court “to be certain of Congress’ intent before finding that federal law overrides the usual constitutional balance of federal and state powers.” The Court grounds this principle on two prior cases; *United States v. Bass* (1971) [text, p. 153] and *Jones v. United States* (2000) [text, p. 168]. *Bass* concerned a statute which prohibited convicted felons from “possessing, or transporting in commerce or affecting commerce...any firearms.” The government argued the statute banned possessions of all firearms by felons, and they did not need to prove any connection to interstate commerce. Rejecting the government’s interpretation, Court ruled that this would “render[] traditionally local criminal conduct a matter for federal enforcement.” In *Jones*, the federal government attempted to prosecute the burning of a private-residence under a federal statute which banned the burning of “any...property used in interstate or foreign commerce.” The Court rejected this reading of the statute because it would “significantly change the federal-state balance.” Chief Justice Roberts concluded that these “precedents make clear that it is appropriate to refer to basic principles of federalism embodied in the Constitution.”

In this case, the Court said there was no clear indication that Congress intended the Implementation Act to cover “purely local crimes” like Mrs. Bond’s. The history of the Implementation Act, its previous enforcement, and the ordinary meaning of the word “chemical weapon” all indicate that Congress did not intend for this law to cover local crimes. Chief

Justice Roberts notes the definition of “chemical weapon” in the Act is “extremely broad” but states that this definition is limited by the “natural meaning” of chemical weapon. An “ordinary person” would not see Bond’s actions as “chemical warfare” which the Act looks to eliminate. The majority goes on to speculate that if Bond had used the same chemicals to poison the city’s water supply, this case may have turned out differently. Chief Justice Roberts concluded by stating that the “need to prevent chemical warfare does not require the Federal Government to reach into the kitchen cupboard.”

Justice Scalia, joined by Justice Thomas and Justice Alito in part, concurred in the judgment but did not join the Court’s opinion. The real question presented, according to Justice Scalia, is whether the federal government had the power, using the Necessary and Proper Clause and the power to form Treaties with foreign sovereigns, to apply the Act to Bond’s case. Because Justice Scalia can find no authority for the federal government to regulate “the kitchen cupboard,” the charges for possession of a chemical weapon against Ms. Bond must be thrown out.

Justice Scalia said he rejected the “unreasoned and citation-less” statement from *Missouri v. Holland* (1920) [text, p. 357] which states, “If the treaty is valid there can be no dispute about the validity of the statute under Article I, §8, as a necessary and proper means to execute the powers of the government.” In *Holland*, the Court addressed a treaty regulating migratory birds and upheld statute implementing that treaty on a broad reading of the necessary and proper clause. However, Justice Scalia contends this sentence in *Missouri v. Holland* is not supported by the text or the structure of the Constitution. Justice Scalia begins by distinguishing between Congress’ power to help *make* treaties and its power to *implement* treaties already made. Once the Convention was signed and ratified by the United States in 1787, the treaty making process was at its end. According to Justice Scalia, Congress may only rely on its expressly granted Article I powers to pass the Implementation Act. The structure of the Constitution also undercuts *Holland*’s language. Congress and the President would theoretically be able to sign a treaty granting them “unlimited power” – a “seismic” change to the structure of the Constitution’s principles of delegated and limited authority.

Justice Thomas with whom Justice Scalia joined and with whom Justice Alito joined in part, concurred in the judgment but not in the Court’s opinion. He suggested “that the Treaty Power is itself a limited federal power.” Although the parties did not directly challenge the constitutionality of the Treaty itself, merely the Implementation Act, Justice Thomas said the Court should address “the scope of the Treaty Power” as it was originally understood. He contended that the understanding of Treaties at the time of drafting of the Constitution was strictly international in character. They dealt with international commerce, “with mutual defense, with belligerent relations ... stipulations not to fortify certain places, etc.” The Federalist papers also declared the Treaty Power “will be exercised principally on external objects, as war, peace, negotiations, and foreign commerce.” The post ratification writings and actions of James Madison, Thomas Jefferson, and Justice Story all indicate a need for a treaty to have “an international nexus.” Therefore, Justice Thomas would in “an appropriate case” seek to “draw a line that respects the original understanding of the Treaty Power.”

#### **§ 4.04 PRIVILEGES AND IMMUNITIES IN THE SEPARATION OF POWERS**

##### **[B] Executive and Legislative Immunity**

**Page 445: Add after note 3:**

4. *Wood v. Moss*, 134 S. Ct. 2056 (2014). A unanimous Court held, per Justice Ginsburg, that two Secret Service agents did not engage in unconstitutional viewpoint discrimination when they removed a group of protesters two blocks away from a restaurant Inn where President Bush was dining during his 2004 Presidential election campaign. The group protesting President Bush's policies contended that because the Secret Service agents did not remove supporters of President Bush from their original position, which was only a block away from the restaurant, the Secret Service agents discriminated against them. The Secret Service agents answered that only the protesters were within "handgun and explosive" range of the President. Therefore the protesters were moved not because of their viewpoint but instead due to safety concerns.

Justice Ginsburg stated at the outset of the opinion that under the doctrine of qualified immunity officials are sheltered from liability "when their conduct does not violate clearly established... constitutional rights' a reasonable official, similarly situated would have comprehended." *Harlow v. Fitzgerald* (1982) [text, p. 444]. The First Amendment disfavors viewpoint based discrimination but safeguarding the President is also "of overwhelming importance." The President, unknown to the Secret Service agents, made a sudden decision to stop for dinner. "No decision of this Court so much as hinted that their on-the-spot action was unlawful because they failed to keep the protesters and supporters, throughout the episode, equidistant from President." The Ninth Circuit found it critical that there was a "considerable disparity in the distance each group was allowed to stand from the President." However, there was no "clearly established" law which controlled the situation. Therefore, the Ninth Circuit's judgment was reversed.

The protesters brought suit against the agents in the federal district court alleging that the agents were "engaged in viewpoint discrimination when they moved the protesters away from the Inn [restaurant] and allowed the supporters to remain in their original location." The agents moved to dismiss the complaint for failure to state a claim constituting a First Amendment violation. Furthermore, the agents contended they were protected by the doctrine of qualified immunity "because the constitutional right asserted by the protesters was not clearly established." The federal district court denied the motion to dismiss. On interlocutory appeal, the Ninth Circuit reversed. The Ninth Circuit held that under recent precedents the facts stated in the complaint were insufficient to state a First Amendment claim. However, the Ninth Circuit ruled that the protesters' complaint was filed before those cases were decided and, therefore, Ninth Circuit gave the protesters leave to amend their complaint.

On remand, the protesters supplemented their complaint alleging that the agents were acting under an "actual but unwritten" Secret Service policy in conjunction with the White House to "eliminate dissent and protest from Presidential appearances." Once again the agents sought to dismiss the suit on grounds of failure to state a claim and qualified immunity. The district court denied the motion. On interlocutory appeal, the Ninth Circuit affirmed the district court's denial of the motion to dismiss. The Ninth Circuit ruled that there was no "legitimate security rationale" for the different treatment accorded the two groups of demonstrators. The Ninth Circuit relied on *Rosenberger v. Rector and Visitors of University of Virginia* (1995) [text, 1202] for the principle "that the government may not regulate speech based on its substantive content or the message it conveys."

Justice Ginsburg set forth some First Amendment principles as follows:

It is uncontested and uncontestable that government official may not exclude from

public places persons engaged in peaceful expressive activity solely because the government actor fears, dislikes, or disagrees with the views those persons express. See, e.g., *Police Department of Chicago v. Mosley* (1972) [text, p. 1023].

It is equally plain that the fundamental right to speak secured by the First Amendment does not leave people at liberty to publicize their views “whenever and however and whenever they please.” *United States v. Grace* (1983) (quoting *Adderly v. Florida* (1966) [text, p. 1146].

Another issue that was involved in the case was whether First Amendment gave rise “to an implied right of action for damages against federal employees” who violated its mandates. The Court pointed out that *Bivens v. Six Unknown Fed. Narcotics Agents* (1971) had recognized claims for damages against federal agents for violation of Fourth Amendment rights. Justice Ginsburg noted that in the past the Court had “assumed without deciding that *Bivens* extends to First Amendment claims.” However, the doctrine of qualified immunity protects government agents from liability for civil damages if “it would [have been] clear to a reasonable officer’ in the agents’ position ‘that [their] conduct was unlawful in the situation [they] confronted’.”

The key question was whether it should “have been clear to the agents that the security perimeter they established violated the First Amendment.” Justice Ginsburg noted that the 9<sup>th</sup> Circuit found the security detail violated the First Amendment by moving the protesters to a location “not comparable” to the location of President’s Bush’s supporters. Justice Ginsburg found no constitutional requirement that “groups with different viewpoints are at comparable locations at all times. Nor would the maintenance of equal access make sense in the situation the agents confronted.”

Justice Ginsburg emphasized the security concerns faced by the Secret Service agents. The protesters’ original position put them facing an alley with a direct line of sight to the outdoor patio where the President was dining. At this point, the protesters were then moved a block away. However, after this move the protesters stood across a parking lot from the dining area and thus continued to be a potential threat. The final move put them two blocks away from the restaurant. Unlike the protesters, the Bush supporters were separated from the area where President Bush was eating by a two-story building and therefore never constituted the same threat. Justice Ginsburg rejected the argument that the supporters should have been moved a similar distance from President Bush, finding no established law requiring “the Secret Service to interfere with even more speech than security concerns would require.”

The protesters attempted to mitigate the security argument by claiming the Secret Service did not act to secure the President but instead moved the protesters merely to insulate President Bush from their message. They argued that if security were the true concern, the Secret Service would have screened or removed the patrons of the restaurant where President dined. The protesters also submitted a White House manual directing the President’s political advance team to work with the Secret Service to designate protest areas “preferably not in view of the event site or motorcade area.” Justice Ginsburg dismissed both arguments. The patrons of the restaurant were not aware the President would be dining there beforehand, and thus would not have been able to plan an attack on the President. The smaller number of patrons and staff also made it easier for them to be monitored. The large number of protestors rendered this type of monitoring ineffective and supports the secret service’s decision to remove them. With regards to the White House directive, the facts of this case do not support the implication that the Secret Service actively attempted to suppress the protesters’ speech. The protesters “were at least as close to the President when the

motorcade arrived at the Jacksonville Inn... [and] when the President reached the patio to dine, the protesters, but not the supporters were within weapons range of his location.”

The Court concluded by ruling that government officials cannot be held liable in a *Bivens* suit unless those officials had themselves acted unconstitutionally: “We therefore decline to infer from alleged instances of misconduct on the part of particular agents an unwritten policy of the Secret Service to suppress disfavored expression, and then to attribute that supposed policy to all field-level operatives.” Justice Ginsburg noted that this case came to the Court “on the agents’ petition to review the Ninth Circuit’s denial of their qualified immunity defense.” Justice Ginsburg then stated the Court’s holding: “Limiting our decision to that question, we hold, for the reasons stated, that the agents are entitled to qualified immunity. Accordingly, we reverse the judgment of the Court of Appeals.”

## Chapter 5      LIMITATIONS ON GOVERNMENTAL POWER

### § 5.04: PROCEDURAL DUE PROCESS

#### Page 480: Add new note 4

4. *Sessions v. Dimaya*, 138 S. Ct. 1204\_ (2018) held, 5-4, per Justice Kagan, that a provision of the Immigration and Nationality Act which deals with deportation of aliens convicted of certain kinds of felonies violated the Due Process Clause of the Fifth Amendment because it was “void for vagueness.” Justice Kagan was joined in reaching this result by Justices Ginsburg, Breyer, Sotomayor and Gorsuch. The Immigration and Nationality Act (INA) provides for the deportation of aliens convicted of an “aggregated felony.” Sec. 16 of the Act states that an “aggravated felony” includes “a crime of violence.” § 16(b) defines a “crime of violence” as any other felony offense that “involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” The inquiry the courts use in analyzing this provision is whether “the ordinary case” of an offense poses the required risk.

The defendant in this case, James Dimaya, was a lawful permanent resident of the U.S. who had been twice convicted of first degree burglary pursuant to California law. An Immigration Judge as well as the Board of Immigration Appeals held that first degree burglary in California is a “crime of violence” under § 16(b) of the INA. Dimaya appealed to the Ninth Circuit. While his appeal was pending, the Supreme Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that a similar provision in another federal statute, the Armed Career Criminal Act (ACCA), was unconstitutionally “void for vagueness” under the Due Process Clause of the Fifth Amendment. In the light of *Johnson*, the Ninth Circuit ruled that § 16(b) was also unconstitutionally vague. The Supreme Court affirmed.

A portion of the Court’s opinion addressed the government’s contention that in civil cases statutory vagueness can be tolerated because “the consequences of imprecision are relatively less severe.” The Court rejected that argument here because deportation is a very severe penalty. Justice Kagan observed that deportation may be of more concern to a convicted alien “than any potential jail sentence.” Justice Gorsuch did not join this portion of the opinion because he thought civil penalties with vagueness defects should be accorded more stringent reviews generally.

Justice Kagan thought that the *Johnson* case was dispositive as far as the *Dimaya* case was concerned. The ban against vagueness in criminal statutes is an essential component of due process. The prohibition against vagueness ensures that “ordinary people have 'fair notice' of the conduct” a statute proscribes. Furthermore, the vagueness doctrine prevents “arbitrary or discriminatory law enforcement” by requiring that a statute set forth standards to control the actions of law enforcement personnel. The Court rejected the government’s contention *Johnson* was not controlling because this was a civil rather than a criminal case.

The majority declared that Sec. 16 (b) has the same constitutional defects as did the similar clause in the ACCA which was struck down in *Johnson*:

It [Sec. 16 (b) of the INA] too “requires a court to picture the kind of conduct that the crime involves in 'the ordinary case' and to judge whether that abstraction presents” some not-well specified – yet – sufficiently large degree of risk. The result

is that § 16(b) produces, just as ACCA’s residual clause did, “more unpredictability and arbitrariness than the DueProcess Clause tolerates.”

Justice Kagan concluded that *Johnson* governs the case. Sec. 16 (b) has the same two features that rendered the similar clause in the ACCA unconstitutionally vague – “an ordinary – case requirement and an ill-defined risk threshold.” These two features “initiated arbitrary enforcement and failed to provide fair notice.” They, therefore, produced “more unpredictability and arbitrariness than the Due Process Clause tolerates.” The judgment of the Ninth Circuit was affirmed.

Justice Gorsuch, concurring in part and concurring in the judgment, explains why he declined to join part of Justice Kagan’s opinion. He agreed with the Court that “we should reject the government’s plea for a feeble standard of review [for civil penalties] but for a different reason:”

My colleagues suggest the law before us should be assessed under the fair notice standard because of the special gravity of its civil deportation penalty. But, grave as that penalty may be, I cannot see why we should single it out for special treatment when (again) so many civil laws today impose so many similarly severe sanctions. Why, for example, would due process require Congress to speak more clearly when it seeks to deport a lawfully resident alien than when it wishes to subject a citizen to indefinite civil commitment, strip him of a business license essential to his family’s living, or confiscate his home? I can think of no good answer.

Chief Justice Roberts, joined by Justices Kennedy, Thomas, and Alito, dissenting, contended that § 16(b) of the INA did “not give rise to the concerns that drove the Court’s decision in *Johnson*.” He asserted that “§ 16(b) yields far less uncertainty about how to estimate the risk posed by a crime” than was the case in *Johnson*. [The extensive discussion on that point in his dissent is omitted.] Indeed, he believed that § 16(b) was not unconstitutionally vague even under the vagueness standard applied to criminal laws. Therefore, there was no need to decide “whether a criminal or more relaxed civil vagueness standard should apply in resolving Dimaya’s challenge.”

Justice Thomas also wrote a separate dissent. He agreed with the dissent of the Chief Justice that § 16(b) was not unconstitutionally vague. But he doubted “whether the vagueness doctrine can be squared with the original meaning of the Due Process Clause.” Furthermore, he said “those doubts are only amplified in the removal [deportation] context.” Furthermore, he was skeptical “that the vagueness doctrine can be justified as a way to prevent delegations of core legislative power in this context.” However, “if the vagueness doctrine has any basis in the Due Process Clause,” vagueness challenges should be limited to cases where “the statute is unconstitutionally vague as applied to the person challenging it.” That is not the case here.

## § 5.05 SECOND AMENDMENT

### Page 505: Add new note 9:

**9. *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (per curiam).** The defendant was convicted in a Massachusetts court of criminal possession of a stun gun. The Supreme Court found that the conviction violated the Second Amendment as incorporated through the Due Process Clause of the Fourteenth Amendment. It concluded that neither the lack of common use of stun guns at the time of the Second Amendment’s enactment, the unusual nature of stun guns, or the lack of ready adaptability of stun guns for use in the military precluded stun guns from being protected by the

Second Amendment right to bear arms. Justice Alito, concurring in the judgment, noted that its decision in *Heller* had rejected as “bordering on the frivolous” the argument “that only those arms in existence in the 18<sup>th</sup> century are protected by the Second Amendment.”

## Chapter 6 FORMS OF SUBSTANTIVE DUE PROCESS

### § 6.01 ECONOMIC SUBSTANTIVE DUE PROCESS

#### [D] An Evolving View of Economic Liberties

#### [3] The Takings Issue

**Page 543: Add before section [4]:**

*Arkansas Game and Fish Commission v. United States*, 133 S. Ct. 511 (2012). The Army Corps of Engineers constructed and maintained a dam upstream from the Dave Donaldson Black River Wildlife Management Area in Arkansas, which the Arkansas Game and Fish Commission operates as a wildlife and hunting preserve and timber resource. The Corps adopted a plan (known as “the Manual”) for seasonal water rate releases with planned deviations for agricultural, recreational, and other purposes. From 1993 to 2000, the Corp deviated from the usual plan at farmers’ requests, which resulted in flooding in the Management Area during tree growing season. The Commission filed suit against the United States, “claiming that the temporary deviations from the Manual constituted a taking of property that entitled the Commission to compensation.” The Federal Claims Court found for the Commission, holding that the six years of flooding altered the character of the Management Area, and awarded just compensation for the lost timber and projected cost of reclamation. The Federal Circuit reversed, holding that flooding cases were an exception to takings, and that government induced flooding gives rise to a taking claim only in situations in which the flooding is “permanent or inevitably recurring.” The Supreme Court reversed the Federal Circuit, holding that “recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability.”

*Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015). The Supreme Court, per Chief Justice Roberts, ruled that the Takings Clause of the Fifth Amendment, which requires that Government must pay just compensation when it takes private property for public use, applies to personal property as well as real property. A federal statute authorized the Secretary of Agriculture to issue “marketing orders” in order to assure stable markets for certain agricultural products. One such product was raisins. The raisin “marketing order” required that raisin growers set aside a certain percentage of their raisin crop for the Government’s account. The Government did not compensate the raisin growers for the set aside. The Government disposed of the raisins in the set aside in several ways – by selling them in non-competitive markets, donating them or by otherwise disposing of them by means consistent with the over-all objectives of the raisin marketing order. Any profits, less expenses, remaining after the set aside raisins were disposed of were given to the raisin growers.

The Horne family who were raisin growers refused to set aside any of their raisins for the Government. They contended that the raisin set aside requirement was an unconstitutional taking of their property in violation of the Takings Clause of the Fifth Amendment. The Government fined the Hornes and used the fair value of the raisins as the measure of the fine and imposed other civil penalties as well on them because they had failed to comply with the raisin marketing order. The Hornes took their case to the federal courts and prevailed in the Supreme Court.

Chief Justice Roberts, speaking for the majority of the Court, ruled that just as Government must pay just compensation when it take real property, so it must pay just compensation when it takes personal property: “The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.”

***Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).** The Court, per Justice Kennedy, 5-3, upheld the state courts in a case that involved adjacent parcels of land under common ownership. These lots were treated by state and local government as a single lot. The state courts ruled that state law in effect merged the two lots. The owners of the two adjacent lots in Troy, Wisconsin were prevented from selling the lots separately. State and local regulations barred the use or sale of adjacent lots under common ownership as separate building sites unless each separate lot had one acre of land suitable for development. Although the owners of the lots could not meet these requirements, they sought to sell one of the lots separately. The state courts ruled the separate sale was not allowed. The Supreme Court affirmed the state courts and ruled that the action of the state courts was not a regulatory taking and did not entitle the owners to compensation under the Takings Clause of the Fifth Amendment.

In Takings Clause cases, Justice Kennedy said, the courts must be cognizant of several factors. Courts should (1) “give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local laws;” (2) “look to the physical characteristics of the landowner’s property;” and (3) “assess the value of the property under the challenged regulation with special attention to the effect of burdened land on the value of other holdings.”

Justice Kennedy concluded that petitioners did not suffer a taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) because petitioners “have not been deprived of all economically beneficial use of their property.” Furthermore, the expert appraisal relied on by the state courts did not support the claim “that the economic impact of the regulation is severe.” In addition, the government action challenged here was a reasonable land – use regulation. It was part of a “coordinated federal, state, and local effort to preserve the river and surrounding land.”

Chief Justice Roberts, joined by Justices Thomas and Alito, dissented:

I would stick with our traditional approach: State law defines the boundaries of distinct parcels of land, and those boundaries should determine the “private property” at issue in regulatory takings case. Whether a regulation effects a taking of that property is a separate question, one in which common ownership of adjacent property may be taken into account. Because the majority departs from these settled principles, I respectfully dissent.

#### **[4] The Contracts Clause**

**Add after the *Allied Structural Steel case* on p. 543**

**In *Sveen v. Melin*, 138 S. Ct. 1815 (2018),** the Supreme Court held, 8 to 1, per Justice Kagan, that a retroactive application of Minnesota’s revocation-on-divorce law did not violate the Contracts Clause of the U. S. Constitution. The facts that occasioned this case were these. Mark Sveen and Kaye

Melin married in 1997. A year later, Mark bought a life insurance policy which named Kay Melin as the primary beneficiary. Mark Sveen named his two children from a previous marriage as contingent beneficiaries. In 2007 Mark and Kaye divorced. The divorce decree did not refer to the insurance policy. Mark Sveen died in 2011.

A Minnesota law enacted after the purchase of the life insurance policy provides that divorce revokes any revocable “beneficiary designation made by an individual to the individual’s former spouse.” Minn. Stat. Sec. 524.2-804, subd. 1. In the instant case the spouse has designated the other spouse a beneficiary of a life insurance policy; the effect of the law is to automatically revoke that designation. After Mark Sveen’s death, Kay Melin and Sveen’s two children made competing claims to Mark Sveen’s life insurance policy.

The Sveen children based their claim to the policy on their designation in the policy as contingent beneficiaries. Kay Melin, however, contended that she is the primary beneficiary of the insurance policy and that the Minnesota law automatically cancelling that designation as a consequence of her divorce from Mark Sveen violates the Contracts Clause of the U. S Constitution which invalidates any state “Law impairing the Obligation of Contracts.” Art. I, § 10, cl. 1. The federal district court rejected Kay Melin’s Contracts Clause arguments and ruled in favor of the Sveen children. The Eighth Circuit reversed and held that Minnesota’s “revocation upon divorce” law is in violation of the Contracts Clause when it is applied retroactively as it was here. The Supreme Court reversed the Eighth Circuit. Justice Kagan declared that “not all laws affecting pre-existing contracts violates the [Contracts] Clause.” In such cases, Justice Kagan said, the Court uses a two step analysis:

The threshold issue is whether the state law has “operated as a substantial impairment of a contractual relationship. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). [The Court then considers whether] the law undermines the contractual bargain, interferes with a party’s reasonable expectations and prevents the party from safeguarding or reinstating his rights. If such factors show a substantial impairment, the inquiry turns to the means and ends of the legislation.

In this case, Justice Kagan said “we may stop after step one.” The Minnesota revocation-on-divorce law does not constitute a substantial impairment of pre-existing contractual arrangements. There were three reasons supporting this conclusion. First, the purpose of the law was to implement the intent of the policy holder. Second, the law is not likely to disturb a policy holder’s expectations “because it does no more than a divorce court could always have done.” Third, the Minnesota law is only a default rule. A policy holder can easily change it. All the policy holder has to do is send a simple change-of-beneficiary form to his insurer. The Court observed that legislative presumptions about divorce are common usually because “they accurately reflect the intent of most divorcing parties.” Although exceptions exist, “most divorcees do not aspire to enrich their former partners.” In light of the foregoing, the judgment of the Eighth Circuit was reversed.

Justice Gorsuch, dissenting, questioned modern Contracts Clause case law which permits a state to substantially impair a contractual obligation “in pursuit of ‘a significant and legitimate public purpose’ so long as the impairment is reasonable.” He contended that this is “hard to square with the Constitution’s original meaning.” He pointed out that “the Constitution does not speak of ‘substantial impairments’ – it bars ‘any’ impairment.” He protested that the Minnesota law at issue here “cannot survive an encounter with even the breeziest of Contracts Clause tests” because it “substantially impairs life insurance contracts by retroactively revising their key term.”

## § 6.02 FUNDAMENTAL RIGHTS

### [A] Conception and Abortion

**Page 621: Add following note 4:**

#### WHOLE WOMAN’S HEALTH v. HELLERSTEDT

136 S. Ct. 2292 \_\_\_\_ (2016)

JUSTICE BREYER delivered the opinion of the Court.

In *Planned Parenthood of Southeastern Pa. v. Casey*, a plurality of the Court concluded that there “exists” an “undue burden” on a woman’s right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the “*purpose or effect*” of the provision “*is to place a substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability.” (Emphasis added.) The plurality added that “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.”

We must here decide whether two provisions of Texas’ House Bill 2 violate the Federal Constitution as interpreted in *Casey*. The first provision, which we shall call the “*admitting-privileges requirement*,” says that

“[a] physician performing or inducing an abortion . . . must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that . . . is located not further than 30 miles from the location at which the abortion is performed or induced.” Tex. Health & Safety Code Ann. §171.0031(a).

This provision amended Texas law that had previously required an abortion facility to maintain a written protocol “for managing medical emergencies and the transfer of patients requiring further emergency care to a hospital.”

The second provision, which we shall call the “*surgical- center requirement*,” says that “the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under [the Texas Health and Safety Code section] for ambulatory surgical centers.” Tex. Health & Safety Code Ann. §245.010(a).

We conclude that neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, and each violates the Federal Constitution.

### I A

In July 2013, the Texas Legislature enacted House Bill 2. In September (before the new law took effect), a group of Texas abortion providers filed an action in Federal District Court seeking

facial invalidation of the law’s admitting-privileges provision. In late October, the District Court granted the injunction. But three days later, the Fifth Circuit vacated the injunction, thereby permitting the provision to take effect.

The Fifth Circuit subsequently upheld the provision, and set forth its reasons in an opinion released late the following March. In that opinion, the Fifth Circuit pointed to evidence introduced in the District Court the previous October. It noted that Texas had offered evidence designed to show that the admitting-privileges requirement “will reduce the delay in treatment and decrease health risk for abortion patients with critical complications,” and that it would “‘screen out’ untrained or incompetent abortion providers.” The opinion also explained that the plaintiffs had not provided sufficient evidence “that abortion practitioners will likely be unable to comply with the privileges requirement.” The court said that all “of the major Texas cities, including Austin, Corpus Christi, Dallas, El Paso, Houston, and San Antonio,” would “continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges.”

## B

On April 6, one week after the Fifth Circuit’s decision, petitioners, a group of abortion providers (many of whom were plaintiffs in the previous lawsuit), filed the present lawsuit in Federal District Court. They sought an injunction preventing enforcement of the admitting-privileges provision as applied to physicians at two abortion facilities, one operated by Whole Woman’s Health in McAllen and the other operated by Nova Health Systems in El Paso. They also sought an injunction prohibiting enforcement of the surgical-center provision anywhere in Texas.

They claimed that the admitting-privileges provision and the surgical-center provision violated the Constitution’s Fourteenth Amendment, as interpreted in *Casey*.

The District Court subsequently received stipulations from the parties and depositions from the parties’ experts. The court conducted a 4-day bench trial. It heard, among other testimony, the opinions from expert witnesses for both sides.

[T]he District Court determined that the surgical-center requirement “imposes an undue burden on the right of women throughout Texas to seek a previability abortion,” and that the “admitting-privileges requirement, . . . in conjunction with the ambulatory-surgical-center requirement, imposes an undue burden on the right of women in the Rio Grande Valley, El Paso, and West Texas to seek a previability abortion.” The District Court concluded that the “two provisions” would cause “the closing of almost all abortion clinics in Texas that were operating legally in the fall of 2013,” and thereby create a constitutionally “impermissible obstacle as applied to all women seeking a previability abortion” by “restricting access to previously available legal facilities.” On August 29, 2014, the court enjoined the enforcement of the two provisions.

## C

On October 2, 2014, at Texas’ request, the Court of Appeals stayed the District Court’s injunction. Within the next two weeks, this Court vacated the Court of Appeals’ stay (in substantial part) thereby leaving in effect the District Court’s injunction against enforcement of the surgical-center provision and its injunction against enforcement of the admitting-privileges requirement as applied to the McAllen and El Paso clinics.

On June 9, 2015, the Court of Appeals reversed the District Court on the merits. [T]he Court

of Appeals reversed the District Court's holding that the admitting-privileges requirement is unconstitutional and its holding that the surgical-center requirement is unconstitutional. The Court of Appeals upheld in part the District Court's more specific holding that the requirements are unconstitutional as applied to the McAllen facility and Dr. Lynn (a doctor at that facility), but it reversed the District Court's holding that the surgical-center requirement is unconstitutional as applied to the facility in El Paso. In respect to this last claim, the Court of Appeals said that women in El Paso wishing to have an abortion could use abortion providers in nearby New Mexico.

### III

#### *Undue Burden—Legal Standard*

We begin with the standard, as described in *Casey*. We recognize that the “State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient.” *Roe v. Wade*. But, we added, “a statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.” *Casey*, (plurality opinion). Moreover, “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.”

The Court of Appeals wrote that a state law is “constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest.” The Court of Appeals went on to hold that “the district court erred by substituting its own judgment for that of the legislature” when it conducted its “undue burden inquiry,” in part because “medical uncertainty underlying a statute is for resolution by legislatures, not the courts.”

The Court of Appeals’ articulation of the relevant standard is incorrect. The first part of the Court of Appeals’ test may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden. The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer. And the second part of the test is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue. The Court of Appeals’ approach simply does not match the standard that this Court laid out in *Casey*, which asks courts to consider whether any burden imposed on abortion access is “undue.”

The statement that legislatures, and not courts, must resolve questions of medical uncertainty is also inconsistent with this Court’s case law. Instead, the Court, when determining the constitutionality of laws regulating abortion procedures, has placed considerable weight upon evidence and argument presented in judicial proceedings.

[T]he relevant statute here does not set forth any legislative findings. Rather, one is left to infer that the legislature sought to further a constitutionally acceptable objective (namely, protecting women’s health). For a district court to give significant weight to evidence in the judicial record in these circumstances is consistent with this Court’s case law. As we shall describe, the District Court did so here. It did not simply substitute its own judgment for that

of the legislature. It considered the evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony. It then weighed the asserted benefits against the burdens. We hold that, in so doing, the District Court applied the correct legal standard.

#### IV

##### *Undue Burden—Admitting-Privileges Requirement*

Turning to the lower courts’ evaluation of the evidence, we first consider the admitting- privileges requirement. Before the enactment of H. B. 2, doctors who provided abortions were required to “have admitting privileges *or* have a working arrangement with a physician(s) who has admitting privileges at a local hospital in order to ensure the necessary back up for medical complications.” Tex. Admin. Code, tit. 25, §139.56 (2009) (emphasis added). The new law changed this requirement by requiring that a “physician performing or inducing an abortion . . . must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that . . . is located not further than 30 miles from the location at which the abortion is performed or induced.” Tex. Health & Safety Code Ann. §171.0031(a). The District Court held that the legislative change imposed an “undue burden” on a woman’s right to have an abortion. We conclude that there is adequate legal and factual support for the District Court’s conclusion.

The purpose of the admitting-privileges requirement is to help ensure that women have easy access to a hospital should complications arise during an abortion procedure. But the District Court found that it brought about no such health-related benefit. The court found that “[t]he great weight of evidence demonstrates that, before the act’s passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure.” Thus, there was no significant health-related problem that the new law helped to cure.

The evidence upon which the court based this conclusion included, among other things:

A collection of at least five peer-reviewed studies on abortion complications in the first trimester, showing that the highest rate of major complications—including those complications requiring hospital admission—was less than one-quarter of 1%.

Figures in three peer-reviewed studies showing that the highest complication rate found for the much rarer second trimester abortion was less than one-half of 1% (0.45% or about 1 out of about 200).

Expert testimony to the effect that complications rarely require hospital admission, much less immediate transfer to a hospital from an outpatient clinic. (citing a study of complications occurring within six weeks after 54,911 abortions that had been paid for by the fee-for-service California Medicaid Program finding that the incidence of complications was 2.1%, the incidence of complications requiring hospital admission was 0.23%, and that of the 54,911 abortion patients included in the study, only 15 required immediate transfer to the hospital on the day of the abortion).

Expert testimony stating that “it is extremely unlikely that a patient will experience a serious complication at the clinic that requires emergent hospitalization” and “in the rare case in which [one does], the quality of care that the patient receives is not affected by whether the abortion provider has admitting privileges at the hospital.”

Expert testimony stating that in respect to surgical abortion patients who do suffer complications requiring hospitalization, most of these complications occur in the days after the abortion, not on the spot.

Expert testimony stating that a delay before the onset of complications is also expected for medical abortions, as “abortifacient drugs take time to exert their effects, and thus the abortion itself almost always occurs after the patient has left the abortion facility.”

Some experts added that, if a patient needs a hospital in the day or week following her abortion, she will likely seek medical attention at the hospital nearest her home.

We have found nothing in Texas’ record evidence that shows that, compared to prior law (which required a “working arrangement” with a doctor with admitting privileges), the new law advanced Texas’ legitimate interest in protecting women’s health.

We add that, when directly asked at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case.

This answer is consistent with the findings of the other Federal District Courts that have considered the health benefits of other States’ similar admitting-privileges laws.

At the same time, the record evidence indicates that the admitting-privileges requirement places a “substantial obstacle in the path of a woman’s choice.” *Casey*. The District Court found, as of the time the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20. Eight abortion clinics closed in the months leading up to the requirement’s effective date.

Eleven more closed on the day the admitting-privileges requirement took effect. Other evidence helps to explain why the new requirement led to the closure of clinics. We read that other evidence in light of a brief filed in this Court by the Society of Hospital Medicine. That brief describes the undisputed general fact that “hospitals often condition admitting privileges on reaching a certain number of admissions per year.” Brief for Society of Hospital Medicine et al. as *Amici Curiae* 11. Returning to the District Court record, we note that, in direct testimony, the president of Nova Health Systems, implicitly relying on this general fact, pointed out that it would be difficult for doctors regularly performing abortions at the El Paso clinic to obtain admitting privileges at nearby hospitals because “[d]uring the past 10 years, over 17,000 abortion procedures were performed at the El Paso clinic [and n]ot a single one of those patients had to be transferred to a hospital for emergency treatment, much less admitted to the hospital.” In a word, doctors would be unable to maintain admitting privileges or obtain those privileges for the future, because the fact that abortions are so safe meant that providers were unlikely to have any patients to admit.

Other *amicus* briefs filed here set forth without dispute other common prerequisites to obtaining admitting privileges that have nothing to do with ability to perform medical procedures.

In our view, the record contains sufficient evidence that the admitting-privileges requirement led to the closure of half of Texas’ clinics, or thereabouts. Those closures meant fewer doctors, longer waiting times, and increased crowding. Record evidence also supports the finding that

after the admitting-privileges provision went into effect, the “number of women of reproductive age living in a county . . . more than 150 miles from a provider increased from approximately 86,000 to 400,000 . . . and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000.” We recognize that increased driving distances do not always constitute an “undue burden.” But here, those increases are but one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the District Court’s “undue burden” conclusion.

The dissent’s only argument why these clinic closures, as well as the ones discussed in Part V, *infra*, may not have imposed an undue burden is this: Although “H. B. 2 caused the closure of *some* clinics,” (emphasis added), other clinics may have closed for other reasons (so we should not “actually count” the burdens resulting from those closures against H. B. 2). But petitioners satisfied their burden to present evidence of causation by presenting direct testimony as well as plausible inferences to be drawn from the timing of the clinic closures. The District Court credited that evidence and concluded from it that H. B. 2 in fact led to the clinic closures. The dissent’s speculation that perhaps other evidence, not presented at trial or credited by the District Court, might have shown that some clinics closed for unrelated reasons does not provide sufficient ground to disturb the District Court’s factual finding on that issue.

In the same breath, the dissent suggests that one benefit of H. B. 2’s requirements would be that they might “force unsafe facilities to shut down.” To support that assertion, the dissent points to the Kermit Gosnell scandal. Gosnell, a physician in Pennsylvania, was convicted of first-degree murder and manslaughter. He “staffed his facility with unlicensed and indifferent workers, and then let them practice medicine unsupervised” and had “[d]irty facilities; unsanitary instruments; an absence of functioning monitoring and resuscitation equipment; the use of cheap, but dangerous, drugs; illegal procedures; and inadequate emergency access for when things inevitably went wrong.” Gosnell’s behavior was terribly wrong. But there is no reason to believe that an extra layer of regulation would have affected that behavior. Determined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to adopt safe practices by a new overlay of regulations. Regardless, Gosnell’s deplorable crimes could escape detection only because his facility went uninspected for more than 15 years. Pre-existing Texas law already contained numerous detailed regulations covering abortion facilities, including a requirement that facilities be inspected at least annually. The record contains nothing to suggest that H. B. 2 would be more effective than pre-existing Texas law at deterring wrongdoers like Gosnell from criminal behavior.

## V

### *Undue Burden—Surgical-Center Requirement*

The second challenged provision of Texas’ new law sets forth the surgical-center requirement. Prior to enactment of the new requirement, Texas law required abortion facilities to meet a host of health and safety requirements. Under those pre-existing laws, facilities were subject to annual reporting and recordkeeping requirements.

H. B. 2 added the requirement that an “abortion facility” meet the “minimum standards . . . for ambulatory surgical centers” under Texas law. The surgical-center regulations include, among other things, detailed specifications relating to the size of the nursing staff, building dimensions, and other building requirements. The nursing staff must comprise at least “an adequate number

of [registered nurses] on duty to meet the following minimum staff requirements: director of the department (or designee), and supervisory and staff personnel for each service area to assure the immediate availability of [a registered nurse] for emergency care or for any patient when needed,” as well as “a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility” for facilities that provide moderate sedation, such as most abortion facilities.

Facilities must include a full surgical suite with an operating room that has “a clear floor area of at least 240 square feet” in which “[t]he minimum clear dimension between built-in cabinets, counters, and shelves shall be 14 feet.” There must be a preoperative patient holding room and a postoperative recovery suite. The former “shall be provided and arranged in a one-way traffic pattern so that patients entering from outside the surgical suite can change, gown, and move directly into the restricted corridor of the surgical suite,” and the latter “shall be arranged to provide a one-way traffic pattern from the restricted surgical corridor to the postoperative recovery suite, and then to the extended observation rooms or discharge.” Surgical centers must meet numerous other spatial requirements. Surgical centers must also have an advanced heating, ventilation, and air conditioning system, and must satisfy particular piping system and plumbing requirements, §135.52(h). Dozens of other sections list additional requirements that apply to surgical centers.

There is considerable evidence in the record supporting the District Court’s findings indicating that the statutory provision requiring all abortion facilities to meet all surgical-center standards does not benefit patients and is not necessary. The District Court found that “risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities.”

The record makes clear that the surgical-center requirement provides no benefit when complications arise in the context of an abortion produced through medication. That is because, in such a case, complications would almost always arise only after the patient has left the facility. The record also contains evidence indicating that abortions taking place in an abortion facility are safe—indeed, safer than numerous procedures that take place outside hospitals and to which Texas does not apply its surgical-center requirements.

Moreover, many surgical-center requirements are inappropriate as applied to surgical abortions. The upshot is that this record evidence, along with the absence of any evidence to the contrary, provides ample support for the District Court’s conclusion that “[m]any of the building standards mandated by the act and its implementing rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary.” That conclusion, along with the supporting evidence, provides sufficient support for the more general conclusion that the surgical-center requirement “will not [provide] better care or . . . more frequent positive outcomes.” The record evidence thus supports the ultimate legal conclusion that the surgical-center requirement is not necessary.

At the same time, the record provides adequate evidentiary support for the District Court’s conclusion that the surgical-center requirement places a substantial obstacle in the path of women seeking an abortion. The parties stipulated that the requirement would further reduce the number of abortion facilities available to seven or eight facilities, located in Houston, Austin, San Antonio, and Dallas/Fort Worth. In the District Court’s view, the proposition that these “seven or eight providers could meet the demand of the entire State stretches credulity.” We take this statement as a finding that these few facilities could not “meet” that “demand.”

The Court of Appeals held that this finding was “clearly erroneous.” Unlike the Court of Appeals, however, we hold that the record provides adequate support for the District Court’s finding.

JUSTICE GINSBURG, concurring.

The Texas law called H. B. 2 inevitably will reduce the number of clinics and doctors allowed to provide abortion services. Texas argues that H. B. 2’s restrictions are constitutional because they protect the health of women who experience complications from abortions. In truth, “complications from an abortion are both rare and rarely dangerous.” *Planned Parenthood of Wis., Inc. v. Schimel*, (CA7 2015). Many medical procedures, including childbirth, are far more dangerous to patients, yet are not subject to ambulatory- surgical- center or hospital admitting-privileges requirements. When a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, *faute de mieux*, at great risk to their health and safety.

JUSTICE THOMAS, dissenting.

Today the Court strikes down two state statutory provisions in all of their applications, at the behest of abortion clinics and doctors. That decision exemplifies the Court’s troubling tendency “to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue.” *Stenberg v. Carhart*. As JUSTICE ALITO observes, today’s decision creates an abortion exception to ordinary rules of *res judicata*, ignores compelling evidence that Texas’ law imposes no unconstitutional burden, and disregards basic principles of the severability doctrine. I write separately to emphasize how today’s decision perpetuates the Court’s habit of applying different rules to different constitutional rights—especially the putative right to abortion.

This case also underscores the Court’s increasingly common practice of invoking a given level of scrutiny—here, the abortion-specific undue burden standard—while applying a different standard of review entirely. Whatever scrutiny the majority applies to Texas’ law, it bears little resemblance to the undue-burden test the Court articulated in *Planned Parenthood* and its successors. Instead, the majority eviscerates important features of that test to return to a regime like the one that *Casey* repudiated.

Our law is now so riddled with special exceptions for special rights that our decisions deliver neither predictability nor the promise of a judiciary bound by the rule of law.

Today’s opinion reimagines the undue-burden standard used to assess the constitutionality of abortion restrictions. Nearly 25 years ago, in *Planned Parenthood* a plurality of this Court invented the “undue burden” standard as a special test for gauging the permissibility of abortion restrictions. *Casey* held that a law is unconstitutional if it imposes an “undue burden” on a woman’s ability to choose to have an abortion, meaning that it “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” *Casey* thus instructed courts to look to whether a law substantially impedes women’s access to abortion, and whether it is reasonably related to legitimate state interests. As the Court explained, “[w]here it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power” to regulate aspects of abortion procedures, “all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.” *Gonzales v. Carhart*.

I remain fundamentally opposed to the Court’s abortion jurisprudence. Even taking *Casey* as the baseline, however, the majority radically rewrites the undue-burden test in three ways. First, today’s decision requires courts to “consider the burdens a law imposes on abortion access together with the benefits those laws confer.” Second, today’s opinion tells the courts that, when the law’s justifications are medically uncertain, they need not defer to the legislature, and must instead assess medical justifications for abortion restrictions by scrutinizing the record themselves. Finally, even if a law imposes no “substantial obstacle” to women’s access to abortions, the law now must have more than a “reasonabl[e] relat[ion] to . . . a legitimate state interest.” These precepts are nowhere to be found in *Casey* or its successors, and transform the undue-burden test to something much more akin to strict scrutiny.

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

Under our cases, petitioners must show that the admitting privileges and ASC requirements impose an “undue burden” on women seeking abortions. And in order to obtain the sweeping relief they seek—facial invalidation of those provisions—they must show, at a minimum, that these provisions have an unconstitutional impact on at least a “large fraction” of Texas women of reproductive age. Such a situation could result if the clinics able to comply with the new requirements either lacked the requisite overall capacity or were located too far away to serve a “large fraction” of the women in question.

Petitioners did not make that showing. Instead of offering direct evidence, they relied on two crude inferences. First, they pointed to the number of abortion clinics that closed after the enactment of H. B. 2, and asked that it be inferred that all these closures resulted from the two challenged provisions. They made little effort to show why particular clinics closed. Second, they pointed to the number of abortions performed annually at ASCs before H. B. 2 took effect and, because this figure is well below the total number of abortions performed each year in the State, they asked that it be inferred that ASC-compliant clinics could not meet the demands of women in the State. Petitioners failed to provide any evidence of the actual capacity of the facilities that would be available to perform abortions in compliance with the new law—even though they provided this type of evidence in their first case to the District Court at trial and then to this Court in their application for interim injunctive relief.

I do not dispute the fact that H. B. 2 caused the closure of some clinics. Indeed, it seems clear that H. B. 2 was intended to force unsafe facilities to shut down.

At least nine Texas clinics may have ceased performing abortions (or reduced capacity) for one or more of the reasons having nothing to do with the provisions challenged here.

Neither petitioners nor the District Court properly addressed these complexities in assessing causation—and for no good reason.

#### NOTE

In *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 587 U.S. \_\_ (2019), the Court considered the constitutionality of two new abortion-related provisions of Indiana law. The first provision altered the way in which abortion providers are permitted to dispose of aborted fetal remains. The law no longer permitted fetal remains to be classified as “infectious and pathological

waste,” thereby effectively preventing the remains from being incinerated alongside “surgical byproduct”. However, the law did not alter a woman’s right “to determine the final disposition of the aborted fetus.” The second provision prohibited an abortion provider from performing an abortion on a woman who the provider knew was seeking an abortion only because of the sex, race or disability status of the fetus.

The Court upheld the first provision and denied the petition for certiorari in the challenge to the second provision, because of the need for additional litigation in the lower courts. The brief majority opinion held that the first statutory provision survived rational basis review. The Court found that the law is rationally related to the State’s asserted interest.

Justice Ginsburg dissented as to the first provision. She disagreed that rational basis was the appropriate standard of review. Instead, she would have applied the “undue burden” standard from the joint opinion in *Casey*.

**[C] Homosexuality and Liberty**

**Page 651: add before [D]:**

**OBERGEFELL v. HODGES**

135 S. Ct. 2584 (2015).

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

JUSTICE KENNEDY delivered the opinion of the Court.

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

**I**

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

**II**

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

## A

From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. This wisdom was echoed centuries later and half a world away by Cicero, who wrote, "The first bond of society is marriage; next, children; and then the family." There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held – and continues to be held – in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect-and need-for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners' cause from their perspective. Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. [They] traveled from Ohio to Maryland, where same-sex marriage was legal. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems "hurtful for the rest of time." He brought suit to be shown as the surviving spouse on Arthur's death certificate.

April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relation in 2007. They both work as nurses,

DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they welcomed another son into their family. The new baby, born prematurely and abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special needs joined their family. Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives.

Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden.

The cases now before the Court involve other petitioners as well, each with their own experiences. Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond.

## **B**

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution – even as confined to opposite-sex relations – has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential.

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity.

A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.

For much of the 20th century, moreover, homosexuality was treated as an illness. Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable. In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. *Baehr v. Lewin*, 74 Haw. 530, 852 P. 2d 44. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife."

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State's Constitution guaranteed same-sex couples the right to marry. See *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003). After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. Two Terms ago, in *United States v. Windsor*, 570 U. S. (2013), this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples "who wanted to affirm their commitment to one another before their children, their family, their friends, and their community."

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With the exception of the opinion here under review and one other, the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many thoughtful District Court decisions addressing same-sex marriage-and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions.

After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage.

### III

Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, e.g., *Eisenstadt v. Baird*; *Griswold v. Connecticut*, 381 U. S. 479, 484-486 (1965).

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." *Poe v. Ullman*, 367 U. S. 497, 542 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence*, at 572. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia*, 388 U. S. 1, 12 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court reaffirmed that holding in *Zablocki v. Redhail*, 434 U. S. 374, 384 (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in *Turner v. Safley*, 482 U. S. 78, 95 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause.

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in *Baker v. Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond.

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is

fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. Indeed, the Court has noted it would be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold v. Connecticut*, which held the Constitution protects the right of married couples to use contraception. Suggesting that marriage is a right "older than the Bill of Rights," *Griswold* described marriage this way:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*. Marriage also affords the permanency and stability important to children's best interests.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot [\*32] be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington v. Glucksberg*, 521 U. S. 702, 721 (1997), which called for a "careful description" of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted

right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.

That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court's cases touching upon the right to marry reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court first declared the prohibition invalid because of its unequal treatment of interracial couples.

Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970's and 1980's. Notwithstanding the gradual erosion of the doctrine of coverture, invidious sex-based classifications in marriage remained common through the mid-20th century. These classifications denied the equal dignity of men and women. Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage. [citing cases dealing with such matters as insurance and retirement benefits] Like *Loving* and *Zablocki*, these precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and *Equal Protection Clauses of the Fourteenth Amendment* couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

#### IV

There may be an initial inclination in these cases to proceed with caution – to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. In its ruling on the cases now before this Court, the majority opinion for the Court of Appeals made a cogent argument that it would be appropriate for the respondents' States to await further public discussion and political measures before licensing same-sex marriages.

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.

This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers*, a bare majority upheld a law criminalizing same-sex intimacy. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the *Bowers* Court. That is why *Lawrence* held *Bowers* was "not correct when it was decided." Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt

lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the same effect – and, like *Bowers*, would be unjustified under the Fourteenth Amendment. Indeed, faced with a disagreement among the Courts of Appeals – a disagreement that caused impermissible geographic variation in the meaning of federal law – the Court granted review to determine whether same-sex couples may exercise the right to marry. Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most basic compact. Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple's decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

## V

These cases also present the question whether the Constitution requires States to recognize same-sex marriages validly performed out of State.

Leaving the current state of affairs in place would maintain and promote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines. In light of the fact that many States already allow same-sex marriage and hundreds of thousands of these marriages already have occurred—the disruption caused by the recognition bans is significant and ever-growing.

As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined. The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

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No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Petitioners make strong arguments rooted in social policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples. That position has undeniable appeal; over the past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex.

But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise "neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered).

Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens – through the democratic process – to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter

of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.

## I

Petitioners and their *amici* base their arguments on the "right to marry" and the imperative of "marriage equality." There is no serious dispute that, under our precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes "marriage," or – more precisely – *who decides* what constitutes "marriage"?

The majority largely ignores these questions, relegating ages of human experience with marriage to a paragraph or two. Even if history and precedent are not "the end" of these cases, I would not "sweep away what has so long been settled" without showing greater respect for all that preceded us.

Over the last few years, public opinion on marriage has shifted rapidly. In 2009, the legislatures of Vermont, New Hampshire, and the District of Columbia became the first in the Nation to enact laws that revised the definition of marriage to include same-sex couples, while also providing accommodations for religious believers. In 2011, the New York Legislature enacted a similar law. In 2012, voters in Maine did the same, reversing the result of a referendum just three years earlier in which they had upheld the traditional definition of marriage.

In all, voters and legislators in eleven States and the District of Columbia have changed their definitions of marriage to include same-sex couples. The highest courts of five States have decreed that same result under their own Constitutions. The remainder of the States retain the traditional definition of marriage.

## II

Petitioners first contend that the marriage laws of their States violate the Due Process Clause. The Solicitor General of the United States, appearing in support of petitioners, expressly disowned that position before this Court. The majority nevertheless resolves these cases for petitioners based almost entirely on the Due Process Clause.

The majority purports to identify four "principles and traditions" in this Court's due process

precedents that support a fundamental right for same-sex couples to marry. In reality, however, the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York*. Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law.

The majority's driving themes are that marriage is desirable and petitioners desire it. The opinion describes the "transcendent importance" of marriage and repeatedly insists that petitioners do not seek to "demean," "devalue," "denigrate," or "disrespect" the institution. Nobody disputes those points. Indeed, the compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry. As a matter of constitutional law, however, the sincerity of petitioners' wishes is not relevant.

When the majority turns to the law, it relies primarily on precedents discussing the fundamental "right to marry." *Turner v. Safley*; *Zablocki*; *Loving*. These cases do not hold, of course, that anyone who wants to get married has a constitutional right to do so. They instead require a State to justify barriers to marriage as that institution has always been understood. In *Loving*, the Court held that racial restrictions on the right to marry lacked a compelling justification. In *Zablocki*, restrictions based on child support debts did not suffice. In *Turner*, restrictions based on status as a prisoner were deemed impermissible.

None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman.

In short, the "right to marry" cases stand for the important but limited proposition that particular restrictions on access to marriage *as traditionally defined* violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here.

### III

In addition to their due process argument, petitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. Its discussion is, quite frankly, difficult to follow. The central point seems to be that there is a "synergy between" the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases. It is casebook doctrine that the "modern Supreme Court's treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing." G. Stone, L. Seidman, C. Sunstein, M. Tushnet, & P. Karlan, *Constitutional Law* 453 (7th ed. 2013). The majority's approach today is different:

Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in

the identification and definition of the right.

The majority goes on to assert in conclusory fashion that the Equal Protection Clause provides an alternative basis for its holding. Yet the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions.

#### IV

Nowhere is the majority's extravagant conception of judicial supremacy more evident than in its description – and dismissal – of the public debate regarding same-sex marriage. Yes, the majority concedes, on one side are thousands of years of human history in every society known to have populated the planet. But on the other side, there has been "extensive litigation," "many thoughtful District Court decisions," "countless studies, papers, books, and other popular and scholarly writings," and "more than 100" *amicus* briefs in these cases alone. What would be the point of allowing the democratic process to go on? It is high time for the Court to decide the meaning of marriage, based on five lawyers' "better informed understanding" of "a liberty that remains urgent in our own era." The answer is surely there in one of those *amicus* briefs or studies.

When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are-in the tradition of our political culture-reconciled to the result of a fair and honest debate. In addition, they can gear up to raise the issue later, hoping to persuade enough on the winning side to think again.

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If you are among the many Americans – of whatever sexual orientation – who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

I respectfully dissent.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I join THE CHIEF JUSTICE's opinion in full. I write separately to call attention to this Court's threat to American democracy.

The substance of today's decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance. Those civil consequences-and the public approval that conferring the name of marriage evidences-can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact – and the furthest extension one can

even imagine – of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

## I

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to. Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work.

The Constitution places some constraints on self-rule-constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments. Forbidden are laws "impairing the Obligation of Contracts," denying Full Faith and Credit" to the "public Acts" of other States, prohibiting the free exercise of religion, abridging the freedom of speech, infringing the right to keep and bear arms, authorizing unreasonable searches and seizures, and so forth. Aside from these limitations, those powers "reserved to the States respectively, or to the people" can be exercised as the States or the People desire. These cases ask us to decide whether the *Fourteenth Amendment* contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove *that* issue from the political process?

Of course not. It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author of today's opinion reminded us only two years ago (in an opinion joined by the same Justices who join him today):

[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States. . . . [T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.

But we need not speculate. When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision-such as "due process of law" or "equal protection of the laws"-it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification. We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

But the Court ends this debate, in an opinion lacking even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling

assertion: No matter *what* it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its "reasoned judgment," thinks the Fourteenth Amendment ought to protect. That is so because "[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions . . . ." One would think that sentence would continue: ". . . and therefore they provided for a means by which the People could amend the Constitution," or perhaps ". . . and therefore they left the creation of additional liberties, such as the freedom to marry someone of the same sex, to the People, through the never-ending process of legislation." But no. What logically follows, in the majority's judge-empowering estimation, is: "and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning." The "we," needless to say, is the nine of us. "History and tradition guide and discipline [our] inquiry but do not set its outer boundaries." Thus, rather than focusing on *the People's* understanding of "liberty"-at the time of ratification or even today-the majority focuses on four "principles and traditions" that, *in the majority's view*, prohibit States from defining marriage as an institution consisting of one man and one woman.

This is a naked judicial claim to legislative – indeed, *super*-legislative-power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' "reasoned judgment." A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans), or even a Protestant of any denomination. The strikingly unrepresentative character of the body voting on today's social upheaval would be irrelevant if they were functioning as *judges*, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; *they say they are not*. And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.

## II

But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003. They have discovered in the *Fourteenth Amendment* a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds – minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and

Henry Friendly – could not. They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when that is called for by their "reasoned judgment." These Justices *know* that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every nation in history until 15 years ago, cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.

The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so. Of course the opinion's showy profundities are often profoundly incoherent. The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis.

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Hubris is sometimes defined as o'erweening pride; and pride, we know, goeth before a fall. The Judiciary is the "least dangerous" of the federal branches because it has "neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm" and the States, "even for the efficacy of its judgments." With each decision of ours that takes from the People a question properly left to them-with each decision that is unabashedly based not on law, but on the "reasoned judgment" of a bare majority of this Court-we move one step closer to being reminded of our impotence.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

The Court's decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits.

Even if the doctrine of substantive due process were somehow defensible – it is not – petitioners still would not have a claim. To invoke the protection of the Due Process Clause at all-whether under a theory of "substantive" or "procedural" due process a party must first identify a deprivation of "life, liberty, or property." The majority claims these state laws deprive petitioners of "liberty," but the concept of "liberty" it conjures up bears no resemblance to any plausible meaning of that word as it is used in the Due Process Clauses.

As used in the Due Process Clauses, "liberty" most likely refers to "the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." 1 W. Blackstone, Commentaries on the Laws of England 130 (1769) (Blackstone). That definition is drawn from the historical roots of the Clauses and is consistent with our Constitution's text and structure.

Whether we define "liberty" as locomotion or freedom from governmental action more broadly, petitioners have in no way been deprived of it.

Petitioners cannot claim, under the most plausible definition of "liberty," that they have been

imprisoned or physically restrained by the States for participating in same-sex relationships. To the contrary, they have been able to cohabit and raise their children in peace. They have been able to hold civil marriage ceremonies in States that recognize same-sex marriages and private religious ceremonies in all States. They have been able to travel freely around the country, making their homes where they please. Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.

Nor, under the broader definition, can they claim that the States have restricted their ability to go about their daily lives as they would be able to absent governmental restrictions. Petitioners do not ask this Court to order the States to stop restricting their ability to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children. The States have imposed no such restrictions. Nor have the States prevented petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney.

Instead, the States have refused to grant them governmental entitlements. Petitioners claim that as a matter of "liberty," they are entitled to access privileges and benefits that exist solely *because of* the government. They want, for example, to receive the State's *imprimatur* on their marriages-on state issued marriage licenses, death certificates, or other official forms. And they want to receive various monetary benefits, including reduced inheritance taxes upon the death of a spouse, compensation if a spouse dies as a result of a work-related injury, or loss of consortium damages in tort suits. But receiving governmental recognition and benefits has nothing to do with any understanding of "liberty" that the Framers would have recognized.

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Our Constitution-like the Declaration of Independence before it-was predicated on a simple truth: One's liberty, not to mention one's dignity, was something to be shielded from – not provided by – the State. Today's decision casts that truth aside. In its haste to reach a desired result, the majority misapplies a clause focused on "due process" to afford substantive rights, disregards the most plausible understanding of the "liberty" protected by that clause, and distorts the principles on which this Nation was founded. Its decision will have inestimable consequences for our Constitution and our society. I respectfully dissent.

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

Until the federal courts intervened, the American people were engaged in a debate about whether their States should recognize same-sex marriage. The question in these cases, however, is not what States *should* do about same-sex marriage but whether the Constitution answers that question for them. It does not. The Constitution leaves that question to be decided by the people of each State.

To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that "liberty" under the Due Process Clause should be understood to protect only those rights that are " 'deeply rooted in this Nation's history and tradition.' " *Washington v. Glucksberg*. And it is beyond dispute that the right to same-sex marriage is not among those rights.

**PAVAN v. SMITH**  
137 S. Ct. 2075\_\_\_\_ (2017)

PER CURIAM.

As this Court explained in *Obergefell v. Hodges* (2015), the Constitution entitles same-sex couples to civil marriage “on the same terms and conditions as opposite-sex couples.” In the decision below, the Arkansas Supreme Court considered the effect of that holding on the State’s rules governing the issuance of birth certificates. When a married woman gives birth in Arkansas, state law generally requires the name of the mother’s male spouse to appear on the child’s birth certificate – regardless of his biological relationship to the child. According to the court below, however, Arkansas need not extend that rule to similarly situated same-sex couples: The State need not, in other words, issue birth certificates including the female spouses of women who give birth in the State. Because that differential treatment infringes *Obergefell*’s commitment to provide same-sex couples “the constellation of benefits that the States have linked to marriage,” we reverse the state court’s judgment.

The petitioners here are two married same-sex couples who conceived children through anonymous sperm donation. When it came time to secure birth certificates for the newborns, each couple filled out paperwork listing both spouses as parents – Leigh and Jana in one case, Terrah and Marisa in the other. Both times, however, the Arkansas Department of Health issued certificates bearing only the birth mother’s name.

The department’s decision rested on a provision of Arkansas law. Ark. Code §20– 18–401 (2014), that specifies which individuals will appear as parents on a child’s state-issued birth certificate. “For the purposes of birth registration,” that statute says, “the mother is deemed to be the woman who gives birth to the child.” §20– 18–401(e). And “[i]f the mother was married at the time of either conception or birth,” the statute instructs that “the name of [her] husband shall be entered on the certificate as the father of the child.” §20– 18–401(f)(1). There are some limited exceptions to the latter rule—for example, another man may appear on the birth certificate if the “mother” and “husband” and “putative father” all file affidavits vouching for the putative father’s paternity. But as all parties agree, the requirement that a married woman’s husband appear on her child’s birth certificate applies in cases where the couple conceived by means of artificial insemination with the help of an anonymous sperm donor.

The Jacobses and Pavans brought this suit in Arkansas state court against the director of the Arkansas Department of Health—seeking, among other things, a declaration that the State’s birth-certificate law violates the Constitution. The trial court agreed, holding that the relevant portions of §20– 18–401 are inconsistent with *Obergefell* because they “categorially prohibit[t] every same-sex married couple . . . from enjoying the same spousal benefits which are available to every opposite-sex married couple.” But a divided Arkansas Supreme Court reversed that judgment, concluding that the statute “pass[es] constitutional muster.” In that court’s view, “the statute centers on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife,” and so it “does not run afoul of *Obergefell*.”

The Arkansas Supreme Court’s decision, we conclude, denied married same-sex couples access to the “constellation of benefits that the State[e] ha[s] linked to marriage.” *Obergefell*. As already explained, when a married woman in Arkansas conceives a child by means of artificial insemination, the State will—indeed, *must*—list the name of her male spouse on the child’s birth certificate. And yet state law, as interpreted by the court below, allows Arkansas officials in those

very same circumstances to omit a married woman’s female spouse from her child’s birth certificate. As a result, same-sex parents in Arkansas lack the same right as opposite-sex parents to be listed on a child’s birth certificate, a document often used for important transactions like making medical decisions for a child or enrolling a child in school.

*Obergefell* proscribes such disparate treatment. As we explained there, a State may not “exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.” Indeed, in listing those terms and conditions—the “rights, benefits, and responsibilities” to which same-sex couples, no less than opposite-sex couples, must have access—we expressly identified “birth and death certificates.” That was no accident: Several of the plaintiffs in *Obergefell* challenged a State’s refusal to recognize their same-sex spouses on their children’s birth certificates. In considering those challenges, we held the relevant state laws unconstitutional to the extent they treated same-sex couples differently from opposite-sex couples. That holding applies with equal force to §20–18–401.

Instead, the State insists, a birth certificate is simply a device for recording biological parentage—regardless of whether the child’s parents are married. But Arkansas law makes birth certificates about more than just genetics. As already discussed, when an opposite-sex couple conceives a child by way of anonymous sperm donation—just as the petitioners did here—state law requires the placement of the birth mother’s husband on the child’s birth certificate. And that is so even though (as the State concedes) the husband “is definitively not the biological father” in those circumstances. Arkansas has thus chosen to make its birth certificates more than a mere marker of biological relationships: The State uses those certificates to give married parents a form of legal recognition that is not available to unmarried parents. Having made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition. The judgment of the Arkansas Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

JUSTICE GORSUCH, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

Summary reversal is usually reserved for cases where “the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.” To be sure, *Obergefell* addressed the question whether a State must recognize same-sex marriages. But nothing in *Obergefell* spoke (let alone clearly) to the question whether §20–18–401 of the Arkansas Code, or a state supreme court decision upholding it, must go. The statute in question establishes a set of rules designed to ensure that the biological parents of a child are listed on the child’s birth certificate. Before the state supreme court, the State argued that rational reasons exist for a biology based birth registration regime, reasons that in no way offend *Obergefell*—like ensuring government officials can identify public health trends and helping individuals determine their biological lineage, citizenship, or susceptibility to genetic disorders. In an opinion that did not in any way seek to defy but rather earnestly engage *Obergefell*, the state supreme court agreed. And it is very hard to see what is wrong with this conclusion for, just as the state court recognized, nothing in *Obergefell* indicates that a birth registration regime based on biology, one no doubt with many analogues across the country and throughout history, offends the Constitution. To the contrary, to the extent they speak to the question at all, this Court’s precedents suggest just the opposite conclusion. Neither does anything in today’s opinion purport to identify any constitutional problem with a biology based birth registration regime. So whatever else we might do with this case, summary reversal would not exactly seem the obvious course.

What, then, is at work here? If there isn’t a problem with a biology based birth registration regime, perhaps the concern lies in this particular regime’s exceptions. For it turns out that Arkansas’s general rule of registration based on biology does admit of certain more specific exceptions. Most importantly for our purposes, the State acknowledges that §9–10–201 of the Arkansas Code controls

how birth certificates are completed in cases of artificial insemination like the one before us. The State acknowledges, too, that this provision, written some time ago, indicates that the mother's husband generally shall be treated as the father—and in this way seemingly anticipates only opposite-sex marital unions.

But if the artificial insemination statute is the concern, it's still hard to see how summary reversal should follow for at least a few reasons. First, petitioners didn't actually challenge §9–10–201 in their lawsuit. Instead, petitioners sought and the trial court granted relief eliminating the State's authority under §9–10–201 in their lawsuit. Instead, petitioners sought and the trial court granted relief eliminating the State's authority under §20–18–401 to enforce a birth registration regime generally based on biology. On appeal, the state supreme court simply held that this overbroad remedy wasn't commanded by *Obergefell* or the Constitution. And, again, nothing in today's opinion for the Court identifies anything wrong, let alone clearly wrong, in that conclusion. Second, though petitioner's lawsuit didn't challenge §9–10–201, the State has repeatedly conceded that the benefits afforded non biological parents under §9–10–201 must be afforded equally to both same-sex and opposite-sex couples. So that in this particular case and all others of its kind, the State agrees, the female spouse of the birth mother must be listed on birth certificates too. Third, further proof still of the state of the law in Arkansas today is the fact that, when it comes to adoption (a situation not present in this case but another one in which Arkansas departs from biology based registration), the State tells us that adopting parents are eligible for placement on birth certificates without respect to sexual orientation.

Given all this, it seems far from clear what here warrants the strong medicine of summary reversal. Indeed, it is not even clear what the Court expects to happen on remand that hasn't happened already. The Court does not offer any remedial suggestion, and none leaps to mind. Perhaps the state supreme court could memorialize the State's concession on §9–10–201, even though that law wasn't fairly challenged and such a chore is hardly the usual reward for seeking faithfully to apply, not evade, this Court's mandates.

I respectfully dissent.

## **Chapter 7 THE MEANING OF EQUAL PROTECTION**

### **§ 7.01 FASHIONING THE CONCEPTS: TRADITIONAL EQUAL PROTECTION**

**Add at the end of note 6:**

*Armour v. City of Indianapolis*, 132 S. Ct. 2073 (2012). was an unusual situation in which the “liberal” side of the Court used rational basis review to uphold city action against an equal protection challenge while the “conservative” wing of the Court would have found a constitutional violation. Justice Breyer, for the Court, described the situation this way:

For many years, an Indiana statute, the “Barrett Law,” authorized Indiana’s cities to impose upon benefitted lot owners the cost of sewer improvement projects. The Law also permitted those lot owners to pay either immediately in the form of a lump sum or over time in installments. In 2005, the city of Indianapolis (City) adopted a new assessment and payment method, the “STEP” plan, and it forgave any Barrett Law installments that lot owners had not yet paid.

A group of lot owners who had already paid their entire Barrett Law assessment in a lump sum believe that the City should have provided them with equivalent refunds. . . . We hold that the City had a rational basis for distinguishing between those lot owners who had already paid their share of project costs and those who had not. And we conclude that there is no equal protection violation.

The refusal to refund pre-payments by some property owners meant that some of them would pay about \$8,000 more than their installment-paying neighbors, a disparity described by the dissent as about a 30-1 discrimination. The city offered justifications based on the administrative inconvenience of calculating refunds and providing multiple payment systems. Because there were not suspect classifications involved, the majority accepted the city’s explanation as a rational basis.

In dissent, Chief Justice Roberts, joined by 2 others, complained that mere administrative convenience had previously been held to be an insufficient basis for disparities in tax treatment. “Our precedents do not ask much from government in this area — only “rough equality in tax treatment.” Indiana violated that principle on a 30-1 ratio, which was too much for the dissenters.

### **§ 7.02 SUSPECT CLASSIFICATIONS -RACE**

**Page 805: Add just before *Parents Involved*:**

*Schuette v. BAMN*, 134 S. Ct. 1623 (2014). In reaction to *Gratz*, the University of Michigan changed its undergraduate admissions plan but the change still permitted “limited use of race preferences.” In 2006, Michigan voters amended the state constitution to prevent the state and state entities from granting race based preferences with respect to a “wide range of actions and decisions.” The ballot proposal which resulted in the enactment of the amendment was called Proposal 2. The resulting enactment, *inter alia*, Article 1, Sec.26, prohibits race based preferences in admissions to the state universities and colleges. Plaintiffs included a civil rights

organization, students, faculty and prospective applicants to Michigan universities brought suit in the United States District Court contending that Proposal 2 violated the Equal Protection Clause of the 14<sup>th</sup> Amendment. The District Court granted summary judgment to Michigan in this case. But the United States Court of Appeals for the Sixth Circuit reversed and ruled that Proposal 2 violated this Court's holding in *Washington v. Seattle School District no. 1*, 458 U.S. 457 (1982).

Justice Kennedy announced the judgment of the Court and delivered a plurality opinion in which Chief Justice Roberts and Justice Alito joined. The Court reversed the Sixth Circuit. This case was “not about the constitutionality, or the merits of race-conscious admissions policies in higher education.” This case does not challenge “the principle that the consideration of race in admissions is permissible, provided that certain conditions are meant.” The issue in the case was “whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in government decisions, in particular with respect to school admissions.” Other states have “decided to prohibit race-conscious admissions policies” and are currently experimenting with variety of alternative approaches.” The Court of Appeals mistakenly relied on the *Seattle* case which raised “quite different issues.” But it is necessary to consider cases which “preceded *Seattle*.” the Court turned to *Reitman v. Mulkey*, 387 U.S. 369 (1967) [text, p. 1573]: “In *Mulkey*, voters amended the California Constitution to prohibit any state legislative interference with an owner's prerogative to decline to sell or rent residential property on any basis. The Court concluded that the state constitutional provision was a denial of equal protection. The Court agreed with the California Supreme Court that the amendment operated to insinuate the State into the decision to discriminate by encouraging that practice.”

Another relevant precedent upon which the respondents had relied was *Hunter v. Erickson*, 393 U.S. 385 (1969). That case dealt with an Akron Ohio fair housing ordinance which prohibited racial discrimination in housing. After the fair housing ordinance was passed by the city council, Akron voters amended the city's charter to overturn the fair housing ordinance and to require that any new anti-discrimination housing ordinance must be approved by referendum: “*Hunter* rests on the unremarkable principle that the State may not alter the procedures of government to target racial minorities. *Hunter* established that invidious discrimination would be the necessary result of the procedural restructuring. Thus, in *Mulkey* and *Hunter*, there was a demonstrated injury on the basis of race that, by reasons of state encouragement or participation, become more aggravated.”

*Seattle* was the third relevant case. In order to remedy “the racial isolation of minority students in local schools,” the school board enacted a mandatory busing program. However, voters opposed to the busing plan were successful in passing an initiative which prohibited mandatory busing in order to achieve integration. Justice Kennedy summarized the *Seattle* holding and rejected a broad reading of some of its language:

“[T]he practical effect” of the state initiative was to “remov[e] the authority to address a racial problem -- and only a racial problem -- from the existing decision-making body, in such a way as to burden minority interests” because advocates of busing ‘now must relief seek from the state legislature, or from the statewide electorate.’ The Court therefore found that the initiative had explicitly us[ed] the racial nature of a decision to determine the decision-making process. *Seattle* is best understood as a case in which the state action in question (the bar on busing enacted by the State's voters) had the serious risk, if not purpose, of causing specific injuries on account of race, just as had been the case in *Mulkey*

and *Hunter*. As this Court held in *Parents Involved*, the school board's purported remedial action would not be permissible today absent a showing of *de jure* segregation. The broad language used in *Seattle*, however, went well beyond the analysis needed to resolve the case. To the extent *Seattle* is read to require the Court to determine and declare which political policies serve the "interests" of a group in d defined in racial terms, that rationale was unnecessary to the decision in *Seattle*; it has no support in precedent; and it raises serious constitutional concerns. That expansive language does not provide a proper guide for decisions and should not be deemed authoritative or controlling.

Justice Kennedy observed that adoption of the *Seattle* formulation would permit those seeking to avoid voter participation to argue that a group they wished to define by "race or racial stereotypes" were "advantaged or disadvantaged" by a wide range of laws such as "tax policy, housing subsidies, wage regulations, and even the naming of public schools." The issue here was not how to avoid race-based injury but instead "whether voters may determine whether a policy of race-based preferences should be continued." In enacting Proposal 2 and in adding Sec. 26 to the Michigan Constitution, the Michigan electorate exercised "their privilege to enact laws as a basic exercise of their democratic power." The respondents argue that "a difficult question of public policy" must be taken out of the hands of the voters and removed from debate in an election campaign. But it is "demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." It would be a disservice to "First Amendment dynamics" to state "that the question here at issue is beyond the capacity of voters to debate and determine." This case was not about how the controversy concerning racial preferences should be decided. This case was about who should decide it. Justice Kennedy said there was nothing in the Constitution or in the Court's precedents to authorize setting aside "Michigan laws that commit this policy determination to the voters."

Justice Kagan took no part in the consideration of this case.

Justice Scalia, with whom Justice Thomas joined, concurred in the judgment. The "real battle ground for this case" is the political process doctrine. The triggering prong of that doctrine "assigns to a court the task of determining whether a law that reallocates policymaking authority concerns a 'racial issue.'" That doctrine and the cases supporting it such as *Seattle* and *Hunter* should be overruled. It involves the judiciary in the "dirty business of dividing the nation 'into racial blocs.'" It also wrongly misreads the Equal Protection Clause as protective of particular groups. Another part of the analysis established by those cases "directs a court to determine whether the challenged act "place[s] effective decision-making authority over [the] racial issue at a different level of government." But the *Hunter-Seattle* analysis "nearly swallows the rule of structural state sovereignty." Justice Scalia concluded: "I part ways with *Hunter*, *Seattle* and (I think) the plurality for an additional reason: Each endorses a version of the position that a facially neutral law may deny equal protection solely because it has a disparate racial impact. Few equal protection theories have been so squarely and soundly rejected."

Justice Breyer, concurring in the judgment, agreed with the plurality that the amendment at issue was consistent with the Equal Protection Clause but for different reasons than those given by the plurality. First, the amendment is only being considered as it applies to and prohibits admission programs that have as their sole justification the use of race to secure the educational benefits that "flow from a diverse student body." Second, while as he explained in his dissent in *Parents Involved* such programs are constitutional, the constitution does not authorize judges "either to forbid or to require the adoption of diversity-seeking 'solutions' (of the kind at issue

here) to such serious problems as administering the country's schools to create a society inclusive of all Americans. Third, *Hunter* and *Seattle* do not apply here. Those cases "involved a restructuring of the political process that changed the political level at which policies were enacted." This case does not reorder the political process. It does not concern "the movement of decision-making from one political level to another." If *Hunter* and *Seattle* were extended to cover situations "in which decision-making authority is moved from an administrative body to a political one," significant problems would arise such as obstructing change. There would also be a risk of "discouraging experimentation" to find out "how race-conscious policies work." "Decision-making through the democratic process" gives the "people, or their elected representatives" the right to "adopt race-conscious policies for reasons of inclusion, so must it give them the right not to do so."

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joined, dissented.

*Hunter* and *Seattle* [r]ecognized what is now known as the political-process doctrine": When the majority reconfigures the political process in a manner that burdens only a racial minority, that alteration triggers strict judicial scrutiny. Today, disregarding *stare decisis*, a majority of the Court effectively discards those precedents. The plurality's decision fundamentally misunderstands the nature of the injustice worked by Sec. 26. This case is not, as the plurality imagines, about "who may resolve the debate" over the use of race in higher education admissions. I agree wholeheartedly that nothing vests the resolution of that debate exclusively in the courts or requires that we remove it from the reach of the electorate. Rather this case is about *how* the debate over the use of race-sensitive admissions policies may be resolved -- that is, it must be resolved in constitutionally permissible ways. While our Constitution does not guarantee groups victory in the political process, it does guarantee them meaningful and equal access to that process. It guarantees that the majority may not win by stacking the political process against minority groups permanently, forcing the minority alone to surmount unique obstacles in pursuit of its goals - here, educational diversity that cannot reasonably be accomplished through race-neutral measures. Today, by permitting a majority of the voters in Michigan to do what our Constitution forbids, the Court ends the debate over race-sensitive admissions policies in Michigan in a manner that contravenes protections long recognized in our precedents.

**FISHER v. UNIVERSITY OF TEXAS AT AUSTIN**  
**136 S. Ct. 2198 (2016)**

JUSTICE KENNEDY delivered the opinion of the Court.

The Court is asked once again to consider whether the race-conscious admissions program at the University of Texas is lawful under the Equal Protection Clause.

The University of Texas at Austin (or University) relies upon a complex system of admissions that has undergone significant evolution over the past two decades. Until 1996, the University made its admissions decisions primarily based on a measure called "Academic Index" (or AI), which it calculated by combining an applicant's SAT score and academic performance in high school. In assessing applicants, preference was given to racial minorities.

In 1996, the Court of Appeals for the Fifth Circuit invalidated this admissions system, holding that any consideration of race in college admissions violates the Equal Protection Clause. *Hopwood v. Texas*.

One year later the University adopted a new admissions policy. Instead of considering race, the University began making admissions decisions based on an applicant's AI and his or her "Personal Achievement Index" (PAI). The PAI was a numerical score based on a holistic review of an application. Included in the number were the applicant's essays, leadership and work experience, extracurricular activities, community service, and other "special characteristics" that might give the admissions committee insight into a student's background. Consistent with *Hopwood*, race was not a consideration in calculating an applicant's AI or PAI.

The Texas Legislature responded to *Hopwood* as well. It enacted H. B. 588, commonly known as the Top Ten Percent Law. As its name suggests, the Top Ten Percent Law guarantees college admission to students who graduate from a Texas high school in the top 10 percent of their class. Those students may choose to attend any of the public universities in the State.

The University implemented the Top Ten Percent Law in 1998. After first admitting any student who qualified for admission under that law, the University filled the remainder of its incoming freshman class using a combination of an applicant's AI and PAI scores—again, without considering race.

The University used this admissions system until 2003, when this Court decided the companion cases of *Grutter v. Bollinger* and *Gratz v. Bollinger*. In *Gratz*, this Court struck down the University of Michigan's undergraduate system of admissions, which at the time allocated predetermined points to racial minority candidates. In *Grutter*, however, the Court upheld the University of Michigan Law School's system of holistic review—a system that did not mechanically assign points but rather treated race as a relevant feature within the broader context of a candidate's application. In upholding this nuanced use of race, *Grutter* implicitly overruled *Hopwood*'s categorical prohibition. In the wake of *Grutter*, the University embarked upon a year-long study seeking to ascertain whether its admissions policy was allowing it to provide "the educational benefits of a diverse student body . . . to all of the University's undergraduate students." The University concluded that its admissions policy was not providing these benefits.

To change its system, the University submitted a proposal to the Board of Regents that requested permission to begin taking race into consideration as one of "the many ways in which [an] academically qualified individual might contribute to, and benefit from, the rich, diverse, and challenging educational environment of the University." After the board approved the proposal, the University adopted a new admissions policy to implement it. The University has continued to use that admissions policy to this day.

Although the University's new admissions policy was a direct result of *Grutter*, it is not identical to the policy this Court approved in that case. Instead, consistent with the State's legislative directive, the University continues to fill a significant majority of its class through the Top Ten Percent Plan (or Plan). Today, up to 75 percent of the places in the freshman class are filled through the Plan. As a practical matter, this 75 percent cap, which has now been fixed by statute, means that, while the Plan continues to be referenced as a "Top Ten Percent Plan," a student actually needs to finish in the top seven or eight percent of his or her class in order to be admitted under this category.

The University did adopt an approach similar to the one in *Grutter* for the remaining 25 percent or so of the incoming class. This portion of the class continues to be admitted based on a combination of their AI and PAI scores. Now, however, race is given weight as a subfactor within the PAI. The PAI is a number from 1 to 6 (6 is the best) that is based on two primary components. The first component is the average score a reader gives the applicant on two required essays. The second component is a full-file review that results in another 1-to-6 score, the “Personal Achievement Score” or PAS. The PAS is determined by a separate reader, who (1) rereads the applicant’s required essays, (2) reviews any supplemental information the applicant submits (letters of recommendation, resumes, an additional optional essay, writing samples, artwork, etc.), and (3) evaluates the applicant’s potential contributions to the University’s student body based on the applicant’s leadership experience, extracurricular activities, awards/honors, community service, and other “special circumstances.”

“Special circumstances” include the socioeconomic status of the applicant’s family, the socioeconomic status of the applicant’s school, the applicant’s family responsibilities, whether the applicant lives in a single-parent home, the applicant’s SAT score in relation to the average SAT score at the applicant’s school, the language spoken at the applicant’s home, and, finally, the applicant’s race.

Both the essay readers and the full-file readers who assign applicants their PAI undergo extensive training to ensure that they are scoring applicants consistently. The Admissions Office also undertakes regular “reliability analyses” to “measure the frequency of readers scoring within one point of each other.” Both the intensive training and the reliability analyses aim to ensure that similarly situated applicants are being treated identically regardless of which admissions officer reads the file.

Once the essay and full-file readers have calculated each applicant’s AI and PAI scores, admissions officers from each school within the University set a cutoff PAI/AI score combination for admission, and then admit all of the applicants who are above that cutoff point. In setting the cutoff, those admissions officers only know how many applicants received a given PAI/AI score combination. They do not know what factors went into calculating those applicants’ scores. The admissions officers who make the final decision as to whether a particular applicant will be admitted make that decision without knowing the applicant’s race. Race enters the admissions process, then, at one stage and one stage only—the calculation of the PAS. Therefore, although admissions officers can consider race as a positive feature of a minority student’s application, there is no dispute that race is but a “factor of a factor of a factor” in the holistic-review calculus. Furthermore, consideration of race is contextual and does not operate as a mechanical plus factor for underrepresented minorities. *Id.*, at 606 (“Plaintiffs cite no evidence to show racial groups other than African-Americans and Hispanics are excluded from benefitting from UT’s consideration of race in admissions. As the Defendants point out, the consideration of race, within the full context of the entire application, may be beneficial to any UT Austin applicant—including whites and Asian-Americans.”) There is also no dispute, however, that race, when considered in conjunction with other aspects of an applicant’s background, can alter an applicant’s PAS score. Thus, race, in this indirect fashion, considered with all of the other factors that make up an applicant’s AI and PAI scores, can make a difference to whether an application is accepted or rejected.

Petitioner Abigail Fisher applied for admission to the University’s 2008 freshman class. She was not in the top 10 percent of her high school class, so she was evaluated for admission through

holistic, full-file review. Petitioner’s application was rejected.

Petitioner then filed suit alleging that the University’s consideration of race as part of its holistic-review process disadvantaged her and other Caucasian applicants, in violation of the Equal Protection Clause. The District Court entered summary judgment in the University’s favor, and the Court of Appeals affirmed.

This Court granted certiorari and vacated the judgment of the Court of Appeals, because it had applied an overly deferential “good-faith” standard in assessing the constitutionality of the University’s program. The Court remanded the case for the Court of Appeals to assess the parties’ claims under the correct legal standard.

Without further remanding to the District Court, the Court of Appeals again affirmed the entry of summary judgment in the University’s favor. This Court granted certiorari for a second time, and now affirms.

## II

Fisher I set forth three controlling principles relevant to assessing the constitutionality of a public university’s affirmative-action program. First, “because racial characteristics so seldom provide a relevant basis for disparate treatment,” *Richmond v. J. A. Croson Co.*, “[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny,” Fisher I. Strict scrutiny requires the university to demonstrate with clarity that its “purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.”

Second, Fisher I confirmed that “the decision to pursue ‘the educational benefits that flow from student body diversity’ . . . is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper.” A university cannot impose a fixed quota or otherwise “define diversity as ‘some specified percentage of a particular group merely because of its race or ethnic origin.’” Once, however, a university gives “a reasoned, principled explanation” for its decision, deference must be given “to the University’s conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals.” *Ibid.* (internal quotation marks and citation omitted).

Third, Fisher I clarified that no deference is owed when determining whether the use of race is narrowly tailored to achieve the university’s permissible goals. A university, Fisher I explained, bears the burden of proving a “nonracial approach” would not promote its interest in the educational benefits of diversity “about as well and at tolerable administrative expense.” Though “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative” or “require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups,” *Grutter*, it does impose “on the university the ultimate burden of demonstrating” that “race-neutral alternatives” that are both “available” and “workable” “do not suffice.” Fisher I.

Fisher I set forth these controlling principles, while taking no position on the constitutionality of the admissions program at issue in this case. The Court held only that the District Court and the Court of Appeals had “confined the strict scrutiny inquiry in too narrow a way by deferring to the University’s good faith in its use of racial classifications.” The Court remanded the case, with instructions to evaluate the record under the correct standard and to determine whether

the University had made “a showing that its plan is narrowly tailored to achieve” the educational benefits that flow from diversity. On remand, the Court of Appeals determined that the program conformed with the strict scrutiny mandated by Fisher I.

### III

The University’s program is *sui generis*. Unlike other approaches to college admissions considered by this Court, it combines holistic review with a percentage plan. This approach gave rise to an unusual consequence in this case: The component of the University’s admissions policy that had the largest impact on petitioner’s chances of admission was not the school’s consideration of race under its holistic-review process but rather the Top Ten Percent Plan. Because petitioner did not graduate in the top 10 percent of her high school class, she was categorically ineligible for more than three-fourths of the slots in the incoming freshman class. It seems quite plausible, then, to think that petitioner would have had a better chance of being admitted to the University if the school used raceconscious holistic review to select its entire incoming class, as was the case in Grutter.

### IV

In seeking to reverse the judgment of the Court of Appeals, petitioner makes four arguments. First, she argues that the University has not articulated its compelling interest with sufficient clarity. According to petitioner, the University must set forth more precisely the level of minority enrollment that would constitute a “critical mass.” Without a clearer sense of what the University’s ultimate goal is, petitioner argues, a reviewing court cannot assess whether the University’s admissions program is narrowly tailored to that goal.

As this Court’s cases have made clear, however, the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining “the educational benefits that flow from student body diversity.” Fisher I. As this Court has said, enrolling a diverse student body “promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.” Equally important, “student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.” *Ibid*.

Increasing minority enrollment may be instrumental to these educational benefits, but it is not, as petitioner seems to suggest, a goal that can or should be reduced to pure numbers. Indeed, since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained. On the other hand, asserting an interest in the educational benefits of diversity writ large is insufficient. A university’s goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.

The record reveals that in first setting forth its current admissions policy, the University articulated concrete and precise goals.

The University has provided in addition a “reasoned, principled explanation” for its decision to pursue these goals. Fisher I. The University’s 39-page proposal was written following a year-long study, which concluded that “[t]he use of race-neutral policies and programs ha[d] not been

successful” in “provid[ing] an educational setting that fosters cross-racial understanding, provid[ing] enlightened discussion and learning, [or] prepar[ing] students to function in an increasingly diverse workforce and society.” Petitioner’s contention that the University’s goal was insufficiently concrete is rebutted by the record. Second, petitioner argues that the University has no need to consider race because it had already “achieved critical mass” by 2003 using the Top Ten Percent Plan and race-neutral holistic review. Petitioner is correct that a university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan. The record reveals, however, that, at the time of petitioner’s application, the University could not be faulted on this score. Before changing its policy the University conducted “months of study and deliberation, including retreats, interviews, [and] review of data,” and concluded that “[t]he use of race-neutral policies and programs ha[d] not been successful in achieving” sufficient racial diversity at the University. At no stage in this litigation has petitioner challenged the University’s good faith in conducting its studies, and the Court properly declines to consider the extra record materials the dissent relies upon, many of which are tangential to this case at best and none of which the University has had a full opportunity to respond to.

The record itself contains significant evidence, both statistical and anecdotal, in support of the University’s position. To start, the demographic data the University has submitted show consistent stagnation in terms of the percentage of minority students enrolling at the University from 1996 to 2002.

In addition to this broad demographic data, the University put forward evidence that minority students admitted under the Hopwood regime experienced feelings of loneliness and isolation.

Third, petitioner argues that considering race was not necessary because such consideration has had only a “minimal impact” in advancing the [University’s] compelling interest.” Again, the record does not support this assertion. In 2003, 11 percent of the Texas residents enrolled through holistic review were Hispanic and 3.5 percent were African-American. In 2007, by contrast, 16.9 percent of the Texas holistic-review freshmen were Hispanic and 6.8 percent were African-American. Those increases show that consideration of race has had a meaningful, if still limited, effect on the diversity of the University’s freshman class.

Petitioner’s final argument is that “there are numerous other available race-neutral means of achieving” the University’s compelling interest. A review of the record reveals, however, that, at the time of petitioner’s application, none of her proposed alternatives was a workable means for the University to attain the benefits of diversity it sought. For example, petitioner suggests that the University could intensify its outreach efforts to African-American and Hispanic applicants. But the University submitted extensive evidence of the many ways in which it already had intensified its outreach efforts to those students. None of these efforts succeeded, and petitioner fails to offer any meaningful way in which the University could have improved upon them at the time of her application.

Petitioner also suggests altering the weight given to academic and socioeconomic factors in the University’s admissions calculus. This proposal ignores the fact that the University tried, and failed, to increase diversity through enhanced consideration of socioeconomic and other factors. And it further ignores this Court’s precedent making clear that the Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence.

Petitioner’s final suggestion is to uncap the Top Ten Percent Plan, and admit more—if not all—the University’s students through a percentage plan. As an initial matter, petitioner overlooks the fact that the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment. Percentage plans are “adopted with racially segregated neighborhoods and schools front and center stage.” Fisher “It is race consciousness, not blindness to race, that drives such plans.” Consequently, petitioner cannot assert simply that increasing the University’s reliance on a percentage plan would make its admissions policy more race neutral.

Even if, as a matter of raw numbers, minority enrollment would increase under such a regime, petitioner would be hard-pressed to find convincing support for the proposition that college admissions would be improved if they were a function of class rank alone. That approach would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students. A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training.

Class rank is a single metric, and like any single metric, it will capture certain types of people and miss others. This does not imply that students admitted through holistic review are necessarily more capable or more desirable than those admitted through the Top Ten Percent Plan. It merely reflects the fact that privileging one characteristic above all others does not lead to a diverse student body. Indeed, to compel universities to admit students based on class rank alone is in deep tension with the goal of educational diversity as this Court’s cases have defined it.

At its center, the Top Ten Percent Plan is a blunt instrument that may well compromise the University’s own definition of the diversity it seeks.

In addition to these fundamental problems, an admissions policy that relies exclusively on class rank creates perverse incentives for applicants.

For all these reasons, although it may be true that the Top Ten Percent Plan in some instances may provide a path out of poverty for those who excel at schools lacking in resources, the Plan cannot serve as the admissions solution that petitioner suggests. Wherever the balance between percentage plans and holistic review should rest, an effective admissions policy cannot prescribe, realistically, the exclusive use of a percentage plan. In short, none of petitioner’s suggested alternatives—nor other proposals considered or discussed in the course of this litigation—have been shown to be “available” and “workable” means through which the University could have met its educational goals, as it understood and defined them in 2008. The University has thus met its burden of showing that the admissions policy it used at the time it rejected petitioner’s application was narrowly tailored.

\* \* \*

A university is in large part defined by those intangible “qualities which are incapable of objective measurement but which make for greatness.” *Sweatt v. Painter*. Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation’s education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.

In striking this sensitive balance, public universities, like the States themselves, can serve as

“laboratories for experimentation.” *United States v. Lopez*, (KENNEDY, J., concurring). The University of Texas at Austin has a special opportunity to learn and to teach. The University now has at its disposal valuable data about the manner in which different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary. The Court’s affirmance of the University’s admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University’s ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.

JUSTICE KAGAN took no part in the consideration or decision of this case. JUSTICE THOMAS, dissenting.

I join JUSTICE ALITO’s dissent. As JUSTICE ALITO explains, the Court’s decision today is irreconcilable with strict scrutiny, rests on pernicious assumptions about race, and departs from many of our precedents.

I write separately to reaffirm that “a State’s use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.” *Fisher v. University of Tex. at Austin* (THOMAS, J., concurring). “The Constitution abhors classifications based on race because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.” *Id.*, That constitutional imperative does not change in the face of a “faddish theor[y]” that racial discrimination may produce “educational benefits.”

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

Something strange has happened since our prior decision in this case. In that decision, we held that strict scrutiny requires the University of Texas at Austin to show that its use of race and ethnicity in making admissions decisions serves compelling interests and that its plan is narrowly tailored to achieve those ends. Rejecting the argument that we should defer to UT’s judgment on those matters, we made it clear that UT was obligated (1) to identify the interests justifying its plan with enough specificity to permit a reviewing court to determine whether the requirements of strict scrutiny were met, and (2) to show that those requirements were in fact satisfied. On remand, UT failed to do what our prior decision demanded. The University has still not identified with any degree of specificity the interests that its use of race and ethnicity is supposed to serve. Its primary argument is that merely invoking “the educational benefits of diversity” is sufficient and that it need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests. This is nothing less than the plea for deference that we emphatically rejected in our prior decision. Today, however, the Court inexplicably grants that request.

To the extent that UT has ever moved beyond a plea for deference and identified the relevant interests in more specific terms, its efforts have been shifting, unpersuasive, and, at times, less than candid.

At times, UT has claimed that its plan is needed to achieve a “critical mass” of African- American and Hispanic students, but it has never explained what this term means. According to UT, a critical

mass is neither some absolute number of African-American or Hispanic students nor the percentage of African-Americans or Hispanics in the general population of the State. The term remains undefined, but UT tells us that it will let the courts know when the desired end has been achieved. See App. 314a–315a. This is a plea for deference—indeed, for blind deference—the very thing that the Court rejected in *Fisher I*.

UT has also claimed at times that the race-based component of its plan is needed because the Top Ten Percent Plan admits the wrong kind of African-American and Hispanic students, namely, students from poor families who attend schools in which the student body is predominantly African-American or Hispanic.

After making this argument in its first trip to this Court, UT apparently had second thoughts, and in the latest round of briefing UT has attempted to disavow ever having made the argument. But it did, and the argument turns affirmative action on its head. Affirmative-action programs were created to help disadvantaged students.

Although UT now disowns the argument that the Top Ten Percent Plan results in the admission of the wrong kind of African-American and Hispanic students, the Fifth Circuit majority bought a version of that claim. As the panel majority put it, the Top Ten African-American and Hispanic admittees cannot match the holistic African American and Hispanic admittees when it comes to “records of personal achievement,” a “variety of perspectives” and “life experiences,” and “unique skills.” All in all, according to the panel majority, the Top Ten Percent students cannot “enrich the diversity of the student body” in the same way as the holistic admittees.

The Fifth Circuit reached this conclusion with little direct evidence regarding the characteristics of the Top Ten Percent and holistic admittees. Instead, the assumption behind the Fifth Circuit’s reasoning is that most of the African-American and Hispanic students admitted under the race-neutral component of UT’s plan were able to rank in the top decile of their high school classes only because they did not have to compete against white and Asian-American students. This insulting stereotype is not supported by the record. African-American and Hispanic students admitted under the Top Ten Percent Plan receive higher college grades than the African-American and Hispanic students admitted under the race-conscious program.

It should not have been necessary for us to grant review a second time in this case, and I have no greater desire than the majority to see the case drag on. But that need not happen. When UT decided to adopt its race-conscious plan, it had every reason to know that its plan would have to satisfy strict scrutiny and that this meant that it would be its burden to show that the plan was narrowly tailored to serve compelling interests. UT has failed to make that showing. By all rights, judgment should be entered in favor of petitioner.

But if the majority is determined to give UT yet another chance, we should reverse and send this case back to the District Court. What the majority has now done—awarding a victory to UT in an opinion that fails to address the important issues in the case—is simply wrong.

## II

UT’s race-conscious admissions program cannot satisfy strict scrutiny. UT says that the program furthers its interest in the educational benefits of diversity, but it has failed to define that interest with any clarity or to demonstrate that its program is narrowly tailored to achieve that or any other particular interest. By accepting UT’s rationales as sufficient to meet its burden, the majority

licenses UT's perverse assumptions about different groups of minority students—the precise assumptions strict scrutiny is supposed to stamp out.

Here, UT has failed to define its interest in using racial preferences with clarity. As a result, the narrow tailoring inquiry is impossible, and UT cannot satisfy strict scrutiny.

By accepting these amorphous goals as sufficient for UT to carry its burden, the majority violates decades of precedent rejecting blind deference to government officials defending “inherently suspect” classifications.

A court cannot ensure that an admissions process is narrowly tailored if it cannot pin down the goals that the process is designed to achieve. UT's vague policy goals are “so broad and imprecise that they cannot withstand strict scrutiny.”

Although UT's primary argument is that it need not point to any interest more specific than “the educational benefits of diversity,” it has—at various points in this litigation—identified four more specific goals: demographic parity, classroom diversity, intraracial diversity, and avoiding racial isolation. Neither UT nor the majority has demonstrated that any of these four goals provides a sufficient basis for satisfying strict scrutiny. And UT's arguments to the contrary depend on a series of invidious assumptions.

The record here demonstrates the pitfalls inherent in racial balancing. Although UT claims an interest in the educational benefits of diversity, it appears to have paid little attention to anything other than the number of students. Instead of focusing on the benefits of diversity, UT seems to have resorted to a simple racial census.

The other major explanation UT offered in the Proposal was its desire to promote classroom diversity.

UT now equivocates, disclaiming any discrete interest in classroom diversity. Instead, UT has taken the position that the lack of classroom diversity was merely a “red flag that UT had not yet fully realized” “the constitutionally permissible educational benefits of diversity.” But UT has failed to identify the level of classroom diversity it deems sufficient, again making it impossible to apply strict scrutiny. A reviewing court cannot determine whether UT's race-conscious program was necessary to remove the so-called “red flag” without understanding the precise nature of that goal or knowing when the “red flag” will be considered to have disappeared.

Putting aside UT's effective abandonment of its interest in classroom diversity, the evidence cited in support of that interest is woefully insufficient to show that UT's race-conscious plan was necessary to achieve the educational benefits of a diverse student body. As far as the record shows, UT failed to even scratch the surface of the available data before reflexively resorting to racial preferences.

Moreover, if UT is truly seeking to expose its students to a diversity of ideas and perspectives, its policy is poorly tailored to serve that end. UT's own study—which the majority touts as the best “nuanced quantitative data” supporting UT's position, demonstrated that classroom diversity was more lacking for students classified as Asian-American than for those classified as Hispanic. Supp. App. 26a. But the UT plan discriminates against Asian-American students.

Finally, it seems clear that the lack of classroom diversity is attributable in good part to factors other than the representation of the favored groups in the UT student population. UT offers an enormous number of classes in a wide range of subjects, and it gives undergraduates a very large measure of freedom to choose their classes. UT also offers courses in subjects that are likely to have special appeal to members of the minority groups given preferential treatment under its challenged plan, and this of course diminishes the number of other courses in which these students can enroll. Having designed an undergraduate program that virtually ensures a lack of classroom diversity, UT is poorly positioned to argue that this very result provides a justification for racial and ethnic discrimination, which the Constitution rarely allows.

UT's purported interest in intraracial diversity, or "diversity within diversity," also falls short. At bottom, this argument relies on the unsupported assumption that there is something deficient or at least radically different about the African-American and Hispanic students admitted through the Top Ten Percent Plan.

Ultimately, UT's intraracial diversity rationale relies on the baseless assumption that there is something wrong with African-American and Hispanic students admitted through the Top Ten Percent Plan, because they are "from the lower-performing, racially identifiable schools."

In addition to relying on stereotypes, UT's argument that it needs racial preferences to admit privileged minorities turns the concept of affirmative action on its head. When affirmative action programs were first adopted, it was for the purpose of helping the disadvantaged. Now we are told that a program that tends to admit poor and disadvantaged minority students is inadequate because it does not work to the advantage of those who are more fortunate. This is affirmative action gone wild.

It is also far from clear that UT's assumptions about the socioeconomic status of minorities admitted through the Top Ten Percent Plan are even remotely accurate.

In addition to using socioeconomic status to falsely denigrate the minority students admitted through the Top Ten Percent Plan, UT also argues that such students are academically inferior.

This argument fails for a number of reasons. First, it is simply not true that Top Ten Percent minority admittees are academically inferior to holistic admittees.

To the extent that intraracial diversity refers to something other than admitting privileged minorities and minorities with higher SAT scores, UT has failed to define that interest with any clarity. UT "has not provided any concrete targets for admitting more minority students possessing [the] unique qualitative-diversity characteristics" it desires. 758 F. 3d, at 669 (Garza, J., dissenting). Nor has UT specified which characteristics, viewpoints, and life experiences are supposedly lacking in the African Americans and Hispanics admitted through the Top Ten Percent Plan. In fact, because UT administrators make no collective, qualitative assessment of the minorities admitted automatically, they have no way of knowing which attributes are missing. See ante, at 9 (admitting that there is no way of knowing "how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review"); 758 F. 3d, at 669 (Garza, J., dissenting)

UT also alleges—and the majority embraces—an interest in avoiding "feelings of loneliness and isolation" among minority students. In support of this argument, they cite only demographic data and anecdotal statements by UT officials that some students (we are not told how many) feel

“isolated.” This vague interest cannot possibly satisfy strict scrutiny.

Even assuming UT is correct that, under Grutter, it need only cite a generic interest in the educational benefits of diversity, its plan still fails strict scrutiny because it is not narrowly tailored. Narrow tailoring requires “a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications.” Fisher I.

UT could have adopted other approaches to further its goals, such as intensifying its outreach efforts, uncapping the Top Ten Percent Law, or placing greater weight on socioeconomic factors.

The majority argues that none of these alternatives is “a workable means for the University to attain the benefits of diversity it sought.” Tellingly, however, the majority devotes only a single, conclusory sentence to the most obvious race-neutral alternative: race-blind, holistic review that considers the applicant’s unique characteristics and personal circumstances.

Given that the University bears the burden of proof, it is not surprising that UT never made the argument that it should win based on the lack of evidence. UT instead asserts that “if the Court believes there are any deficiencies in [the] record that cast doubt on the constitutionality of UT’s policy, the answer is to order a trial, not to grant summary judgment.” Nevertheless, the majority cites three reasons for breaking from the normal strict scrutiny standard. None of these is convincing.

**Page 834: Add before § 7.03:**

*Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). The problem of redistricting state legislatures with attention to both population and race surfaced again after the 2010 census. Alabama, according to the Supreme Court, “sought to minimize the extent to which a district might deviate from the theoretical ideal of precisely equal population” and also “to ensure compliance with federal law, and, in particular, the Voting Rights Act of 1965.” The problem was that the 1965 Act “required Alabama to demonstrate that an electoral change, such as redistricting, would not bring about retrogression in respect to racial minorities’ ‘ability . . . to elect their preferred candidates of choice.’ ”

In a 5-4 decision, the Supreme Court vacated and remanded a three judge federal district court judgment which had upheld a 2012 Alabama legislative redistricting plan. The three judge federal district had rejected an equal protection challenge which claimed that the plan constituted a racial gerrymander. The Supreme Court held that a claim of racial gerrymandering should be analyzed on a district-by-district basis. The three judge district court had wrongly based its analysis on an inquiry directed to whether race impermissibly motivated “drawing the boundary lines of the State considered as a whole.” The majority instead held that a claim of racial gerrymandering should be analyzed on a district-by-district basis.

Justice Breyer’s majority opinion concluded that Alabama’s plans might have unconstitutionally classified black voters by race by intentionally packing them in districts designed to maintain supermajority percentages. The Court’s explanation shows the difficulties faced by legislatures covered by the 1965 Act:

Imagine a majority-minority district with a 70% black population. Assume also that

voting in that district, like that in the State itself, is racially polarized. And assume that the district has long elected to office black voters' preferred candidate. Other things being equal, it would seem highly unlikely that a redistricting plan that, while increasing the numerical size of the district, reduced the percentage of the black population from, say, 70% to 65% would have a significant impact on the black voters' ability to elect their preferred candidate. And, for that reason, it would be difficult to explain just why a plan that uses racial criteria predominately to maintain the black population at 70% is "narrowly tailored" to achieve a "compelling state interest," namely the interest in preventing § 5 retrogression.

In saying this, we do not insist that a legislature guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive. The law cannot insist that a state legislature, when redistricting, determine precisely what percent minority population §5 demands. The standards of §5 are complex; they often require evaluation of controverted claims about voting behavior; the evidence may be unclear; and, with respect to any particular district, judges may disagree about the proper outcome. The law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under §5 should the legislature place a few too few. Thus, we agree with the United States that a court's analysis of the narrow tailoring requirement insists only that the legislature have a "strong basis in evidence" in support of the (race-based) choice that it has made. This standard, as the United States points out, "does not demand that a State's actions actually be necessary to achieve a compelling state interest in order to be constitutionally valid." And legislators "may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have good reasons to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance."

In dissent, Justice Scalia for the conservative wing of the Court found this explanation to be giving the litigants a "second bite at the apple" by going back to prove something that had not been litigated in the district court – namely, that some specific districts might have more minority voters than would be justified by the "retrogression" issue.

In *Bethune-Hill v. Virginia State Board of Election*, 137 S. Ct. 788 (2017), the Court, per Justice Kennedy, ruled that a court reviewing the constitutional validity of a legislative re-districting plan with respect to the impact of race on designing the district's borders must take a holistic approach. In *Bethune-Hill*, the Court once again wrestled with applying the principle set forth in *Miller v. Johnson*, 515 U.S. 900 (1994) that a state legislative districting plan violates the Equal Protection Clause if "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." After the 2010 census, some legislative redistricting was necessary to "ensure proper numerical apportionment for the Virginia House of Delegates." The Virginia State legislature drew the boundary lines for 12 legislative districts with the objective "that each district would have a black voting-age population (BVAP) of at least 55%." Some voters challenged the re-districting plan as an unconstitutional racial gerrymander which violated the Equal Protection Clause of the Fourteenth Amendment.

A three judge district court interpreted *Miller v. Johnson, supra*, to mean that race predominates only in the case of an “actual conflict” between the traditional redistricting criteria used for evaluating the validity of a plan and race. Using this approach, the three judge district court held that 11 of the 12 districts did not present such a conflict. With respect to one legislative district, District 75, the Court found that race predominated but that the boundary lines of District 75 did deviate from the traditional criteria used to draw lines for state legislative districts. Nevertheless, the district court ruled that the new lines drawn for district 75 were necessary to enable black voters to elect “their preferred candidates.” Furthermore, at the time, a contrary result would have violated §5 of the Fourteenth Amendment *cf. Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). In light of the foregoing, the three judge district court held the lines drawn for District 75 were valid because the legislature’s use of race in drawing those lines was narrowly tailored and served a compelling state interest.

Justice Kennedy disagreed with two aspects of the three judge district court opinion. The first aspect had to do with the district court’s view that there had to be an actual conflict between a predominant use of race and traditional districting criteria: “[T]here may be cases where challengers will be able to establish racial predominance in the absence of an actual conflict by presenting direct evidence of the legislative purpose and intent or other compelling circumstantial evidence.” The second aspect of the district court opinion with which the Supreme Court disagreed was the district court’s view that it needed to consider the “legislature’s motive only to the extent that the challengers identified deviations from traditional redistricting criteria that were attributable to race and not to some other factor.” Instead, what was necessary was a holistic analysis. The failure of the district court to take such an approach resulted in that court giving “insufficient weight to the 55% of BVAP target and other relevant evidence that race predominated.” With respect to 11 of the districts, the district court on remand should, in light of these principles, determine whether the requirements of the strict scrutiny standard have been met. As for District 75, Justice Kennedy said that the Court “finds no error” in the district court’s determination “that the race-based calculus it employed in District 75 was necessary to avoid” violation of §5 of the Voting Rights Act.

As to the other 11 districts, the district court on remand was directed to apply the “racial predominance analysis” in *Miller* and *Shaw II* as well as the “basic narrow tailoring analysis” of *Alabama Legislative Caucus* to those districts. Therefore, the judgment of the district court was affirmed in part and vacated in part and remanded to the district court for further proceedings.

***Cooper v. Harris*, 137 S. Ct. 1455 \_\_\_\_\_ (2017)**, is yet another state legislative plan which was ruled to be in violation of the Equal Protection Clause. *Cooper* involves the North Carolina legislature’s re-drawing of the borders for North Carolina’s 1<sup>st</sup> and 12<sup>th</sup> Congressional districts. Registered voters in these districts filed suit against North Carolina state officials. They contended that the geographic lines drawn by the state legislature constituted racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment. The three judge district court held that the lines drawn for both Congressional districts were unconstitutional.

The Supreme Court, per Justice Kagan, joined by Justices Ginsburg, Breyer, Sotomayor, and Thomas, affirmed the three judge district court. Relying on the analysis of racial gerrymanders in state legislative re-districting plans in *Bethune-Hill v. Virginia Elections Board, supra*, Justice Kagan noted that *Bethune-Hill* had declared that the Equal Protection Clause does not permit a state to separate “its citizens into different voting districts on the basis of race” if “sufficient justification” is lacking.

The three judge district court held that there was insufficient justification for the geographic

lines that the North Carolina legislature had drawn for Congressional districts 1 and 12. With respect to Congressional District 1, the three judge district court concluded that “racial considerations predominated” in drawing the lines for District 1. Using the strict scrutiny standard of review, the three judge district court rejected North Carolina’s contention that the Voting Rights Act required “a race-based drawing of District 1’s lines.” The Court agreed with three judge district court that “race furnished the predominant rationale” for the redesign of District 1 and that the Voting Rights Act did not justify North Carolina’s use of race in drawing the borders for that district.

The three judge district court found with respect to District 1 that race was a predominant consideration in the legislature’s drawing of the lines for the District 12. The Supreme Court declared that on the basis of the evidence at trial the district court had “plausibly found” that the plaintiffs had met their burden of “debunking North Carolina’s ‘it was really politics defense.’” The Supreme Court, “[a]pplying a clear error standard,” affirmed the three judge district court’s conclusions that “racial considerations predominated in designing both District 1 and District 12.”

Justice Alito, joined by Chief Justice Roberts, and Justice Kennedy, concurred in part and dissented in part. Justice Alito objected to the majority’s ruling that the borders drawn by the North Carolina legislature for District 12 were unconstitutional. Justice Alito contended that on the basis of his review of the evidence concerning the borders of District 12, two themes emerged. The first theme was that the borders were satisfactorily “explained by political considerations and the effects of the legislature’s political strategy on the demographics of District 12.” The second theme was that the majority opinion had paid no attention to the first theme. The majority simply ignored North Carolina’s explanation that political and not racial considerations were dominant in drawing the borders for District 12. Indeed, in Justice Alito’s view, the majority chose to adopt “the most damning interpretation” of the evidence. Justice Alito’s concluded his dissent by pointing to the admonition in *Easley v. Cromartie*, 532 U.S. 234 (2001) [*Cromartie II*], that “extraordinary caution must be used “when the State presented “a legitimate political explanation for its districting decision.”

## **NORTH CAROLINA v. COVINGTON**

137 S. Ct. \_1624\_\_\_ (2017)

### PER CURIAM.

The North Carolina General Assembly redrew state legislative districts in 2011 to account for population changes revealed by the 2010 census. In May 2015, several registered North Carolina voters (here called plaintiffs) brought this action in the U.S. District Court for the Middle District of North Carolina, alleging that 28 majority-black districts in the new plan were unconstitutional racial gerrymanders. The District Court ruled for the plaintiffs in August 2016, holding that race was the predominant factor in the design of each challenged district, and that in none was that use of race “supported by a strong basis in evidence and narrowly tailored to comply with [the Voting Rights Act].” The court declined to require changes in time for the then-impending November 2016 election, but ordered the General Assembly to redraw the map before North Carolina holds any future elections for that body.

Three weeks after the November 2016 election, the District Court ordered additional relief. In addition to setting a March 2017 deadline for the General Assembly’s drawing of new districts,

the court ordered that “[t]he term of any legislator elected in 2016” from a district later modified by that remedial plan “shall be shortened to one year” (rather than the regular two). Those legislators would then be replaced by new ones, to be chosen in court-ordered special elections in the fall of 2017. The legislators elected in those special elections, too, were then to “serve a one year term.” Finally, in order to make this regime workable, the court also suspended provisions of the North Carolina Constitution requiring prospective legislators to reside within a district for one year before they may be elected to represent it. To explain why these measures were warranted, the court stated: “While special elections have costs, those costs pale in comparison to the injury caused by allowing citizens to continue to be represented by legislators elected pursuant to a racial gerrymander.”

North Carolina appealed the District Court’s remedial order to this Court, and we granted a stay pending appeal. The State now contends that “the remedial order should be vacated for the simple reason that the district court failed to meaningfully weigh any equitable considerations.” We share that assessment and now vacate the order.

Relief in redistricting cases is “fashioned in the light of well-known principles of equity.” *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). A district court therefore must undertake an “equitable weighing process” to select a fitting remedy for the legal violations it has identified, taking account of what is necessary, what is fair, and what is workable.” And in the context of deciding whether to truncate existing legislators’ terms and order a special election, there is much for a court to weigh. Although this Court has never addressed whether or when a special election may be a proper remedy for a racial gerrymander, obvious considerations include the severity and nature of the particular constitutional violation, the extent of the likely disruption to the ordinary processes of governance if early elections are imposed, and the need to act with proper judicial restraint when intruding on state sovereignty. We do not suggest anything about the relative weight of these factors (or others), but they are among the matters a court would generally be expected to consider in its “balancing of the individual and collective interests” at stake. *Swann v. Charlotte-Mecklenburg Bd. Of Ed.*, 402 U.S. 1, 16 (1971).

Rather than undertaking such an analysis in this case, the District Court addressed the balance of equities in only the most cursory fashion. As noted above, the court simply announced that “[w]hile special elections have costs,” those unspecified costs “pale in comparison” to the prospect that citizens will be “represented by legislators elected pursuant to a racial gerrymander.” App. to Juris. Statement 200. That minimal reasoning would appear to justify a special election in every racial-gerrymandering case—a result clearly at odds with our demand for careful case-specific analysis. For that reason, we cannot have confidence that the court adequately grappled with the interests on both sides of the remedial question before us. And because the District Court’s discretion “was barely exercised here,” its order provides no meaningful basis for even deferential review. For these reasons, we vacate the District Court’s remedial order and remand the case for further proceedings consistent with this opinion.

### § 7.03 NOT-SO-SUSPECT CLASSIFICATIONS

[D]            **Rational Basis “with  
Teeth” [2]    **Sexual Orientation****

**Page 915: Add before § 7.04:**

**UNITED STATES v. WINDSOR**

133 S. Ct. 2675\_\_\_\_\_(2013)

JUSTICE KENNEDY delivered the opinion of the Court.

Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007. Edith Windsor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses. She was barred from doing so, however, by a federal law, the Defense of Marriage Act, which excludes a same-sex partner from the definition of “spouse” as that term is used in federal statutes. Windsor paid the taxes but filed suit to challenge the constitutionality of this provision. The United States District Court and the Court of Appeals ruled that this portion of the statute is unconstitutional and ordered the United States to pay Windsor a refund. This Court granted certiorari and now affirms the judgment in Windsor’s favor.

In 1996, as some States were beginning to consider the concept of same-sex marriage and before any State had acted to permit it, Congress enacted the Defense of Marriage Act (DOMA), 110 Stat. 2419. DOMA contains two operative sections: Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States. See 28 U.S.C. § 1738C

Section 3 is at issue here. It amends the Dictionary Act in Title 1, § 7, of the United States Code to provide a federal definition of “marriage” and “spouse.” Section 3 of DOMA provides as follows:

“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”

The definitional provision does not by its terms forbid States from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status. The enactment’s comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms, however, does control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law.

Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship. Windsor and Spyer registered as domestic partners when New York City gave that right to same-sex couples in 1993. Concerned about Spyer’s health, the couple made the 2007 trip to Canada for their marriage, but they continued to reside in New York City. The State of New York deems their Ontario marriage to be a valid one.

Spyer died in February 2009, and left her entire estate to Windsor. Because DOMA denies federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation “any interest in property which passes or has passed from the decedent to his surviving spouse.” 26 U.S.C. § 2056(a). Windsor paid \$363,053 in estate taxes and sought a refund. The Internal Revenue Service denied the refund,

concluding that, under DOMA, Windsor was not a “surviving spouse.” Windsor commenced this refund suit in the United States District Court for the Southern District of New York. She contended that DOMA violates the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment.

While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to 28 U. S. C. § 530D, that the Department of Justice would no longer defend the constitutionality of DOMA’s § 3. Noting that “the Department has previously defended DOMA against ... challenges involving legally married same-sex couples,” the Attorney General informed Congress that “the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny.” The Department of Justice has submitted many § 530D letters over the years refusing to defend laws it deems unconstitutional, when, for instance, a federal court has rejected the Government’s defense of a statute and has issued a judgment against it. This case is unusual, however, because the § 530D letter was not preceded by an adverse judgment. The letter instead reflected the Executive’s own conclusion, relying on a definition still being debated and considered in the courts, that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.

Although “the President ... instructed the Department not to defend the statute in *Windsor*,” he also decided “that Section 3 will continue to be enforced by the Executive Branch” and that the United States had an “interest in providing Congress a full and fair opportunity to participate in the litigation of those cases.” The stated rationale for this dual-track procedure (determination of unconstitutionality coupled with ongoing enforcement) was to “recogniz[e] the judiciary as the final arbiter of the constitutional claims raised.”

In response to the notice from the Attorney General, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend the constitutionality of § 3 of DOMA. The Department of Justice did not oppose limited intervention by BLAG. The District Court denied BLAG’s motion to enter the suit as of right, on the rationale that the United States already was represented by the Department of Justice. The District Court, however, did grant intervention by BLAG as an interested party.

On the merits of the tax refund suit, the District Court ruled against the United States. It held that § 3 of DOMA is unconstitutional and ordered the Treasury to refund the tax with interest. Both the Justice Department and BLAG filed notices of appeal, and the Solicitor General filed a petition for certiorari before judgment. Before this Court acted on the petition, the Court of Appeals for the Second Circuit affirmed the District Court’s judgment. It applied heightened scrutiny to classifications based on sexual orientation, as both the Department and Windsor had urged. The United States has not complied with the judgment. Windsor has not received her refund, and the Executive Branch continues to enforce § 3 of DOMA.

\* \* \*

### III

When at first Windsor and Spyer longed to marry, neither New York nor any other State granted them that right. After waiting some years, in 2007 they traveled to Ontario to be married there. It seems fair to conclude that, until recent years, many citizens had not even considered the possibility

that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight. Accordingly some States concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other. The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.

Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community. And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage. New York, in common with, as of this writing 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons. After a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood.

Against this background of lawful same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution. By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States. Yet it is further established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges. Just this Term the Court upheld the authority of the Congress to preempt state laws, allowing a former spouse to retain life insurance proceeds under a federal program that gave her priority, because of formal beneficiary designation rules, over the wife by a second marriage who survived the husband. *Hillman v. Maretta*.

Other precedents involving congressional statutes which affect marriages and family status further illustrate this point. In addressing the interaction of state domestic relations and federal immigration law Congress determined that marriages “entered into for the purpose of procuring an alien’s admission [to the United States] as an immigrant” will not qualify the noncitizen for that status, even if the noncitizen’s marriage is valid and proper for state-law purposes. 8 U. S. C. § 1186a(b)(1). And in establishing income-based criteria for Social Security benefits, Congress decided that although state law would determine in general who qualifies as an applicant’s spouse, common-law marriages also should be recognized, regardless of any particular State’s view on these relationships. 42 U. S. C. § 1382c(d)(2).

Though these discrete examples establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations.

In order to assess the validity of that intervention it is necessary to discuss the extent of the state

power and authority over marriage as a matter of history and tradition. State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, see, e.g., *Loving v. Virginia*, but, subject to those guarantees, “regulation of domestic relations” is “an area that has long been regarded as a virtually exclusive province of the States.” *Sosna v. Iowa*.

Against this background DOMA rejects the long established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State’s power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. “ ‘[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.’ ” *Romer v. Evans*.

The Federal Government uses this state-defined class for the opposite purpose — to impose restrictions and disabilities. That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment. What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect.

The States’ interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form “but one element in a personal bond that is more enduring.” *Lawrence v. Texas*. By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same sex-marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. The Constitution’s guarantee of equality “must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot” justify disparate treatment of that group. *Department of Agriculture v. Moreno*. In determining whether a law is motivated by an improper animus or purpose, “ ‘[d]iscriminations of an unusual character’ ” especially require careful consideration. DOMA cannot survive under these principles. The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State’s classifications have in the daily lives and customs of its people. DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here

operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. ... H. R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage." The House concluded that DOMA expresses "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." The stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.

DOMA's operation in practice confirms this purpose. When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system wide enactment with no identified connection to any particular area of federal law. DOMA writes inequality into the entire United States Code. The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits.

DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound. It prevents same-sex married couples from

obtaining government healthcare benefits they would otherwise receive. It deprives them of the Bankruptcy Code's special protections for domestic-support obligations. It forces them to follow a complicated procedure to file their state and federal taxes jointly. It prohibits them from being buried together in veterans' cemeteries.

For certain married couples, DOMA's unequal effects are even more serious. The federal penal code makes it a crime to "assaul[t], kidna[p], or murde[r]... a member of the immediate family" of "a United States official, a United States judge, [or] a Federal law enforcement officer," with the intent to influence or retaliate against that official. Although a "spouse" qualifies as a member of the officer's "immediate family," DOMA makes this protection inapplicable to same-sex spouses.

DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.

DOMA divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force. For instance, because it is expected that spouses will support each other as they pursue educational opportunities, federal law takes into consideration a spouse's income in calculating a student's federal financial aid eligibility. Same-sex married couples are exempt from this requirement. The same is true with respect to federal ethics rules. Federal executive and agency officials are prohibited from "participat[ing] personally and substantially" in matters as to which they or their spouses have a financial interest. A similar statute prohibits Senators, Senate employees, and their spouses from accepting high-value gifts from certain sources, and another mandates detailed financial disclosures by numerous high-ranking officials and their spouses. Under DOMA, however, these Government-integrity rules do not apply to same-sex spouses.

The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.

What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.

The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples

interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages.

**CHIEF JUSTICE ROBERTS, dissenting.**

I agree with Justice Scalia that Congress acted constitutionally in passing the Defense of Marriage Act (DOMA). Interests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world.

But while I disagree with the result to which the majority's analysis leads it in this case, I think it more important to point out that its analysis leads no further. The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their "historic and essential authority to define the marital relation," may continue to utilize the traditional definition of marriage.

I think the majority goes off course, as I have said, but it is undeniable that its judgment is based on federalism.

The majority extensively chronicles DOMA's departure from the normal allocation of responsibility between State and Federal Governments, emphasizing that DOMA "rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State." But there is no such departure when one State adopts or keeps a definition of marriage that differs from that of its neighbor, for it is entirely expected that state definitions would "vary, subject to constitutional guarantees, from one State to the next." Thus, while "[t]he State's power in defining the marital relation is of central relevance" to the majority's decision to strike down DOMA here, that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions. So too will the concerns for state diversity and sovereignty that weigh against DOMA's constitutionality in this case.

The majority focuses on the legislative history and title of this particular Act; those statute specific considerations will, of course, be irrelevant in future cases about different statutes. The majority emphasizes that DOMA was a "system-wide enactment with no identified connection to any particular area of federal law," but a State's definition of marriage "is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" And the federal decision undermined (in the majority's view) the "dignity [already] conferred by the States in the exercise of their sovereign power," whereas a State's decision whether to expand the definition of marriage from its traditional contours involves no similar concern.

We may in the future have to resolve challenges to state marriage definitions affecting same-sex couples. That issue, however, is not before us in this case. I write only to highlight the limits of the majority's holding and reasoning today, lest its opinion be taken to resolve not only a question that I believe is not properly before us — DOMA's constitutionality — but also a

question that all agree, and the Court explicitly acknowledges, is not at issue.

**JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom THE CHIEF JUSTICE joins as to Part I, dissenting.**

This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today’s opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The Court’s errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America.

**I  
A**

The Court is eager — *hungry* — to tell everyone its view of the legal question at the heart of this case. Standing in the way is an obstacle, a technicality of little interest to anyone but the people of We the People, who created it as a barrier against judges’ intrusion into their lives. They gave judges, in Article III, only the “judicial Power,” a power to decide not abstract questions but real, concrete “Cases” and “Controversies.” Yet the plaintiff and the Government agree entirely on what should happen in this lawsuit. They agree that the court below got it right; and they agreed in the court below that the court below that got it right as well. What, then, are we *doing* here?

**II  
A**

There are many remarkable things about the majority’s merits holding. The first is how rootless and shifting its justifications are. For example, the opinion starts with seven full pages about the traditional power of States to define domestic relations — initially fooling many readers, I am sure, into thinking that this is a federalism opinion. But we are eventually told that “it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution,” and that “[t]he State’s power in defining the marital relation is of central relevance in this case quite apart from principles of federalism” because “the State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import.” But no one questions the power of the States to define marriage (with the concomitant conferral of dignity and status), so what is the point of devoting seven pages to describing how long and well established that power is? Even after the opinion has formally disclaimed reliance upon principles of federalism, mentions of “the usual tradition of recognizing and accepting state definitions of marriage” continue. What to make of this? The opinion never explains. My guess is that the majority, while reluctant to suggest that defining the meaning of “marriage” in federal statutes is unsupported by any of the Federal Government’s enumerated powers, nonetheless needs some rhetorical basis to support its pretense that today’s prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term). But I am only guessing.

Moreover, if this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality. In accord with my previously expressed skepticism about the Court’s “tiers of scrutiny” approach, I would review this classification only

for its rationality. As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases. But the Court certainly does not *apply* anything that resembles that deferential framework.

The majority opinion need not get into the strict vs rational basis scrutiny question, and need not justify its holding under either, because it says that DOMA is unconstitutional as “a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution,” that it violates “basic due process” principles, and that it inflicts an “injury and indignity” of a kind that denies “an essential part of the liberty protected by the Fifth Amendment.” The majority never utters the dread words “substantive due process,” perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements mean. Yet the opinion does not argue that same-sex marriage is “deeply rooted in this Nation’s history and tradition,” *Washington v. Glucksberg*, a claim that would of course be quite absurd. So would the further suggestion (also necessary, under our substantive-due-process precedents) that a world in which DOMA exists is one bereft of ‘ordered liberty.’

Some might conclude that this loaf could have used a while longer in the oven. But that would be wrong; it is already overcooked. The most expert care in preparation cannot redeem a bad recipe. The sum of all the Court’s nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a “‘bare ... desire to harm’ ” couples in same-sex marriages. It is this proposition with which I will therefore engage.

## B

As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. I will not swell the U. S. Reports with restatements of that point. It is enough to say that the Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol.

The majority concludes that the only motive for this Act was the “bare ... desire to harm a politically unpopular group.” Bear in mind that the object of this condemnation is not the legislature of some once- (Confederate Southern state” is to remain in text) but our respected coordinate branches, the Congress and Presidency of the United States. Laying such a charge against them should require the most extraordinary evidence, and I would have thought that every attempt would be made to indulge a more anodyne explanation for the statute. The majority does the opposite — affirmatively concealing from the reader the arguments that exist in justification. It makes only a passing mention of the “arguments put forward” by the Act’s defenders, and does not even trouble to paraphrase or describe them. See *ante*, at 21. I imagine that this is because it is harder to maintain the illusion of the Act’s supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as *they* see them.

To choose just one of these defenders’ arguments, DOMA avoids difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage. Imagine a pair of women who marry in Albany and then move to Alabama, which does not “recognize as valid any marriage of parties of the same sex.” When the couple files their next federal tax return, may it be a joint one? Which State’s law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)? (Does the answer depend on whether they were just visiting in Albany?) Are these questions to be answered as a matter of

federal common law, or perhaps by borrowing a State's choice-of-law rules? If so, *which* State's? And what about States where the status of an out-of-state same-sex marriage is an unsettled question under local law? DOMA avoided all of this uncertainty by specifying which marriages would be recognized for federal purposes. That is a classic purpose for a definitional provision.

Further, DOMA preserves the intended effects of prior legislation against then- unforeseen changes in circumstance. When Congress provided (for example) that a special estate-tax exemption would exist for spouses, this exemption reached only *opposite-sex* spouses — those being the only sort that were recognized in *any* State at the time of DOMA's passage. When it became clear that changes in state law might one day alter that balance, DOMA's definitional section was enacted to ensure that state-level experimentation did not automatically alter the basic operation of federal law, unless and until Congress made the further judgment to do so on its own. That is not animus — just stabilizing prudence. Congress has hardly demonstrated itself unwilling to make such further, revising judgments upon due deliberation.

The Court mentions none of this. Instead, it accuses the Congress that enacted this law and the President who signed it of something much worse than, for example, having acted in excess of enumerated federal powers — or even having drawn distinctions that prove to be irrational. Those legal errors may be made in good faith, errors though they are. But the majority says that the supporters of this Act acted with *malice* — with *the "purpose"* "to disparage and to injure" same-sex couples. It says that the motivation for DOMA was to "demean," *ibid.*; to "impose inequality," to "impose ... a stigma," to deny people "equal dignity," to brand gay people as "unworthy," and to "*humiliat[e]*" their children.

I am sure these accusations are quite untrue. To be sure (as the majority points out), the legislation is called the Defense of Marriage Act. But to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements, any more than to defend the Constitution of the United States is to condemn, demean, or humiliate other constitutions. To hurl such accusations so casually demeans *this institution*. In the majority's judgment, any resistance to its holding is beyond the pale of reasoned disagreement.

The penultimate sentence of the majority's opinion is a naked declaration that "[t]his opinion and its holding are confined" to those couples "joined in same-sex marriages made lawful by the State." I have heard such "bald, unreasoned disclaimer[s]" before. *Lawrence v. Texas*.

When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." Now we are told that DOMA is invalid because it "demeans the couple, whose moral and sexual choices the Constitution protects," with an accompanying citation of *Lawrence*. It takes real cheek for today's majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here — when what has preceded that assurance is a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to the Congress's hateful moral judgment against it. I promise you this: The only thing that will "confine" the Court's holding is its sense of what it can get away with. As I have said, the real rationale of today's opinion, whatever disappearing trail of its legalistic arglebargle one chooses to follow, is that DOMA is motivated by " 'bare ... desire to harm' " couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.

In the majority's telling, this story is black-and-white: Hate your neighbor or come along with us. The truth is more complicated. It is hard to admit that one's political opponents are not monsters, especially in a struggle like this one, and the challenge in the end proves more than today's Court can handle. Too bad. A reminder that disagreement over something so fundamental as marriage can still be politically legitimate would have been a fit task for what in earlier times was called the judicial temperament. We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide.

But that the majority will not do. Some will rejoice in today's decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better.

I dissent.

**JUSTICE ALITO, with whom JUSTICE THOMAS joins as to Parts II and III, dissenting.**

Our Nation is engaged in a heated debate about same-sex marriage. That debate is, at bottom, about the nature of the institution of marriage. Respondent Edith Windsor, supported by the United States, asks this Court to intervene in that debate, and although she couches her argument in different terms, what she seeks is a holding that enshrines in the Constitution a particular understanding of marriage under which the sex of the partners makes no difference. The Constitution, however, does not dictate that choice. It leaves the choice to the people, acting through their elected representatives at both the federal and state levels. I would therefore hold that Congress did not violate Windsor's constitutional rights by enacting § 3 of the Defense of Marriage Act (DOMA), which defines the meaning of marriage under federal statutes that either confer upon married persons certain federal benefits or impose upon them certain federal obligations.

\* \* \*

## II

Windsor and the United States argue that § 3 of DOMA violates the equal protection principles that the Court has found in the Fifth Amendment's Due Process Clause. The Court rests its holding on related arguments.

Same-sex marriage presents a highly emotional and important question of public policy — but not a difficult question of constitutional law. The Constitution does not guarantee the right to enter into a same-sex marriage. Indeed, no provision of the Constitution speaks to the issue.

The Court has sometimes found the Due Process Clauses to have a substantive component that guarantees liberties beyond the absence of physical restraint. And the Court's holding that "DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution," suggests that substantive due process may partially underlie the Court's decision today. But it is well established that any "substantive" component to the Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' " *Washington v. Glucksberg*,

as well as “ ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’ ” *Glucksberg*, (quoting *Palko v. Connecticut*).

It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation’s history and tradition. In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.

What Windsor and the United States seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility.

Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials.

### III

In my view, the approach that Windsor and the United States advocate is misguided. Our equal protection frame-work, upon which Windsor and the United States rely, is a judicial construct that provides a useful mechanism for analyzing a certain universe of equal protection cases. But that framework is ill suited for use in evaluating the constitutionality of laws based on the traditional understanding of marriage, which fundamentally turn on what marriage is. Underlying our equal protection jurisprudence is the central notion that “[a] classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’ ” *Reed v. Reed*. The modern tiers of scrutiny — on which Windsor and the United States rely so heavily — are a heuristic to help judges determine when classifications have that “fair and substantial relation to the object of the legislation.” *Reed*.

So, for example, those classifications subject to strict scrutiny — *i.e.*, classifications that must be “narrowly tailored” to achieve a “compelling” government interest, are those that are “so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.” *Cleburne v. Cleburne Living Center, Inc.*,

In contrast, those characteristics subject to so-called intermediate scrutiny — *i.e.*, those classifications that must be “ ‘substantially related’ ” to the achievement of “important governmental objective[s],” *United States v. Virginia*, are those that are *sometimes* relevant considerations to be taken into account by legislators, but “generally provid[e] no sensible ground for different treatment,” *Cleburne, supra*.

Finally, so-called rational-basis review applies to classifications based on “distinguishing characteristics relevant to interests the State has the authority to implement.” *Cleburne, supra*.

We have long recognized that “the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantages to various groups or persons.” *Romer v. Evans*. As a result, in rational-basis cases, where the court does not view the classification at issue as “inherently suspect,” *Adarand Constructors, Inc. v. Peña*, (internal quotation marks omitted), “the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.” *Cleburne, supra*.

By asking the Court to strike down DOMA as not satisfying some form of heightened scrutiny, Windsor and the United States are really seeking to have the Court resolve a debate between two competing views of marriage.

The first and older view, which I will call the “traditional” or “conjugal” view, sees marriage as an intrinsically opposite-sex institution. BLAG notes that virtually every culture, including many not influenced by the Abrahamic religions, has limited marriage to people of the opposite sex. And BLAG attempts to explain this phenomenon by arguing that the institution of marriage was created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing.

The other, newer view is what I will call the “consent-based” vision of marriage, a vision that primarily defines marriage as the solemnization of mutual commitment — marked by strong emotional attachment and sexual attraction — between two persons. At least as it applies to heterosexual couples, this view of marriage now plays a very prominent role in the popular understanding of the institution. Indeed, our popular culture is infused with this understanding of marriage. Proponents of same-sex marriage argue that because gender differentiation is not relevant to this vision, the exclusion of same-sex couples from the institution of marriage is rank discrimination.

The Constitution does not codify either of these views of marriage (although I suspect it would have been hard at the time of the adoption of the Constitution or the Fifth Amendment to find Americans who did not take the traditional view for granted). The silence of the Constitution on this question should be enough to end the matter as far as the judiciary is concerned. Yet, Windsor and the United States implicitly ask us to endorse the consent-based view of marriage and to reject the traditional view, thereby arrogating to ourselves the power to decide a question that philosophers, historians, social scientists, and theologians are better qualified to explore. Because our constitutional order assigns the resolution of questions of this nature to the people, I would not presume to enshrine either vision of marriage in our constitutional jurisprudence.

To the extent that the Court takes the position that the question of same-sex marriage should be resolved primarily at the state level, I wholeheartedly agree. I hope that the Court will ultimately permit the people of each State to decide this question for themselves. Unless the Court is willing to allow this to occur, the whiffs of federalism in the today’s opinion of the Court will soon be scattered to the wind.

In any event, § 3 of DOMA, in my view, does not encroach on the prerogatives of the States, assuming of course that the many federal statutes affected by DOMA have not already done so. Section 3 does not prevent any State from recognizing same-sex marriage or from extending to same-sex couples any right, privilege, benefit, or obligation stemming from state law. All that § 3 does is to define a class of persons to whom federal law extends certain special benefits and

upon whom federal law imposes certain special burdens. In these provisions, Congress used marital status as a way of defining this class — in part, I assume, because it viewed marriage as a valuable institution to be fostered and in part because it viewed married couples as comprising a unique type of economic unit that merits special regulatory treatment. Assuming that Congress has the power under the Constitution to enact the laws affected by § 3, Congress has the power to define the category of persons to whom those laws apply.

**SESSIONS v. MORALES-SANTANA**  
137 S. Ct. 1678 (2017)

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns a gender-based differential in the law governing acquisition of U.S. citizenship by a child born abroad, when one parent is a U.S. citizen, the other, a citizen of another nation. The main rule appears in 8 U.S.C. § 1401(a)(7) (1958 ed.), now § 1401(g) (2012 ed.). Applicable to married couples, § 1401(a)(7) requires a period of physical presence in the United States for the U.S.-citizen parent. The requirement, as initially prescribed, was ten years' physical presence prior to the child's birth, § 601(g) (1940 ed.); currently, the requirement is five years prebirth, § 1401(g)(2012 ed.). That main rule is rendered applicable to unwed U.S.-citizen fathers by § 1409(a). Congress ordered an exception, however, for unwed U.S.-citizen mothers. Contained in § 1409(c), the exception allows an unwed mother to transmit her citizenship to a child born abroad if she has lived in the United States for just one year prior to the child's birth.

The respondent in this case, Luis Ramon Morales-Santana, was born in the Dominican Republic when his father was just 20 days short of meeting § 1401(a)(7)'s physical-presence requirement. Opposing removal to the Dominican Republic, Morales-Santana asserts that the equal protection principle implicit in the Fifth Amendment entitles him to citizenship stature. We hold that the gender line Congress drew is incompatible with the requirement that the Government accord to all persons "the equal protection of the laws." Nevertheless, we cannot covert § 1409(c)'s exception for unwed mothers into the main rule displacing § 1401(a)(7) (covering married couples) and § 1409(a) (covering unwed fathers). We must therefore leave it to Congress to select, going forward, a physical-presence requirement (ten years, one year, or some other period) uniformly applicable to all children born abroad with one U.S. –citizen and one alien parent, wed or unwed. In the interim, the Government must ensure that the laws in question are administered in a manner free from gender-based discrimination. Respondent Luis Ramon Morales-Santana moved to the United States at age 13, and has resided in this country most of his life. Now facing deportation, he asserts U.S. citizenship at birth based on the citizenship of his biological father, Jose Morales, who accepted parental responsibility and included Morales-Santana in his household.

In 2000, the Government placed Morales-Santana in removal proceedings based on several convictions for offenses under New York State Penal Law, all of them rendered on May 7, 1995. Morales-Santana ranked as an alien despite the many years he lived in the United States, because, at the time of his birth, his father did not satisfy the requirement of five years' physical presence after age 14. An immigration judge rejected Morales-Santana's claim to citizenship derived from the U.S. citizenship of his father, and ordered Morales-Santana's removal to the Dominican Republic. The United States Court of Appeals for the Second Circuit reversed the [Board of Immigration Appeals'] BIA's decision. Relying on this Court's post-1970 construction of the equal protection principle as it bears on gender-based classifications, the court held unconstitutional the

differential treatment of unwed mothers and fathers.

Because § 1409 treats sons and daughters alike, Morales-Santana does not suffer discrimination on the basis of *his* gender. He complains, instead, of gender-based discrimination against his father, who was unwed at the time of Morales-Santana's birth and was not accorded the right an unwed U.S.-citizen mother would have to transmit citizenship to her child. Although the Government does not contend otherwise, we briefly explain why Morales-Santana may seek to vindicate his father's right to the equal protection of the laws. Ordinarily, a party "must assert his own legal rights" and "cannot rest his claim to relief on the legal rights . . . of third parties." But we recognize an exception where, as here, "the party asserting the right has a close relationship with the person who possesses the right [and] there is a hindrance to the possessor's ability to protect his own interests."

Section 1401 and 1409, we note, date from an era when the lawbooks of Nation were rife with overbroad generalizations about the way men and women are (women are the "center of home and family life" therefore they can be "relieved from the civic duty of jury service"); (State may draw "a sharp line between the sexes"). Today, laws of this kind are subject to review under the heightened scrutiny that now attends "all gender-based classifications." Laws granting or denying benefits "on the basis of the sex of the qualifying parent," our post-1970 decisions affirm, differentiate on the basis of gender, and therefore attract heightened review under the Constitution's equal protection guarantee. Prescribing one rule for mothers, another for fathers, § 1409 is of the same genre as the classifications we declared unconstitutional in *Reed*, *Frontiero*, *Wiesenfeld*, *Goldfarb*, and *Westcott*. As in those cases, heightened scrutiny is in order. Successful defense of legislation that differentiates on the basis of gender, we have reiterated, requires an "exceedingly persuasive justification."

The defender of legislation that differentiates on the basis of gender must show "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." [*United States v. Virginia*], 518 U.S. at 533 (quoting *Mississippi Univ. for Women v. Hogan*). Moreover, the classification must substantially serve an important governmental interest *today*, for "in interpreting the [e]qual [p]rotection [guarantee], [we have] recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged." *Obergefell v. Hodges*. Here, the Government has supplied no "exceedingly persuasive justification," *Virginia*, for § 1409(a) and (c)'s "gender-based" and "gender-biased" disparity.

For close to a half century, as earlier observed, this Court has viewed with suspicion laws that rely on "overbroad generalizations about the different talents, capacities, or preferences of males or females." *Virginia*. In particular, we have recognized that if a "statutory objective is to exclude or 'protect' members of one gender" in reliance on "fixed notions concerning [that gender's] roles and abilities," the "objective itself is illegitimate. *Mississippi Univ. for Women*, 458 U.S. at 725. In accord with this eventual understanding, the Court has held that no "important [governmental] interest" is served by laws grounded, as § 1409(a) and (c) are, the obsolescing view that "unwed fathers [are] invariably less qualified and entitled than mothers" to take responsibility for nonmartial children.

We take up first the Government's assertion that § 1409(a) and (c)'s gender-based differential ensures that a child born abroad has a connection to the United States of sufficient strength to warrant conferral of citizenship at birth. The Government does not contend, nor could it, that unmarried men take more time to absorb U.S. values than unmarried women do. Instead, it

presents a novel argument. An unwed mother, the Government urges, is the child's only "legally recognized" parent at the time of childbirth. An unwed citizen father enters the scene later, as a second parent. A longer physical connection to the United States is warranted for the unwed father, the Government maintains, because of the "competing national influence" of the alien mother. Congress, the Government suggests, designed the statute to bracket an unwed U.S. –citizen mother with a married couple in which both parents are U.S. citizens, and to align an unwed U.S. –citizen father with a married couple, one spouse a citizen, the other, an alien

Underlying this apparent design is the assumption that the alien father of a nonmarital child born abroad to a U.S.-citizen mother will not accept parental responsibility. For an actual affiliation between alien father and nonmarital child would create the "competing national influence" that, according to the Government, justifies imposing on unwed U.S. -citizen fathers, but not unwed U.S. -citizen mothers, lengthy physical-presence requirements. Hardly gender neutral, that assumption conforms to the long-held view that unwed fathers care little about, indeed are strangers to, their children. Lump characterization of that kind, however, no longer passes equal protection inspection.

The Government maintains that Congress established the gender-based residency differential in § 1409(a) and (c) to reduce the risk that a foreign-born child of a U.S. citizen would be born stateless. This risk, according to the Government, was substantially greater for the foreign-born child of an unwed U.S.-citizen mother than it was for the foreign-born child of an unwed U.S. -citizen father. But there is little reason to believe that a statelessness concern prompted the diverse physical-presence requirements. Nor has the Government shown that the risk of statelessness disproportionately endangered the children of unwed mothers.

In sum, the Government has advanced no "exceedingly persuasive" justification for § 1409 and (c)'s gender-specific residency and age criteria. Those disparate criteria, we hold, cannot withstand inspection under a Constitution that requires the Government to respect the equal dignity and stature of its male and female citizens. While the equal protection infirmity in retaining a longer physical-presence requirement for unwed fathers than for unwed mothers is clear, this Court is not equipped to grant the relief Morales-Santana seeks, *i.e.*, extending to his father (and, derivatively, to him) the benefit of the one-year physical-presence term § 1409(c) reserves for unwed mothers. There are "two remedial alternatives," our decisions instruct when a statute benefits one class (in this case, unwed mothers and their children), as § 1409(c) does, and excludes another from the benefit (here, unwed fathers and their children). "[A] court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." Ordinarily, we have reiterated, "extension rather than nullification, is the proper course." Here, however, the discriminatory exception consists of *favorable* treatment for a discrete group (a shorter physical-presence requirement for unwed U.S.-citizen mothers giving birth abroad). Following the same approach as in those benefits cases – striking the discriminatory exception – leads here to extending the general rule of longer physical-presence requirements to cover the previously favored group. The residual policy here, the longer physical-presence requirement stated in §§ 1401(a)(7) and 1409, evidences Congress' recognition of "the importance of residence in this country as the talisman of dedicated attachment."

Although extension of benefits is customary in federal benefit cases, all indicators in this case point in the opposite direction. Put to the choice, Congress, we believe, would have abrogated § 1409(c)'s exception, preferring preservation of the general rule. The gender-based distinction infecting §§ 1401(a)(7) and 1409(a) and (c), we hold, violates the equal protection principle, as the Court of Appeals correctly ruled. For the reasons stated, however, we must adopt the remedial

course Congress likely would have chosen “had it been apprised of the constitutional infirmity.” Although the preferred rule in the typical case is to extend favorable treatment, this is hardly the typical case. Extension here would render the special treatment Congress prescribed in § 1409(c), the one-year physical-presence requirement for U.S.-citizen mothers, the general rule, no longer an exception. Section 1401(a)(7)’s longer physical-presence requirement, applicable to a substantial majority of children born abroad to one U.S.-citizen parent and one foreign-citizen parent, therefore, must hold sway. Going forward, Congress may address the issue and settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender. In the interim, as the Government suggests, § 1401(a)(7)’s now-five-year requirement should apply, prospectively, to children born to unwed U.S.-citizen mothers.

The judgement of the Court of Appeals for the Second Circuit is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

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

JUSTICE THOMAS filed an opinion concurring in the judgment in part, in which JUSTICE ALITO joined.

## § 7.04 FUNDAMENTAL RIGHTS AND INTERESTS

### [C] Equal Access to the Franchise [2]

#### Dilution of the Franchise

**Page 951: Insert immediately following discussion of *League of United Latin American Citizens v. Perry*:**

*Evenwell v. Abbott*, 136 S. Ct. 1120 (2016). Texas, like all other states, uses total population numbers from the decennial census when drawing legislative districts. After the 2010 census, Texas adopted a State Senate map that has a maximum total-population deviation of 8.04%. However, measured by a voter-population baseline—i.e., eligible voters or registered voters—the map’s maximum population deviation exceeded 40%. Texas voters sought a permanent injunction against the Texas Governor and Secretary of State, barring use of the existing state senate map in favor of a map equalizing voter population in each district. They argued that state redistricting that favors equivalent total population in each district unconstitutionally dilutes the votes of those who live in districts with large numbers of registered voters, and thus violates the one-person, one-vote dictate of the Equal Protection Clause. The Court rejected the argument, reasoning that a state or locality is permitted to draw its districts based on total population and there is no voter equality argument. States may deviate somewhat from perfect population equality to accommodate traditional districting objectives. The Court found that constitutional history demonstrates that at the time of the founding, the Framers endorsed allocating House seats to states based on total population. When debating what would become the Fourteenth Amendment, Congress reconsidered the proper basis for apportioning House seats. Retaining the total-population rule, Congress rejected proposals to allocate House seats to states on the basis of voter population. Therefore the Texas voters’ voter-population rule is inconsistent with the “theory of the Constitution.” Furthermore, the Court found that settled practice confirms what constitutional history and prior decisions strongly suggest.

Adopting voter-eligible apportionment as a constitutional command, the Court said, would upset a well- functioning approach to districting that has been universally followed.

***Harris v. Arizona Independent Redistricting Commission*, 136 S. Ct. 1301 (2016).**

Individual registered voters in Arizona challenged the map drawn for state legislative districts by the Arizona Independent Redistricting Commission for use starting in 2012, based on the 2010 census. The initial plan had a maximum population deviation from absolute equality of districts of 4.07%, but the Commission adopted a revised plan with an 8.8% deviation on a 3-2 vote, with the two Republican members dissenting. After the Justice Department approved the revised plan as consistent with the Voting Rights Act, plaintiffs sued, claiming that the plan’s population variations were inconsistent with the Fourteenth Amendment.

The Supreme Court upheld the plan. It reasoned that while the Equal Protection Clause requires states to “make an honest and good faith effort to construct [legislative] districts...as nearly of equal population as is practicable,” quoting *Reynolds v. Sims*, mathematical perfection is not required. Deviations may be justified by “legitimate considerations,” including “traditional districting principles such as compactness [and] contiguity, [quoting *Shaw v. Reno*], as well as a state interest in maintaining the integrity of political subdivisions or a competitive balance among political parties. Minor deviations from mathematical equality—i.e., deviations under 10%--do not, by themselves, establish a prima facie case of invidious discrimination requiring state justification. Because the numbers involved here were under 10%, they cannot rely upon the numbers alone to demonstrate a constitutional violation. The Court found that the record supported the lower court’s conclusion that the deviations predominantly reflected the Commission’s efforts to achieve compliance with the Voting Rights Act, not to secure political advantage for the Democratic Party.

## Chapter 8      **FREEDOM OF EXPRESSION**

### § 8.01      **FREE SPEECH DOCTRINE**

#### [B]              **The Structure of Speech Regulation**

#### [1]                      **Content-Based and Content—Neutral Regulation**

#### **Page 1031: add Note 5:**

**5. Content-based signage.** A case that illustrates the point that a regulation can be deemed a content based regulation even though it is clearly not viewpoint based is *Reed v. Town of Gilbert*, **135 S. Ct. (2015)**. The Court, per Justice Thomas, ruled that the Town’s Sign Code which regulated one type of sign – temporary directional signs – more harshly than it regulated political and ideological signs violated the First Amendment. A church in town which did not own a building held its events and services in varying locales and needed to use temporary directional signs to notify its member of the whereabouts of those locales. Yet temporary signs were required to be much smaller and could only be displayed for much shortest periods of time than the other types of signs. The church challenged the Sign Code.

The Court declared that the Sign Code’s distinctions were wholly dependent on the content of the signs. The Sign Code could not be deemed content neutral because it had content neutral justifications, or a good motive or lacked a censorial motivation. Nor did it matter that the Sign Code did not favor a particular viewpoint. A regulation of speech which targets a specific subject matter is content with discriminating “among viewpoints within the subject matter.”

Because the Town’s Sign Code was content based, it had to satisfy the strict scrutiny standard of review which it failed to do. The Town sought to justify its harsher regulation of temporary directional signs on aesthetic and safety grounds. But the other types of signs presented identical concerns and yet were treated less harshly. The Sign Code was underinclusive and was not “narrowly tailored to further a compelling government interest.”

Justice Kagan, joined by Justices Ginsburg and Breyer, concurred only in the judgment. There was no need to decide if strict scrutiny applies to every sign ordinance which contains a subject matter distinction: “The Town of Gilbert’s defense of its sign ordinance – most notably, the law’s distinctions between directional signs and others – does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test.”

6. In *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361\_ (2018), the Court, per Justice Thomas, struck down, 5-4, a California law that required crisis pregnancy centers to give women state-mandated information about the availability, at free or low-cost, of state provided abortion and birth control services. Two crisis pregnancy centers (one licensed and one not) brought suit in a California federal district court and alleged that a state law, the Reproductive Freedom, Accountability and Transparency Act [hereafter called the FACT Act] infringed on their free speech rights in violation of the First Amendment. The Act imposes notice requirements on crisis pregnancy centers. These centers were described in a California State Assembly report as “pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling,

and other services.” These centers seek to discourage women from seeking abortions.

The FACT Act required licensed crisis centers or clinics to issue a government drafted notice to women that the State offers free or low cost abortions. The FACT Act further stated that the rationale of the law is to “ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them.” Additionally, the Act declares that “thousands of women remain unaware” of state public programs available to them offering abortion free or low- cost abortions as well as contraceptive and family planning information. The Act also obliged unlicensed clinics or centers to notify women that they are not licensed to provide medical services.

The federal district court denied the motion of the petitioners for a preliminary injunction. The Ninth Circuit affirmed and ruled that the licensed notice regulation survives the “lower level of scrutiny that is applied to regulation of ‘professional speech.’” As for the notice requirement imposed on unlicensed clinics, the Ninth Circuit ruled that the requirement ‘satisfies any level of scrutiny’” The Supreme Court reversed.

With respect to the licensed notice requirement, Justice Thomas noted that the regulations at issue here were content-based under *Reed v. Town of Gilbert* (2015), were “presumptively unconditional” and could be justified only if the government could show “they are narrowly tailored to serve compelling interests.” Justice Thomas stated his rationale for concluding that the licensed notice requirements were content-based: “By requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly ‘alters the content of petitioners’ speech.’”

The Ninth Circuit erred in not applying strict scrutiny to the required licensed crisis center notice on the ground that it constituted a separate category of speech known as “professional speech” which is not subject to the rule “that content-based regulations of speech are subject to strict scrutiny.” However, Justice Thomas declared that “this Court has not recognized ‘professional speech’ as a separate category of speech.” Recognizing such a separate category of professional speech would embrace a vast number of individuals. The result would be to give the “States unfettered power.”

The State of California and the Ninth Circuit have not provided a persuasive rationale “for treating professional speech as a unique category that is exempt from ordinary First Amendment principles.” The Court did not exclude “the possibility” that such a rationale exists. However, the licensed notice requirement “fails to meet even intermediate scrutiny.”

Justice Thomas concluded his discussion of the FACT Act’s licensed notice requirement as follows:

The FACT Act also excludes, without explanation, federal clinics and [other] providers from the licensed notice requirement. California has identified no evidence that the exempted clinics are more likely to provide the information than the covered clinics. The FACT Act’s exemption from these clinics, which serve many women who are pregnant or could become pregnant in the future, demonstrates the disconnect between its stated purpose and its actual scope.

Yet “[p]recision . . . must be the touchstone” when it comes to regulations of speech which “so closely touch[h] our most precious freedoms.” Further California could inform low-income women about its services” without burdening a speaker with unwanted speech.” California cannot co-opt the licensed facilities to deliver its message for it. In short, petitioners are likely to succeed on the merits of their

challenge to the licensed notice.

Justice Thomas then proceeded to consider the constitutional validity of the requirement the FACT Act imposed on unlicensed clinics. Although the Act did not require these clinics to inform women that the State provided free or low-cost abortions, family planning and birth control information, the Act required them to notify women that they were not licensed by the State. An issue in the case which the Court declined to decide was whether *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985) mandated that deferential review be applied to the unlicensed notice requirement. However, the Court observed that “[e]ven under *Zauderer*, a disclosure requirement cannot be ‘unjustified or unduly burdensome.’” California failed to meet that obligation. California has made a hypothetical and unproven assumption “that pregnant women do not already know that the covered facilities are staffed by unlicensed medical professionals.”

Furthermore, even if California had posited a non-hypothetical rationale for the unlicensed notice requirement, the FACT Act still “unduly burdens protected speech.” The Act requires “covered facilities to post California’s precise notice, no matter what the facilities say on site or in their advertisements.” Indeed, the application of the unlicensed notice to advertisements is especially burdensome:

[A] billboard for an unlicensed facility that says “Choose Life” would have to surround that two-word statement with a 29-word statement from the government in as many as 13 different languages.

The Court concluded that even if *Zauderer* is assumed to apply, the *Zauderer* standard is not satisfied. The unlicensed notice requirement “targets speakers, not speech, and imposes an unduly burdensome requirement that will chill their protected speech.”

We hold that petitioners are likely to succeed on the merits of their claim that the FACT ACT violates the First Amendment.

The judgment of the Court of Appeals was reversed and remanded.

Justice Breyer, joined by Justices Ginsburg, Sotomayor and Kagan dissented. Justice Breyer protested the application of heightened scrutiny to the Act on the ground that it was “content-based” under *Reed v. Town of Gilbert*, *supra*: “Almost every disclosure law can be characterized as ‘content-based’ because they require individuals ‘to speak a particular message’.” A literal application of the majority view here could radically place existing laws in securities law and consumer law “at constitutional risk.”

Justice Breyer found the Court’s decision here inconsistent with its prior decisions on abortion regulation:

If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services? As the question suggests, there is no convincing reason to distinguish between information about adoption and

information about abortion in this context. After all, the rule of law embodies evenhandedness, and “what is sauce for the goose is normally sauce for the gander.”

On the basis of these arguments and others in his dissent, Justice Breyer said he would not hold the FACT Act to be facially unconstitutional nor would he require the district court to enjoin the Act’s enforcement.

**Add before § 8.01[B][2]:**

**UNITED STATES v. ALVAREZ**  
132 S. Ct. 2537 (2012)

**JUDGES: KENNEDY, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C.J., and GINSBURG and SOTOMAYOR, JJ., joined. BREYER, J., filed an opinion concurring in the judgment, in which KAGAN, J., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ. joined.**

**KENNEDY, J:**

Lying was his habit. Xavier Alvarez, the respondent here, lied when he said that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico. But when he lied in announcing he held the Congressional Medal of Honor, respondent ventured onto new ground; for that lie violates a federal criminal statute, the Stolen Valor Act of 2005. 18 § 704.

In 2007, respondent attended his first public meeting as a board member of the Three Valley Water District Board. The board is a governmental entity with headquarters in Claremont, California. He introduced himself as follows: “I’m a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy.” 617 F.3d 1198, 1201-1202 (CA9 2010). None of this was true. For all the record shows, respondent’s statements were but a pathetic attempt to gain respect that eluded him. The statements do not seem to have been made to secure employment or financial benefits or admission to privileges reserved for those who had earned the Medal.

Respondent was indicted under the Stolen Valor Act for lying about the Congressional Medal of Honor at the meeting. The United States District Court for the Central District of California rejected his claim that the statute is invalid under the First Amendment. Respondent pleaded guilty to one count, reserving the right to appeal on his First Amendment claim. The United States Court of Appeals for the Ninth Circuit, in a decision by a divided panel, found the Act invalid under the First Amendment and reversed the conviction. With further opinions on the issue, and over a dissent by seven judges, rehearing en banc was denied. 638 F.3d 666 (2011).

After certiorari was granted, and in an unrelated case, the United States Court of Appeals for the Tenth Circuit, also in a decision by a divided panel, found the Act constitutional. *United States v. Strandlof*, 667 F.3d 1146 (2012). So there is now a conflict in the Courts of Appeals on the question of the Act’s validity.

This is the second case in two Terms requiring the Court to consider speech that can disparage, or attempt to steal, honor that belongs to those who fought for this Nation in battle. See *Snyder v. Phelps*, (2011) (hateful protests directed at the funeral of a serviceman who died in Iraq). Here the statement that the speaker held the Medal was an intended, undoubted lie.

It is right and proper that Congress, over a century ago, established an award so the Nation can hold in its highest respect and esteem those who, in the course of carrying out the “supreme and noble duty of contributing to the defense of the rights and honor of the nation,” have acted with extraordinary honor. And it should be uncontested that this is a legitimate Government objective, indeed a most valued national aspiration and purpose. This does not end the inquiry, however. Fundamental constitutional principles require that laws enacted to honor the brave must be consistent with the precepts of the Constitution for which they fought.

The Government contends the criminal prohibition is a proper means to further its purpose in creating and awarding the Medal. When content-based speech regulation is in question, however, exacting scrutiny is required. Statutes suppressing or restricting speech must be judged by the sometimes inconvenient principles of the First Amendment. By this measure, the statutory provisions under which respondent was convicted must be held invalid, and his conviction must be set aside.

## I

Respondent’s claim to hold the Congressional Medal of Honor was false. There is no room to argue about interpretation or shades of meaning. On this premise, respondent violated § 704(b); and, because the lie concerned the Congressional Medal of Honor, he was subject to an enhanced penalty under subsection (c). Those statutory provisions are as follows:

**FALSE CLAIMS ABOUT RECEIPT OF MILITARY DECORATIONS OR MEDALS.** — Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States ... shall be fined under this title, imprisoned not more than six months, or both.

**ENHANCED PENALTY FOR OFFENSES INVOLVING CONGRESSIONAL MEDAL OF HONOR.**

(1) **IN GENERAL.** — If a decoration or medal involved in an offense under subsection (a) or (b) is a Congressional Medal of Honor, in lieu of the punishment provided in that subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both.”

Respondent challenges the statute as a content-based suppression of pure speech, speech not falling within any of the few categories of expression where content-based regulation is permissible. The Government defends the statute as necessary to preserve the integrity and purpose of the Medal, an integrity and purpose it contends are compromised and frustrated by the false statements the statute prohibits. It argues that false statements “have no First Amendment value in themselves,” and thus “are protected only to the extent needed to avoid chilling fully protected speech.” Although the statute covers respondent’s speech, the Government argues that it leaves breathing room for protected speech, for example speech which might criticize the idea of the Medal or the importance of the military. The Government’s arguments cannot suffice to save the

statute.

## II

“[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002). As a result, the Constitution “demands that content-based restrictions on speech be presumed invalid ... and that the Government bear the burden of showing their constitutionality.”

In light of the substantial and expansive threats to free expression posed by content-based restrictions, this Court has rejected as “startling and dangerous” a “free-floating test for First Amendment coverage ... [based on] an ad hoc balancing of relative social costs and benefits.” Instead, content-based restrictions on speech have been permitted, as a general matter, only when confined to the few “ ‘historic and traditional categories [of expression] long familiar to the bar,’ ” Among these categories are advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called “fighting words;” child pornography; fraud; true threats; and speech presenting some grave and imminent threat the government has the power to prevent, see *Near v. Minnesota*, although a restriction under the last category is most difficult to sustain, see *New York Times Co. v. United States*. These categories have a historical foundation in the Court’s free speech tradition. The vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules.

Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.

The Government disagrees with this proposition. It cites language from some of this Court’s precedents to support its contention that false statements have no value and hence no First Amendment protection. These quotations all derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation. In those decisions the falsity of the speech at issue was not irrelevant to our analysis, but neither was it determinative. The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection. Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.

Even when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood.

The Government then gives three examples of regulations on false speech that courts generally have found permissible: first, the criminal prohibition of a false statement made to a Government official, 18 U. S. C. § 1001; second, laws punishing perjury; and third, prohibitions on the false representation that one is speaking as a Government official or on behalf of the Government, see, *e.g.*, § 912; § 709. These restrictions, however, do not establish a principle that all proscriptions of false statements are exempt from exacting First Amendment scrutiny.

The federal statute prohibiting false statements to Government officials punishes “whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government ... makes any materially false, fictitious, or fraudulent statement or representation.” § 1001. Section 1001’s prohibition on false statements made to Government officials, in communications concerning official matters, does not lead to the broader proposition that false statements are unprotected when made to any person, at any time, in any context.

The same point can be made about what the Court has confirmed is the “unquestioned constitutionality of perjury statutes.” It is not simply because perjured statements are false that they lack First Amendment protection. Perjured testimony “is at war with justice” because it can cause a court to render a “judgment not resting on truth.” Perjury undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal system.

Statutes that prohibit falsely representing that one is speaking on behalf of the Government, or that prohibit impersonating a Government officer, also protect the integrity of Government processes, quite apart from merely restricting false speech. Title 18 U. S. C. § 912, for example, prohibits impersonating an officer or employee of the United States. Even if that statute may not require proving an “actual financial or property loss” resulting from the deception, the statute is itself confined to “maintain[ing] the general good repute and dignity of ... government ... service itself.” The same can be said for prohibitions on the unauthorized use of the names of federal agencies such as the Federal Bureau of Investigation in a manner calculated to convey that the communication is approved, or using words such as “Federal” or “United States” in the collection of private debts in order to convey that the communication has official authorization. These examples, to the extent that they implicate fraud or speech integral to criminal conduct, are inapplicable here.

As our law and tradition show, then, there are instances in which the falsity of speech bears upon whether it is protected. Some false speech may be prohibited even if analogous true speech could not be. This opinion does not imply that any of these targeted prohibitions are somehow vulnerable. But it also rejects the notion that false speech should be in a general category that is presumptively unprotected.

### III

The probable, and adverse, effect of the Act on freedom of expression illustrates, in a fundamental way, the reasons for the Law’s distrust of content-based speech prohibitions.

The Act by its plain terms applies to a false statement made at any time, in any place, to any person. It can be assumed that it would not apply to, say, a theatrical performance. Still, the sweeping, quite unprecedented reach of the statute puts it in conflict with the First Amendment. Here the lie was made in a public meeting, but the statute would apply with equal force to personal, whispered conversations within a home. The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain.

Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth. See G. Orwell, *Nineteen Eighty-Four* (1949) (Centennial ed. 2003). Were this law to be sustained, there could be an endless list of subjects the National Government or the States could single out. Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment. But the Stolen Valor Act is not so limited in its reach. Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.

#### IV

The previous discussion suffices to show that the Act conflicts with free speech principles. But even when examined within its own narrow sphere of operation, the Act cannot survive. Although the objectives the Government seeks to further by the statute are not without significance, the Court must, and now does, find the Act does not satisfy exacting scrutiny.

The Government is correct when it states military medals “serve the important public function of recognizing and expressing gratitude for acts of heroism and sacrifice in military service,” and also “‘foste[r] morale, mission accomplishment and esprit de corps’ among service members.” General George Washington observed that an award for valor would “cherish a virtuous ambition in . . . soldiers, as well as foster and encourage every species of military merit.” Time has not diminished this idea. In periods of war and peace alike public recognition of valor and noble sacrifice by men and women in uniform reinforces the pride and national resolve that the military relies upon to fulfill its mission.

These interests are related to the integrity of the military honors system in general, and the Congressional Medal of Honor in particular. Although millions have served with brave resolve, the Medal, which is the highest military award for valor against an enemy force, has been given just 3,476 times. Established in 1861, the Medal is reserved for those who have distinguished themselves “conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty.” The Government's interest in protecting the integrity of the Medal of Honor is beyond question.

But to recite the Government's compelling interests is not to end the matter. The First Amendment requires that the Government's chosen restriction on the speech at issue be “actually necessary” to achieve its interest. There must be a direct causal link between the restriction imposed and the injury to be prevented. See *ibid*. The link between the Government's interest in protecting the integrity of the military honors system and the Act's restriction on the false claims of liars like respondent has not been shown. Although appearing to concede that “an isolated misrepresentation by itself would not tarnish the meaning of military honors,” the Government asserts it is “common sense that false representations have the tendency to dilute the value and meaning of military awards.” It must be acknowledged that when a pretender claims the Medal to be his own, the lie might harm the Government by demeaning the high purpose of the award,

diminishing the honor it confirms, and creating the appearance that the Medal is awarded more often than is true. Furthermore, the lie may offend the true holders of the Medal. From one perspective it insults their bravery and high principles when falsehood puts them in the unworthy company of a pretender.

Yet these interests do not satisfy the Government's heavy burden when it seeks to regulate protected speech. The Government points to no evidence to support its claim that the public's general perception of military awards is diluted by false claims such as those made by Alvarez. The lack of a causal link between the Government's stated interest and the Act is not the only way in which the Act is not actually necessary to achieve the Government's stated interest. The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest. The facts of this case indicate that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie. Respondent lied at a public meeting. Even before the FBI began investigating him for his false statements "Alvarez was perceived as a phony." Once the lie was made public, he was ridiculed online, his actions were reported in the press, and a fellow board member called for his resignation. There is good reason to believe that a similar fate would befall other false claimants. Indeed, the outrage and contempt expressed for respondent's lies can serve to reawaken and reinforce the public's respect for the Medal, its recipients, and its high purpose. The acclaim that recipients of the Congressional Medal of Honor receive also casts doubt on the proposition that the public will be misled by the claims of charlatans or become cynical of those whose heroic deeds earned them the Medal by right.

The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth. See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence"). The theory of our Constitution is "that the best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content- based mandates.

Expressing its concern that counterspeech is insufficient, the Government responds that because "some military records have been lost ... some claims [are] unverifiable." This proves little, however; for without verifiable records, successful criminal prosecution under the Act would be more difficult in any event. So, in cases where public refutation will not serve the Government's interest, the Act will not either. In addition, the Government claims that "many [false claims] will remain unchallenged." The Government provides no support for the contention. And in any event, in order to show that public refutation is not an adequate alternative, the Government must demonstrate that unchallenged claims undermine the public's perception of the military and the integrity of its awards system. This showing has not been made.

In addition, when the Government seeks to regulate protected speech, the restriction must be the "least restrictive means among available, effective alternatives." There is, however, at least one less speech-restrictive means by which the Government could likely protect the integrity of the military awards system. A Government-created database could list Congressional Medal of Honor

winners. Were a database accessible through the Internet, it would be easy to verify and expose false claims. It appears some private individuals have already created databases similar to this, and at least one database of past winners is online and fully searchable. The Solicitor General responds that although Congress and the Department of Defense investigated the feasibility of establishing database in 2008, the Government “concluded that such a database would be impracticable and insufficiently comprehensive.” Without more explanation, it is difficult to assess the Government’s claim, especially when at least one database of Congressional Medal of Honor winners already exists.

The Government may have responses to some of these criticisms, but there has been no clear showing of the necessity of the statute, the necessity required by exacting scrutiny.

The Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace. Though few might find respondent’s statements anything but contemptible, his right to make those statements is protected by the Constitution’s guarantee of freedom of speech and expression. The Stolen Valor Act infringes upon speech protected by the First Amendment.

The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

**JUSTICE BREYER, with whom JUSTICE KAGAN joins, concurring in the judgment.**

I agree with the plurality that the Stolen Valor Act of 2005 violates the First Amendment. But I do not rest my conclusion upon a strict categorical analysis. Rather, I base that conclusion upon the fact that the statute works First Amendment harm, while the Government can achieve its legitimate objectives in less restrictive ways.

## I

In determining whether a statute violates the First Amendment, this Court has often found it appropriate to examine the fit between statutory ends and means. In doing so, it has examined speech-related harms, justifications, and potential alternatives. In particular, it has taken account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision’s countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so. Ultimately the Court has had to determine whether the statute works speech-related harm that is out of proportion to its justifications.

Sometimes the Court has referred to this approach as “intermediate scrutiny,” sometimes as “proportionality” review, sometimes as an examination of “fit,” and sometimes it has avoided the application of any label at all.

Regardless of the label, some such approach is necessary if the First Amendment is to offer proper protection in the many instances in which a statute adversely affects constitutionally protected interests but warrants neither near-automatic condemnation (as “strict scrutiny” implies) nor near-automatic approval (as is implicit in “rational basis” review). But in this case, the Court’s term “intermediate scrutiny” describes what I think we should do.

As the dissent points out, “there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech.” Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like raise such concerns, and in many contexts have called for strict scrutiny. But this case does not involve such a law. The dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts that do not concern such subject matter. Such false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas. And the government often has good reasons to prohibit such false speech. But its regulation can nonetheless threaten speech-related harms. Those circumstances lead me to apply what the Court has termed “intermediate scrutiny” here.

## II A

I would read the statute favorably to the Government as criminalizing only false factual statements made with knowledge of their falsity and with the intent that they be taken as true. As so interpreted the statute covers only lies. But although this interpretation diminishes the extent to which the statute endangers First Amendment values, it does not eliminate the threat.

False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child’s innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates’ methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth.

Further, the pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more. And those who are unpopular may fear that the government will use that weapon selectively, say by prosecuting a pacifist who supports his cause by (falsely) claiming to have been a war hero, while ignoring members of other political groups who might make similar false claims.

I also must concede that many statutes and common-law doctrines make the utterance of certain kinds of false statements unlawful. Those prohibitions, however, tend to be narrower than the statute before us, in that they limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims; sometimes by specifying that the lies be made in contexts in which a tangible harm to others is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to produce harm.

Statutes prohibiting false claims of terrorist attacks, or other lies about the commission of crimes or catastrophes, require proof that substantial public harm be directly foreseeable, or, if not, involve false statements that are very likely to bring about that harm.

While this list is not exhaustive, it is sufficient to show that few statutes, if any, simply prohibit without limitation the telling of a lie, even a lie about one particular matter. Instead, in virtually all these instances limitations of context, requirements of proof of injury, and the like, narrow the statute to a subset of lies where specific harm is more likely to occur. The limitations help to make

certain that the statute does not allow its threat of liability or criminal punishment to roam at large, discouraging or forbidding the telling of the lie in contexts where harm is unlikely or the need for the prohibition is small.

The statute before us lacks any such limiting features. It may be construed to prohibit only knowing and intentional acts of deception about readily verifiable facts within the personal knowledge of the speaker, thus reducing the risk that valuable speech is chilled. But it still ranges very broadly. And that breadth means that it creates a significant risk of First Amendment harm. As written, it applies in family, social, or other private contexts, where lies will often cause little harm. It also applies in political contexts, where although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is also high. And so the prohibition may be applied where it should not be applied, for example, to bar stool braggadocio or, in the political arena, subtly but selectively to speakers that the Government does not like. These considerations lead me to believe that the statute as written risks significant First Amendment harm.

## B

The Government has provided no convincing explanation as to why a more finely tailored statute would not work. In my own view, such a statute could significantly reduce the threat of First Amendment harm while permitting the statute to achieve its important protective objective. That being so, I find the statute as presently drafted works disproportionate constitutional harm. It consequently fails intermediate scrutiny, and so violates the First Amendment.

For these reasons, I concur in the Court's judgment.

**JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.**

Only the bravest of the brave are awarded the Congressional Medal of Honor, but the Court today holds that every American has a constitutional right to claim to have received this singular award. The Court strikes down the Stolen Valor Act of 2005, which was enacted to stem an epidemic of false claims about military decorations. These lies, Congress reasonably concluded, were undermining our country's system of military honors and inflicting real harm on actual medal recipients and their families.

Building on earlier efforts to protect the military awards system, Congress responded to this problem by crafting a narrow statute that presents no threat to the freedom of speech. The statute reaches only knowingly false statements about hard facts directly within a speaker's personal knowledge. These lies have no value in and of themselves, and proscribing them does not chill any valuable speech.

By holding that the First Amendment nevertheless shields these lies, the Court breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest. I would adhere to that principle and would thus uphold the constitutionality of this valuable law.

## I

As Congress recognized, the lies proscribed by the Stolen Valor Act inflict substantial harm. In many instances, the harm is tangible in nature: Individuals often falsely represent themselves as award recipients in order to obtain financial or other material rewards, such as lucrative contracts and government benefits. An investigation of false claims in a single region of the United States, for example, revealed that 12 men had defrauded the Department of Veterans Affairs out of more than \$1.4 million in veteran's benefits. In other cases, the harm is less tangible, but nonetheless significant. The lies proscribed by the Stolen Valor Act tend to debase the distinctive honor of military awards. And legitimate award recipients and their families have expressed the harm they endure when an imposter takes credit for heroic actions that he never performed. One Medal of Honor recipient described the feeling as a “ ‘slap in the face of veterans who have paid the price and earned their medals.’ ”

It is well recognized in trademark law that the proliferation of cheap imitations of luxury goods blurs the “ ‘signal’ given out by the purchasers of the originals.” In much the same way, the proliferation of false claims about military awards blurs the signal given out by the actual awards by making them seem more common than they really are, and this diluting effect harms the military by hampering its efforts to foster morale and esprit de corps. Surely it was reasonable for Congress to conclude that the goal of preserving the integrity of our country's top military honors is at least as worthy as that of protecting the prestige associated with fancy watches and designer handbags.

## II

Time and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value. Consistent with this recognition, many kinds of false factual statements have long been proscribed without “ ‘rais[ing] any Constitutional problem.’ ” Laws prohibiting fraud, perjury, and defamation, for example, were in existence when the First Amendment was adopted, and their constitutionality is now beyond question.

We have also described as falling outside the First Amendment's protective shield certain false factual statements that were neither illegal nor tortious at the time of the Amendment's adoption. The right to freedom of speech has been held to permit recovery for the intentional infliction of emotional distress by means of a false statement, even though that tort did not enter our law until the late 19th century. And in *Hill, supra*, at 390, 87 S. Ct. 534, 17 L. Ed. 2d 456, the Court concluded that the free speech right allows recovery for the even more modern tort of false-light invasion of privacy.

In line with these holdings, it has long been assumed that the First Amendment is not offended by prominent criminal statutes with no close common-law analog. The most well known of these is probably 18 U. S. C. § 1001, which makes it a crime to “knowingly and willfully” make any “materially false, fictitious, or fraudulent statement or representation” in “any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.” Unlike perjury, § 1001 is not limited to statements made under oath or before an official government tribunal. Nor does it require any showing of “pecuniary or property loss to the government.” *United States v. Gilliland*, 312 U.S. 86, 93, 61 S. Ct. 518, 85 L. Ed. 598 (1941). Instead, the statute is based on the need to protect “agencies from the perversion which *might* result from the deceptive practices described.”

Still other statutes make it a crime to falsely represent that one is speaking on behalf of, or with the approval of, the Federal Government. All told, there are more than 100 federal criminal

statutes that punish false statements made in connection with areas of federal agency concern.

These examples amply demonstrate that false statements of fact merit no First Amendment protection in their own right. It is true, as Justice Breyer notes, that many in our society either approve or condone certain discrete categories of false statements, including false statements made to prevent harm to innocent victims and so-called “white lies.” But respondent’s false claim to have received the Medal of Honor did not fall into any of these categories.

Respondent and others who join him in attacking the Stolen Valor Act take a different view. Respondent’s brief features a veritable paean to lying. According to respondent, his lie about the Medal of Honor was nothing out of the ordinary for 21st-century Americans. “Everyone lies,” he says. “We lie all the time.” “[H]uman beings are constantly forced to choose the persona we present to the world, and our choices nearly always involve intentional omissions and misrepresentations, if not outright deception.”

This radical interpretation of the First Amendment is not supported by any precedent of this Court. The lies covered by the Stolen Valor Act have no intrinsic value and thus merit no First Amendment protection unless their prohibition would chill other expression that falls within the Amendment’s scope. I now turn to that question.

## B

While we have repeatedly endorsed the principle that false statements of fact do not merit First Amendment protection for their own sake, we have recognized that it is sometimes necessary to “exten[d] a measure of strategic protection” to these statements in order to ensure sufficient “‘breathing space’ ” for protected speech. [T]here are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat. The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth.

In stark contrast to hypothetical laws prohibiting false statements about history, science, and similar matters, the Stolen Valor Act presents no risk at all that valuable speech will be suppressed. The speech punished by the Act is not only verifiably false and entirely lacking in intrinsic value, but it also fails to serve any instrumental purpose that the First Amendment might protect. Tellingly, when asked at oral argument what truthful speech the Stolen Valor Act might chill, even respondent’s counsel conceded that the answer is none.

## C

Neither of the two opinions endorsed by Justices in the majority claims that the false statements covered by the Stolen Valor Act possess either intrinsic or instrumental value. Instead, those opinions appear to be based on the distinct concern that the Act suffers from overbreadth. But to strike down a statute on the basis that it is overbroad, it is necessary to show that the statute’s “overbreadth [is] *substantial*, not only in an absolute sense, but also relative to [its] plainly legitimate sweep.” The plurality and the concurrence do not even attempt to make this showing.

The Stolen Valor Act represents the judgment of the people’s elected representatives that false statements about military awards are very different from false statements about civilian awards.

Certainly this is true with respect to the high honor that respondent misappropriated. Congress was entitled to conclude that falsely claiming to have won the Medal of Honor is qualitatively different from even the most prestigious civilian awards and that the misappropriation of that honor warrants criminal sanction.

## § 8.01 FREE SPEECH DOCTRINE

### [C] Fighting Words, Threats, and Offensive Speech

#### Page 1111: Note 4:

4. *Elonis v. United States*, 135 S Ct. 2001 (2015). Anthony Elonis was convicted under a federal statute that criminalizes the making of threats on the Internet. His estranged wife Tara obtained a protective order against him after several uncomfortable incidents. Then he started an abusive campaign against her on his Facebook page. “Fold up your PFA [protection- from-abuse order] and put it in your pocket. Is it thick enough to stop a bullet?” Elonis speculated about blowing up elementary schools and threatened co-workers. He posted about Tara, “There’s one way to love you but a thousand ways to kill you. I’m not going to rest until your body is a mess, soaked in blood and dying from all the little cuts.” When an FBI agent visited Elonis to discuss the postings, Elonis wrote later on Facebook: “Little agent lady stood so close, took all the strength I had not to turn the [expletive] ghost. Pull my knife, flick my wrist and slit her throat.”

The Court, in an 7-2 decision by Chief Justice Roberts, held that the statute’s mens rea requirement would require his knowledge that he was communicating a threat. “Elonis’s conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a ‘reasonable person’ standard is a familiar feature of civil liability in tort law, but is inconsistent with ‘the conventional requirement for criminal conduct—awareness of some wrongdoing.’ ”

Although the decision is a matter of statutory construction, it is heavily dependent on the principle that expression is protected unless it transmits a “genuine threat.” “There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.”

### [E] Regulating the Public Forum

#### Page 1177: Add after *Hill v. Colorado*:

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#### MINNESOTA VOTERS ALLIANCE v. MANSKY

138 S. CT. 1876 [2018]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Under Minnesota law, voters may not wear a political badge, political button, or anything bearing political insignia inside a polling place on Election Day. The question presented is whether this ban violates the Free Speech Clause of the First Amendment.

Minnesota's law contains three prohibitions, only one of which is challenged here. See Minn. Stat. §211B.11(1) (Supp. 2017). The first sentence of §211B.11(1) forbids any person to "display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet of the building in which a polling place is situated" to "vote for or refrain from voting for a candidate or ballot question." The second sentence prohibits the distribution of "political badges, political buttons, or other political insignia to be worn at or about the polling place." The third sentence-the "political apparel ban"-states that a "political badge, political button, or other political insignia may not be worn at or about the polling place." Versions of all three prohibitions have been on the books in Minnesota for over a century.

There is no dispute that the political apparel ban applies only *within* the polling place, and covers articles of clothing and accessories with "political insignia" upon them. Minnesota election judges-temporary government employees working the polls on Election Day-have the authority to decide whether a particular item falls within the ban. If a voter shows up wearing a prohibited item, the election judge is to ask the individual to conceal or remove it. If the individual refuses, the election judge must allow him to vote, while making clear that the incident "will be recorded and referred to appropriate authorities."

Petitioner Minnesota Voters Alliance (MVA) is a non-profit organization that "seeks better government through election reforms." Pet. for Cert. 5. Petitioner Andrew Cilek is a registered voter in Hennepin County and the executive director of MVA; petitioner Susan Jeffers served in 2010 as a Ramsey County election judge. Five days before the November 2010 election, MVA, Jeffers, and other likeminded groups and individuals filed a lawsuit in Federal District Court challenging the political apparel ban on First Amendment grounds. The groups-calling themselves "Election Integrity Watch" (EIW)-planned to have supporters wear buttons to the polls printed with the words "Please I. D. Me," a picture of an eye, and a tele- phone number and web address for EIW. (Minnesota law does not require individuals to show identification to vote.) One of the individual plaintiffs also planned to wear a "Tea Party Patriots" shirt. The District Court denied the plaintiffs' request for a temporary restraining order and preliminary injunction and allowed the apparel ban to remain in effect for the upcoming election.

In response to the lawsuit, officials for Hennepin and Ramsey Counties distributed to election judges an "Election Day Policy," providing guidance on the enforcement of the political apparel ban. The Policy specified that examples of apparel falling within the ban "include, but are not limited to":

" Any item including the name of a political party in Minnesota, such as the Republican, [Democratic- Farmer-Labor], Independence, Green or Libertarian parties.

Any item including the name of a candidate at any election.

Any item in support of or opposition to a ballot question at any election.

Issue oriented material designed to influence or impact voting (including specifically the 'PleaseI.D. Me' buttons).

Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)."

As alleged in the plaintiffs' amended complaint and supporting declarations, some voters associated with EIW ran into trouble with the ban on Election Day. One individual was asked to cover up his Tea Party shirt. Another refused to conceal his "Please I. D. Me" button, and an election judge recorded his name and address for possible referral. And petitioner Cilek—who was wearing the same button and a T-shirt with the words "Don't Tread on Me" and the Tea Party Patriots logo—was twice turned away from the polls altogether, then finally permitted to vote after an election judge recorded his information.

Back in court, MVA and the other plaintiffs (now joined by Cilek) argued that the ban was unconstitutional both on its face and as applied to their apparel. The District Court granted the State's motions to dismiss and the Court of Appeals for the Eighth Circuit affirmed in part and reversed in part. In evaluating MVA's facial challenge, the Court of Appeals observed that this Court had previously upheld a state law restricting speech "related to a political campaign" in a 100-foot zone outside a polling place; the Court of Appeals determined that Minnesota's law likewise passed constitutional muster. The Court of Appeals reversed the dismissal of the plaintiffs' as-applied challenge, however, finding that the District Court had improperly considered matters outside the pleadings. On remand, the District Court granted summary judgment for the State on the as-applied challenge, and this time the Court of Appeals affirmed.

MVA, Cilek, and Jeffers (hereinafter MVA) petitioned for review of their facial First Amendment claim only. We granted certiorari. 583 U. S. \_\_ 017).

The First Amendment prohibits laws "abridging the freedom of speech." Minnesota's ban on wearing any "political badge, political button, or other political insignia" plainly restricts a form of expression within the protection of the First Amendment.

But the ban applies only in a specific location: the interior of a polling place. It therefore implicates our "'forum based' approach for assessing restrictions that the government seeks to place on the use of its property." *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U. S. 672, 678 (1992) (*ISKCON*). Generally speaking, our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums. In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited. The same standards apply in designated public forums—spaces that have "not traditionally been regarded as a public forum" but which the government has "intentionally opened up for that purpose." In a nonpublic forum, on the other hand—a space that "is not by tradition or designation a forum for public communication"—the government has much more flexibility to craft rules limiting speech. The government may reserve such a forum "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."

This Court employs a distinct standard of review to assess speech restrictions in nonpublic forums because the government, "no less than a private owner of property," retains the "power to preserve the property under its control for the use to which it is lawfully dedicated."

*Adlerley v. Florida*, 385 U. S. 39, 47 (1966). Accordingly, our decisions have long recognized

that the government may impose some content-based restrictions on speech in nonpublic forums, including restrictions that exclude political advocates and forms of political advocacy.

A polling place in Minnesota qualifies as a nonpublic forum. It is, at least on Election Day, government-controlled property set aside for the sole purpose of voting. The space is "a special enclave, subject to greater restriction." Rules strictly govern who may be present, for how long.

We therefore evaluate MVA's First Amendment challenge under the nonpublic forum standard. The text of the apparel ban makes no distinction based on the speaker's political persuasion, so MVA does not claim that the ban discriminates on the basis of viewpoint on its face. The question accordingly is whether Minnesota's ban on political apparel is "reasonable in light of the purpose served by the forum": voting.

We first consider whether Minnesota is pursuing a permissible objective in prohibiting voters from wearing particular kinds of expressive apparel or accessories while inside the polling place. The natural starting point for evaluating a First Amendment challenge to such a restriction is this Court's decision in *Burson v. Freeman*, 504 U.S. 191 (1992), which upheld a Tennessee law imposing a 100-foot campaign-free zone around polling place entrances. Under the Tennessee law—much like Minnesota's buffer-zone provision—no person could solicit votes for or against a candidate, party, or ballot measure, distribute campaign materials, or "display . . . campaign posters, signs or other campaign materials" within the restricted zone. The plurality found that the law withstood even the strict scrutiny applicable to speech restrictions in traditional public forums. In his opinion concurring in the judgment, Justice Scalia argued that the less rigorous "reasonableness" standard of review should apply, and found the law "at least reasonable" in light of the plurality's analysis.

That analysis emphasized the problems of fraud, voter intimidation, confusion, and general disorder that had plagued polling places in the past. Against that historical backdrop, the plurality and Justice Scalia upheld Tennessee's determination, supported by overwhelming consensus among the States and "common sense," that a campaign-free zone outside the polls was "necessary" to secure the advantages of the secret ballot and protect the right to vote.

MVA disputes the relevance of *Burson* to Minnesota's apparel ban. On MVA's reading, *Burson* considered only "active campaigning" outside the polling place by campaign workers and others trying to engage voters approaching the polls. Minnesota's law, by contrast, prohibits what MVA characterizes as "passive, silent" self-expression by voters themselves when voting. MVA also points out that the plurality focused on the extent to which the restricted zone combated "voter intimidation and election fraud," concerns that, in MVA's view, have little to do with a prohibition on certain types of voter apparel.

Campaign buttons and apparel did come up in the *Burson* briefing and argument, but neither the plurality nor Justice Scalia expressly addressed such applications of the law. Nor did either opinion specifically consider the interior of the polling place as opposed to its environs, and it is true that the plurality's reasoning focused on campaign activities of a sort not likely to occur in an area where, for the most part, only voters are permitted while voting.

In any event, we see no basis for rejecting Minnesota's determination that some forms of advocacy should be excluded from the polling place, to set it aside as "an island of calm in which voters can peacefully contemplate their choices." Casting a vote is a weighty civic act, akin to a jury's return of a verdict, or a representative's vote on a piece of legislation. It is a time for choosing, not campaigning. The State may reasonably decide that the interior of the polling place should reflect that distinction. To be sure, our decisions have noted the "nondisruptive" nature of expressive apparel in more mundane settings. But those observations do not speak to the unique context of a polling place on Election Day. Members of the public are brought together at that place, at the end of what may have been a divisive election season, to reach considered decisions about their government and laws. The State may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most. That interest may be thwarted by displays that do not raise significant concerns in other situations.

Other States can see the matter differently, and some do. The majority, however, agree with Minnesota that at least some kinds of campaign-related clothing and accessories should stay outside. That broadly shared judgment is entitled to respect.

Thus, in light of the special purpose of the polling place itself, Minnesota may choose to prohibit certain apparel there because of the message it conveys, so that voters may focus on the important decisions immediately at hand.

But the State must draw a reasonable line. Although there is no requirement of narrow tailoring in a nonpublic forum, the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out. Here, the unmoored use of the term "political" in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota's restriction to fail even this for-giving test.

Again, the statute prohibits wearing a "political badge, political button, or other political insignia." It does not define the term "political." And the word can be expansive. It can encompass anything "of or relating to government, a government, or the conduct of governmental affairs." Under a literal reading of those definitions, a button or T-shirt merely imploring others to "Vote!" could qualify.

The State argues that the apparel ban should not be read so broadly. Instead, the State interprets the ban to proscribe "only words and symbols that an objectively reasonable observer would perceive as conveying a message about the electoral choices at issue in [the] polling place."

At the same time, the State argues that the category of "political" apparel is *not* limited to campaign apparel. After all, the reference to "campaign material" in the first sentence of the statute-describing what one may not "display" in the buffer zone as well as inside the polling place-implies that the distinct term "political" should be understood to cover a broader class of items.

We consider a State's "authoritative constructions" in interpreting a state law. But far from clarifying the indeterminate scope of the political apparel provision, the State's "electoral choices" construction introduces confusing line-drawing problems.

For specific examples of what is banned under its standard, the State points to the 2010 Election Day Policy-which it continues to hold out as authoritative guidance regarding implementation of the statute. The first three examples in the Policy are clear enough: items displaying the name of a political party, items displaying the name of a candidate, and items demonstrating "support of or opposition to a ballot question."

But the next example-"[i]ssue oriented material designed to influence or impact voting," raises more questions than it answers. What qualifies as an "issue"? The answer, as far as we can tell from the State's briefing and argument, is any subject on which a political candidate or party has taken a stance.

A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable. Candidates for statewide and federal office and major political parties can be expected to take positions on a wide array of subjects of local and national import. Would a "Support Our Troops" shirt be banned, if one of the candidates or parties had expressed a view on military funding or aid for veterans? What about a "#MeToo" shirt, referencing the movement to increase awareness of sexual harassment and assault? At oral argument, the State indicated that the ban would cover such an item if a candidate had "brought up" the topic.

The next broad category in the Election Day Policy-any item "promoting a group with recognizable political views," makes matters worse. The State construes the category as limited to groups with "views" about "the issues confronting voters in a given election." The State does not, however, confine that category to groups that have endorsed a candidate or taken a position on a ballot question.

Any number of associations, educational institutions, businesses, and religious organizations could have an opinion on an "issue[] confronting voters in a given election." For instance, the American Civil Liberties Union, the AARP, the World Wildlife Fund, and Ben & Jerry's all have stated positions on matters of public concern. If the views of those groups align or conflict with the position of a candidate or party on the ballot, does that mean that their insignia are banned?

The State emphasizes that the ban covers only apparel promoting groups whose political positions are sufficiently "well-known." But that requirement, if anything, only increases the potential for erratic application. Well known by whom? The State tells us the lodestar is the "typical observer" of the item. But that measure may turn in significant part on the background knowledge and media consumption of the particular election judge applying it.

The State's "electoral choices" standard, considered together with the nonexclusive examples in the Election Day Policy, poses riddles that even the State's top lawyers struggle to solve. But the State's difficulties with its restriction go beyond close calls on borderline or fanciful cases. And that is a serious matter when the whole point of the exercise is to prohibit the expression of political views.

It is "self-evident" that an indeterminate prohibition carries with it "[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation." Election judges "have the authority to decide what is political" when screening individuals at the entrance to the polls. We do not doubt that the vast majority of election judges strive to

enforce the statute in an evenhanded manner, nor that some degree of discretion in this setting is necessary. But that discretion must be guided by objective, workable standards. Without them, an election judge's own politics may shape his views on what counts as "political."

That is not to say that Minnesota has set upon an impossible task. Other States have laws proscribing displays (including apparel) in more lucid terms. We do not suggest that such provisions set the outer limit of what a State may proscribe, and do not pass on the constitutionality of laws that are not before us. But we do hold that if a State wishes to set its polling places apart as areas free of partisan discord, it must employ a more discernible approach than the one Minnesota has offered here.

\* \* \*

Cases like this "present[] us with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote." *Burson*, 504 U. S., at 198 (plurality opinion). Minnesota, like other States, has sought to strike the balance in a way that affords the voter the opportunity to exercise his civic duty in a setting removed from the clamor and din of election-eering. While that choice is generally worthy of our respect, Minnesota has not supported its good intentions with a law capable of reasoned application.

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

It is so ordered

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins,  
dissenting.

I agree with the Court that "[c]asting a vote is a weighty civic act" and that "State[s] may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth," including by "prohibit[ing] certain apparel [in polling places] because of the message it conveys." *Ante*, at 11-12. I disagree, however, with the Court's decision to declare Minnesota's political apparel ban unconstitutional on its face because, in its view, the ban is not "capable of reasoned application," *ante*, at 19, when the Court has not first afforded the Minnesota state courts "a reasonable opportunity to pass upon" and construe the statute, *Babbitt v. Farm Worlors*, 442 U. S. 289, 308 (1979). I would certify this case to the Minnesota Supreme Court for a definitive interpretation of the political apparel ban under Minn. Stat. §211B.11(1) (Supp. 2017), which likely would obviate the hypothetical line-drawing problems that form the basis of the Court's decision today.

**6. *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).** In 2000, the Massachusetts legislative enacted the Massachusetts Reproductive Health Care Facilities Act. In order "to address clashes" between opponents of abortion and advocates of abortion rights which occurred outside abortion facilities, the Act provided "for a defined area with an 18-foot radius around the entrance and driveways of such facilities." The Act provided that although anyone could enter the areas,

no one, excluding exempt individuals, “could knowingly approach within six feet of another person” without that person’s consent for the purpose of passing leaflets, displaying signs or “engaging in oral protest, or counseling.” Another provision of the law subjected to criminal punishment anyone who impeded or blocked another person’s entry to a reproductive health facility or exit from it. The Massachusetts law was based on a Colorado law upheld by the Supreme Court in *Hill v. Colorado* (2000). By 2007, Massachusetts legislators and law enforcement personnel had come to consider the Massachusetts law inadequate.

Abortion clinic employees and volunteers testified at legislature hearings that “protesters congregated near the doors and in the driveways of the clinics, with the result that prospective patients occasionally retreated from the clinics rather than try to make their way to the clinic entrances or parking lots.” Therefore, Massachusetts amended its Reproductive Health Care Facilities Act in 2007 to minimize confrontations outside of medical facilities which provide abortions. The revised statute makes it a crime to stand on a “public way or sidewalk within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed.” Unlike more aggressive opponents of abortion who use techniques such as face-to-face confrontations, petitioners engage in “sidewalk counseling” of women as they walk into the facilities in order to dissuade those women from having an abortion. The “buffer” zone often prevented the petitioners from having the personal contact they previously enjoyed with women.

The petitioners brought suit alleging that the 2007 law violated the First and Fourteenth Amendments and was facially invalid and as applied to them. The United States Court of Appeals for the First Circuit upheld the 2007 law. The Supreme Court granted certiorari and unanimously reversed the 2007 law. Chief Justice Roberts, joined by Justices Ginsburg, Breyer, Sotomayor and Kagan, delivered the opinion for the Court. Chief Justice Roberts began his opinion by pointing out that sidewalks are “traditional public fora” which have historically been open for the exchange of information. Within these fora, the government’s ability to limit speech there is “very limited” when attempting to regulate “expression because of its message, its ideas, its subject matter, or its content.” However, the government may place “reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content” as long as they are “narrowly tailored to serve a significant government interest” and leave “ample alternative channels for communication.”

Chief Justice Roberts continued as follows:

While the parties agree that this test supplies the proper framework for assessing the constitutionality of the Massachusetts Act, they disagree about whether the Act satisfies the test’s three requirements. Petitioners contend that the Act is not content neutral for two independent reasons:

The first reason that petitioners rely on to support their contention that the [2007] Act is not content neutral is that the buffer zone discriminates against abortion-related speech because it establishes buffer zones only at clinics that perform abortions. However, the law bans all speech within 35 feet of the facilities and thus does not discriminate on the basis of content. Chief Justice Roberts went on to explain the Court’s position that the 2007 law was not content—based:

The Act would be content based if it requires “enforcement authorities” to “examine the content of the message that is conveyed to determine whether” a violation has occurred. But it does not.

Whether petitioners violate the Act “depends” not “on what they say,” but simply on where they say it. Indeed, petitioners can violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word. It is true, of course, that by limiting the buffer zones to abortion clinics, the Act has the “inevitable effect” of restricting abortion-related speech more than speech on other subjects. But a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics. On the contrary, “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” The question in such a case is whether the law is “justified without reference to the content of the regulated speech.” *Renton v. Playtime Theatres, Inc.* (1986).

A question of whether a regulation that is not based on content is constitutional turns on whether it is “justified without reference to the content of the regulated speech.” The Massachusetts law is exactly that. The law was passed to remedy problems of “public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways.” The law was passed to address “crowding, obstruction, and even violence” outside of clinics by moving people a good distance away from the facility. Although petitioners ask the Court to find a discriminatory purpose in the law because it only applies to facilities that provide abortions, the Court finds it logical that the law only applies to the facilities which were having problems with “crowding, obstruction, and even violence.”

Petitioners’ second reason that the Act is not content neutral is the law allows an exemption for “clinic employees and agents” to enter the buffer zone “in the scope of their employment.” The law favors one side of the abortion debate over another. Particularly egregious is the fact that employees “escort” women through the buffer zone, which allows employees to “speak” inside of the buffer zone where petitioners may not. Chief Justice Roberts rejects this argument. It is more likely that employees are allowed in “the scope of employment” to enter the buffer zone merely to go to and from their jobs. The exemption covers security guards patrolling entrances and maintenance workers shoveling snow. It would appear this exemption merely allows the facilities to function as any other business would from day to day. Chief Justice Roberts rejected petitioners’ arguments that when women are escorted by volunteers and employees through the buffer zone, the employees actively thwart their attempts to speak to the women and hand them literature. Even if this activity takes place in the buffer zone, which is unclear on the record, there is no indication that this activity is part of the employees “scope of employment.” If the clinics themselves condoned this activity and encouraged it from the employees, the law would discriminate based on viewpoint. There is no evidence of such a policy in the record. The law therefore does not discriminate based on viewpoint.

In view of the forgoing, the Court reasoned that the 2007 law does not discriminate based on content and is content neutral. Therefore, it does not need to “be analyzed under strict scrutiny.” But it still must be “narrowly tailored” to serve a “significant governmental interest.” It must not “regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.” The Court concluded that the 2007 law failed the “narrow tailoring” prong of the test used for content neutral regulation. The buffer zone places “serious burdens” on petitioner’s speech. Before the 2007 Amendment, petitioners engaged in “close personal” contact with women entering the clinic and would place literature directly in the hands of the women. The petitioners testified that they convinced “hundreds” of women from having abortions. The buffer zone “carves out a significant portion” of adjacent sidewalks” and pushes petitioners well back from entrances to the clinics which compromise their ability to have the contact they previously enjoyed. Since 2007 they have reached far fewer women with their

advocacy. In the face of this substantial burden on speech, the Court concludes Massachusetts could have achieved its goals using less restrictive alternatives. Chief Justice Roberts notes the existence of ordinances which prohibit the blocking of streets and sidewalks, and statutes in other states which make it a crime “to follow and harass another person within 15 feet of the premises of a reproductive health care facility.” These laws would achieve Massachusetts desired result of avoiding crowding and disruptive confrontations outside of the clinics without “sweeping in innocent individuals and their speech” like the buffer zone does. The respondents have “but one reply.” They argue they have tried other methods, but they are simply not effective. The Court rejects this argument, noting that Massachusetts has not “a single prosecution on the books” under the old rules in 17 years. The only injunctions they can cite date back to the 1990’s. Finally, although the buffer zone is a statewide policy, the problems are limited “principally to the Boston clinic on Saturday mornings.” Because of the importance of the First Amendment rights involved, the apparent availability of other laws, Massachusetts’ apparent lack of effort in enforcing less restrictive laws, and the rather limited nature of the problem, the Court concludes the law was not narrowly tailored:

Petitioners wish to converse with their fellow citizens about an important subject on the public streets and sidewalks—sites that have hosted discussions about the issues of the day throughout history. Respondents assert undeniably significant interests in maintaining public safety on those same streets and sidewalks, as well as preserving access to adjacent healthcare facilities. But here the Commonwealth has pursued those interests by the extreme step of closing a substantial portion of a traditional public forum to all speakers. It has done so without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes. The Commonwealth may not do that consistent with the First Amendment. The judgment of the Court of Appeals for the First Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

Justice Scalia, joined by Justices Kennedy and Thomas, concurred in the judgment but not in the Court’s opinion. Justice Scalia said the Court’s opinion continues its “practice of giving abortion—rights advocates a pass when it comes to suppressing the free speech rights of their opponents.” Justice Scalia believes the Massachusetts law is content based: “[I]t applies outside abortion clinics only (rather than outside other buildings as well.) It blinks reality to say, as the majority does, that a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur—and where that speech can most effectively be communicated—is not content based.”

Justice Scalia further explained his disagreement with the Court’s opinion:

The majority says, correctly enough, that a facially neutral speech restriction escapes strict scrutiny, even when it “may disproportionately affect speech on certain topics,” so long as it is “justified without reference to the content of the regulated speech.” But in the cases in which the Court has previously found that standard satisfied—in particular, *Renton v. Playtime Theatre, Inc.* (1986), and *Ward v. Rock Against Racism*, (1989), both of which the majority cites—are a far cry from what confronts us here. In *Renton*, the Court reasoned that if the city “has been concerned with restricting the message purveyed adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location.” *Ward*, in turn, involved a New York City regulation requiring the

use of the city’s own sound equipment and technician for events at a bandshell in Central Park. The Court held the regulation content neutral because its “principal justification [was] the city’s desire to control noise levels,” a justification that “‘ha[d] nothing to do with [the] content’ ‘of respondent’s rock concerts or music more generally. The regulation ‘ha[d] no material impact on any performer’s ability to exercise complete artistic control over sound quality.’”

Compare these cases’ reasons for concluding that the regulations in question were “justified without reference to the content of the regulated speech” with the feeble reasons for the majority’s adoption of that conclusion in the present case. The majority points only to the statute’s stated purpose of increasing “‘public safety’ ‘at abortion clinics, and to the additional aims articulated by respondents before this Court—namely, protecting’ ‘patient access to healthcare . . . and the unobstructed use of public sidewalks and roadways.’ “Does a statute become “justified without reference to the content of the regulated speech” simply because the statute itself and those defending it in court *say* that it is? Every objective is to restrict speech that opposes abortion.

Furthermore, the Massachusetts law at issue was based on a Colorado law upheld in *Hill v. Colorado* (2000). In *Hill*, Justice Scalia said the Colorado law at issue was aimed “at the suppression of unwelcome speech, vindicating what *Hill*, called ‘[t]he unwilling listener’s interest in avoiding unwanted communication.’ The Court held that interest to be content material.” In this case also the law was meant to protect the “supposed right” of citizens “to avoid speech that they would rather not hear.” Indeed, this Court in granting review granted a second question for review in this case. The question was “whether *Hill* should be cut back or cast aside.” Justice Scalia remarks that the Court’s opinion ducks that issue “by declaring the Act content neutral on other (entirely unpersuasive grounds.)”

Justice Scalia then declares:

In concluding that the statute is content based and therefore subject to strict scrutiny, I necessarily conclude that *Hill* should be overruled. Reasons for doing so are set forth in the dissents (KENNEDY, J.), and in the abundance of scathing academic commentary describing how *Hill* stands in contradiction to our First Amendment jurisprudence. Protecting people from speech they do not want to hear is not a function that the First Amendment allows the government to undertake in the public streets and sidewalks.

Justice Scalia agrees with the petitioners that the law is content based because it allows clinic employees to access the buffer zone but not petitioners. While the majority sees this exemption as a logical way to provide for employees to access their place of employment. There is no “serious doubt” that employees “will speak in favor of abortion” or “speak in opposition” to petitioners. He posits employees could “pull a woman away” from petitioners, “cover her ears,” or make “loud noises to drown out” petitioners “pleas.” The Court’s position that “scope of employment” and the lack of evidence that the clinics authorize such behavior does not save the statute. It is “implausible” that a clinic would bar employees from engaging in that type of activity. The Planned Parenthood League of Massachusetts website states that escort volunteers protect women entering the clinic from protesters who “hold signs, try to speak to patients entering the building, and distribute literature that can be misleading.”

[F] **Speech in Restricted Environments**

[2] **Government Employee Speech**

**Page 1199: Add after Note 5:**

*Lane v. Franks*, 134 S. Ct. 2369 (2014). Edward Lane, the program director at an Alabama state community college, conducted an audit and discovered that a program employee, Suzanne Schmitz, who was also an Alabama state representative, had not been showing up at her office at the program. Lane shared this information with the then college president and the college counsel. They warned Lane that firing Schmitz would be bad for him as well as the program he directed. Lane terminated Schmitz who was subsequently indicted and convicted for mail fraud and theft with regard to a program receiving federal funds. Pursuant to a subpoena, Lane testified at Schmitz’s trial concerning his termination of Schmitz.

The college program that Lane directed continued to experience shortfalls. In January 2009 a new college President, Steve Franks, decided to terminate 29 probationary employees including Lane. But then Franks rescinded “all but 2 of the 29 terminations – those of Lane and one other employee.” In September 2009 the college eliminated the program altogether. Lane then brought suit against Franks in his individual and official capacities under 42 U.S.C. Sec. 1983 contending that Franks had “violated the First Amendment by firing him in retaliation for his testimony against Schmitz.” Both the federal and district court and the Eleventh Circuit ruled against Lane because he “spoke as an employee and not as a citizen because he was acting pursuant to his official duties when he investigated Schmitz’s employment.” In addition, the Eleventh Circuit ruled that even if Lane’s First Amendment rights had been violated, Franks would be entitled to qualified immunity in his personal capacity “because the right at issue had not been clearly established.” The Supreme Court granted certiorari because of a conflict amount the Circuits – “as to whether public employees may be fined – or suffer other adverse employment consequences – for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities.”

Justice Sotomayor, speaking for the Court, noted that *Garcetti v. Ceballos* [text, p. 1190] had set forth a “two-step inquiry into whether a public employee’s speech is entitled to protection.” The first inquiry is “ ‘whether the employee spoke as a citizen on a matter of public concern.’ ” If the employee speech did not involve a matter of public concern, then the “ ‘employee has no First Amendment cause of action based on his or her employer’s reaction to the speech.’ ” If the employee’s speech did involve a matter of public concern, then there is a possible First Amendment claim. Then the following question is presented: “Did the ‘government entity have an adequate justification for treating the employee different from any other member of the general public?’ ” *Garcetti* distinguished between employee speech – when government employees “make statements pursuant to their official duties” and citizen speech – when government employees are “speaking as citizens for First Amendment purposes.”

Applying this analysis the Court held that “the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities.” Justice Sotomayor pointed out that it was “undisputed that Lane’s ordinary job responsibilities did not include testifying in court proceedings.” In addition, Justice Sotomayor observed: “Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth.” Just the fact that Lane acquired information because he

was a government employee did not “transform that speech into employee – rather than citizen – speech.” If such were the rule, serious problems would be presented:

It would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials – speech by public employees regarding information learned through their employment – may never form the basis for a First Amendment retaliation claim. Such a rule would place public employees who witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs.

The Court concluded that Lane’s “sworn testimony” was citizen speech and that it was speech on a matter of public concern. The subject of Lane’s testimony was “corruption in a public program and misuse of state funds.” This was obviously “a matter of significant public concern.” But Lane’s testimony does not automatically receive First Amendment protection just because it is speech as a citizen on a matter of public concern. Under *Pickering v. Board of Education* [text, p. ] an inquiry must still be made as to “whether the government had ‘an adequate justification for treating the employee differently from any other member of the public’ based on the government’s needs as an employee.” But here there is no “government interest that tips the balance in their favor.” Therefore, Lane’s speech warrants First Amendment protection.

The case also contained a qualified immunity issue. However, Franks contends that “even if Lane’s testimony is protected under the First Amendment the claims against him in his individual capacity should be dismissed on the basis of qualified immunity.” The Court agreed with Franks that he had qualified immunity:

The relevant question for qualified immunity purposes is this:

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

Justice Thomas concurring joined by Justices Scalia and Alito joined in the Court’s opinion and judgment:

“The petitioner in this case did not speak ‘pursuant to’ his ordinary job duties because his responsibilities did not include testifying in Court proceedings—We accordingly have no occasion to address the quite different question whether a public employee speaks ‘as a citizen’ in the course of his ordinary job responsibilities. For some public employees—such as police officers, crime scene technicians, and laboratory analysts—testifying is a routine and critical part of their employment duties. The Court properly leaves the constitutional questions raised by these scenarios for another day.”

**Page 1199: add Note 7:**

**Judicial Speech.** In *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 \_\_\_\_\_ (2015), the

Supreme Court, 5-4, per Chief Justice Roberts, rejected a First Amendment challenge to Canon 7(c)(1) of the Florida Supreme Court’s Code of Judicial Conduct. The Canon provides that candidates for state judicial office may not personally solicit funds for their campaigns. Despite the Canon, Lanell Williams-Yulee, who was running for country court judgeship sent a letter to county voters soliciting campaign contributions. She posted the letter on her campaign website. Lanell Yulee-Williams was disciplined by the Florida bar. She sought relief in the state courts where she contended that as a judicial candidate, the First Amendment protected her right to solicit personally campaign funds in a judicial election. The Supreme Court of Florida did not agree and upheld the constitutionality of the Canon.

The U.S. Supreme Court affirmed and ruled that the Canon did not violate the First Amendment and that the Canon satisfied the strict scrutiny standard of review. Earlier, the Court had ruled in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), that a state rule prohibiting candidates from announcing positions on legal issues was an unconstitutional content-based restriction on speech despite the need for judges to be perceived by the public as impartial and open-minded. Here, by contrast, Florida has a compelling interest in protecting the integrity of the judiciary and assuring public confidence in an impartial judiciary. The judiciary differs from the executive and legislative branches of government. Politicians have to be attentive to the opinions of their supporters. But judges have a duty to be fair and not to give special consideration to campaign donors.

Justice Scalia, joined by Justice Thomas, dissenting, declared that the normal rules used to evaluate “laws that suppress speech because of content” should have been used.

### [3] PUBLICLY FUNDED SPEECH

**Add before *National Endowment for the Arts v. Finley*:**

***Agency for International Development v. Alliance for Open Society International, Inc.*, 133 S. Ct. 2321 (2013).** The United States Leadership Act of 2003 imposes two conditions (the “Policy Requirement”) on NGO recipients of federal funds: “(1) No funds may be used to promote or advocate the legalization or practice of prostitution ... and (2) no funds may be used by an organization that does not have a policy explicitly opposing prostitution.” Respondents were domestic NGOs working abroad to combat HIV/AIDS who want to remain neutral on the issue of prostitution, fearing “that adopting a policy explicitly opposing prostitution may alienate certain host governments, and may diminish the effectiveness of some of their programs by making it more difficult to work with prostitutes in the fight against HIV/AIDS” and that they may have to “censor their privately funded discussions in publications, at conferences, and in other forums about how best to prevent the spread of HIV/AIDS among prostitutes.” The organizations brought suit seeking a declaratory judgment that the Policy Requirements violates their First Amendment rights and a preliminary injunction barring the Government from cutting their funds during the litigation.

The Supreme Court, in an opinion by the Chief Justice, held that the Policy Requirement violates the First Amendment because it “mandates that recipients of Leadership Act funds explicitly agree with the Governments’ policy to oppose prostitution and sex trafficking” and it is “a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say.” The Government, said the Court, “may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement

to that benefit.” The Court drew a distinction between “conditions that define the federal program and those that reach outside it.” Because the first — and unchallenged — provision of the Policy Requirement, standing alone, ensures that federal funds will not be used to promote prostitution, the second provision “must be doing something more.” The Court found that the second provision goes “beyond defining the limits of the federally funded program to defining the recipient.”

Justice Scalia, dissenting, argued that the “Policy Requirement is nothing more than a means of selecting suitable agents to implement the Government’s chosen strategy to eradicate HIV/AIDS. That is perfectly permissible under the Constitution.”

**Page 1219: Add before § 8.02:**

**WALKER v. TEX. DIV., SONS OF CONFEDERATE VETERANS**  
135 S. Ct. 2239 (2015)

JUSTICE BREYER delivered the opinion of the Court.

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

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

**I**  
**A**

Texas law requires all motor vehicles operating on the State’s roads to display valid license plates. And Texas makes available several kinds of plates. Drivers may choose to display the State’s general-issue license plates. In the alternative, drivers may choose from an assortment of specialty license plates. Finally, Texas law provides for personalized plates (also known as vanity plates) [where the usual number is replaced by a name or letters of the owner’s choice].

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

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

Second, the Board may approve a specialty plate design proposal that a state-designated private

vendor has created at the request of an individual or organization. Among the plates created through the private-vendor process are plates promoting the "Keller Indians" and plates with the slogan "Get it Sold with RE/MAX."

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

## B

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

In 2010, SCV renewed its application before the Board. The Board invited public comment on its website and at an open meeting. After considering the responses, including a number of letters sent by elected officials who opposed the proposal, the Board voted unanimously against issuing the plate. The Board explained that it had found "it necessary to deny th[e] plate design application, specifically the confederate flag portion of the design, because public comments ha[d] shown that many members of the general public find the design offensive, and because such comments are reasonable." The Board added "that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups."

In 2012, SCV and two of its officers (collectively SCV) brought this lawsuit against the chairman and members of the Board (collectively Board). SCV argued that the Board's decision violated the Free Speech Clause of the First Amendment, and it sought an injunction requiring the Board to approve the proposed plate design. The District Court entered judgment for the Board. A divided panel of the Court of Appeals for the Fifth Circuit reversed. It held that Texas's specialty license plate designs are private speech and that the Board, in refusing to approve SCV's design, engaged in constitutionally forbidden viewpoint discrimination. The dissenting judge argued that Texas's specialty license plate designs are government speech, the content of which the State is free to control.

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

## II

When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 467-468 (2009). That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech. Thus, government statements (and government actions and programs

that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas. Instead, the Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate.

Were the Free Speech Clause interpreted otherwise, government would not work. How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary? How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization? "[I]t is not easy to imagine how government could function if it lacked th[e] freedom" to select the messages it wishes to convey. *Summum* at 468.

We have therefore refused "[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals." *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). We have pointed out that a contrary holding "would render numerous Government programs constitutionally suspect." *Id.*

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

### III

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

#### A

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

This Court rejected the organization's argument. We held that the city had not "provid[ed] a forum for private speech" with respect to monuments. Rather, the city, even when "accepting a privately donated monument and placing it on city property," had "engage[d] in expressive conduct."

The speech at issue, this Court decided, was "best viewed as a form of government speech" and "therefore [was] not subject to scrutiny under the Free Speech Clause."

We based our conclusion on several factors. First, history shows that "[g]overnments have long used monuments to speak to the public."

Second, we noted that it "is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated."

Third, we found relevant the fact that the city maintained control over the selection of monuments.

## B

Our analysis in *Summum* leads us to the conclusion that here, too, government speech is at issue. First, the history of license plates shows that, insofar as license plates have conveyed more than state names and vehicle identification numbers, they long have communicated messages from the States. States have used license plate slogans to urge action, to promote tourism, and to tout local industries.

Second, Texas license plate designs "are often closely identified in the public mind with the [State]." Texas license plates are, essentially, government IDs. And issuers of ID "typically do not permit" the placement on their IDs of "message[s] with which they do not wish to be associated."

Third, Texas maintains direct control over the messages conveyed on its specialty plates. This final approval authority allows Texas to choose how to present itself and its constituency. Texas offers plates that say "Fight Terrorism." But it need not issue plates promoting al Qaeda.

These considerations, taken together, convince us that the specialty plates here in question are similar enough to the monuments in *Summum* to call for the same result. That is not to say that every element of our discussion in *Summum* is relevant here. But those characteristics of the speech at issue in *Summum* were particularly important because the government speech at issue occurred in public parks, which are traditional public forums for "the delivery of speeches and the holding of marches and demonstrations" by private citizens. By contrast, license plates are not traditional public forums for private speech.

Texas presents these designs on government-mandated, government-controlled, and government-issued IDs that have traditionally been used as a medium for government speech. And it places the designs directly below the large letters identifying "TEXAS" as the issuer of the IDs. "The [designs] that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech."

## C

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

to display the private parties' designs. We cannot agree.

We have previously used what we have called "forum analysis" to evaluate government restrictions on purely private speech that occurs on government property. But forum analysis is misplaced here. Because the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply.

The parties agree that Texas's specialty license plates are not a "traditional public forum," such as a street or a park."

It is equally clear that Texas's specialty plates are neither a " 'designated public forum,' " which exists where "government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose,," nor a "limited public forum," which exists where a government has "reserv[ed] a forum] for certain groups or for the discussion of certain topics."

With respect to specialty license plate designs, Texas is not simply managing government property, but instead is engaging in expressive conduct. As we have described, we reach this conclusion based on the historical context, observers' reasonable interpretation of the messages conveyed by Texas specialty plates, and the effective control that the State exerts over the design selection process.

\* \* \*

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

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

The Court's decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing. Under our First Amendment cases, the distinction between government speech and private speech is critical. The First Amendment "does not regulate government speech," and therefore when government speaks, it is free "to select the views that it wants to express." *Pleasant Grove City v. Summum*. By contrast, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

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

Here is a test. Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. You would see, in addition to the standard Texas plates, an impressive array of specialty plates. (There are now more than 350 varieties.) [many of which were included in an Appendix to the dissent]

As you sat there watching these plates speed by, would you really think that the sentiments reflected

in these specialty plates are the views of the State of Texas and not those of the owners of the cars? If a car with a plate that says "Rather Be Golfing" passed by at 8:30 am on a Monday morning, would you think: "This is the official policy of the State-better to golf than to work?"

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

This capacious understanding of government speech takes a large and painful bite out of the First Amendment. Specialty plates may seem innocuous. They make motorists happy, and they put money in a State's coffers. But the precedent this case sets is dangerous. While all license plates unquestionably contain *some* government speech (*e.g.*, the name of the State and the numbers and/or letters identifying the vehicle), the State of Texas has converted the remaining space on its specialty plates into little mobile billboards on which motorists can display their own messages. And what Texas did here was to reject one of the messages that members of a private group wanted to post on some of these little billboards because the State thought that many of its citizens would find the message offensive. That is blatant viewpoint discrimination.

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

What if a state college or university did the same thing with a similar billboard or a campus bulletin board or dorm list serve? What if it allowed private messages that are consistent with prevailing views on campus but banned those that disturbed some students or faculty? Can there be any doubt that these examples of viewpoint discrimination would violate the First Amendment? I hope not, but the future uses of today's precedent remain to be seen.

## I

The Texas Division of Sons of Confederate Veterans (SCV) is an organization composed of descendants of Confederate soldiers. The group applied for a Texas specialty license plate in 2009 and again in 2010. Their proposed design featured a controversial symbol, the Confederate battle flag, surrounded by the words "Sons of Confederate Veterans 1896" and a gold border. App. 29. The Texas Department of Motor Vehicles Board (or Board) invited public comments and considered the plate design at a meeting in April 2011.

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

## II A

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

In *Summum*, a private group claimed the right to erect a large stone monument in a small city park. The 2.5-acre park contained 15 permanent displays, 11 of which had been donated by private parties. The central question concerned the nature of the municipal government's conduct when it accepted privately donated monuments for placement in its park. We held that the monuments represented government speech, and we identified several important factors that led to this conclusion.

First, governments have long used monuments as a means of expressing a government message. Thus, long experience has led the public to associate public monuments with government speech.

Second, there is no history of landowners allowing their property to be used by third parties as the site of large permanent monuments that do not express messages that the landowners wish to convey. We were not presented in *Summum* with any examples of public parks that had been thrown open for private groups or individuals to put up whatever monuments they desired.

Third, spatial limitations played a prominent part in our analysis. "[P]ublic parks can accommodate only a limited number of permanent monuments," and consequently permanent monuments "monopolize the use of the land on which they stand and interfere permanently with other uses of public space."

These characteristics, which rendered public monuments government speech in *Summum*, are not present in Texas's specialty plate program.

## B

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

The Texas specialty plate program also does not exhibit the "selective receptivity" present in *Summum*. To the contrary, Texas's program is *not* selective by design. The Board's chairman, who is charged with approving designs, explained that the program's purpose is "to encourage private plates" in order to "generate additional revenue for the state."

## III

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

The Confederate battle flag is a controversial symbol. To the Texas Sons of Confederate Veterans, it is said to evoke the memory of their ancestors and other soldiers who fought for the South in the Civil War. See *id.*, at 15-16. To others, it symbolizes slavery, segregation, and hatred. Whatever it means to motorists who display that symbol and to those who see it, the flag expresses a viewpoint. The Board rejected the plate design because it concluded that many Texans would find the flag symbol offensive. That was pure viewpoint discrimination.

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

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

\* \* \*

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

## **§ 8.02 CALIBRATING FIRST AMENDMENT PROTECTION**

### **[B] Obscene and Indecent Speech**

### **[4] Indecency Regulation on Broadcasting**

**MATAL v. TAM**  
137 St. Ct. 1744\_  
(2017)

JUSTICE ALITO announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III-A, and an opinion with respect to Parts 11-B, 11-C, and IV, in which THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE BREYER join.

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

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

At issue in this case is one such provision, which we will call "the disparagement clause." This provision prohibits the registration of a trademark "which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." §1052(a). This clause appeared in the original Lanham Act and has remained the same to this day.

## I

## D

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

Tam sought federal registration of "THE SLANTS," on the principal register, but an examining attorney at the PTO rejected the request. . . . finding that "there is . . . a substantial composite of persons who find the term in the applied- for mark offensive." The examining attorney relied in part on the fact that "numerous dictionaries define 'slants' or 'slant-eyes' as a derogatory or offensive term."

Tam contested the denial of registration before the examining attorney and before the PTO's Trademark Trial and Appeal Board (TTAB) but to no avail. Eventually, he took the case to federal court, where the en banc Federal Circuit ultimately found the disparagement clause facially unconstitutional under the First Amendment's Free Speech Clause. The majority found that the clause engages in viewpoint-based discrimination, that the clause regulates the expressive component of trademarks and consequently cannot be treated as commercial speech, and that the clause is subject to and cannot satisfy strict scrutiny.

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

## II

Before reaching the question whether the disparagement clause violates the First Amendment, we consider Tam's argument that the clause does not reach marks that disparage racial or ethnic groups. As noted, the disparagement clause prohibits the registration of trademarks "which may disparage . . . persons, living or dead." 15 U.S. C. §1052(a). Tam points to a definition of "person" in the Lanham Act, which provides that "[i]n the construction of this chapter, unless the contrary is plainly apparent from the context . . . [t]he term 'person' and any other word or term used to designate the applicant or other entitled to a benefit or privilege or rendered liable under the provisions of this chapter includes a juristic person as well as a natural person." §1127. Because racial and ethnic groups are neither natural nor "juristic" persons, Tam asserts, these groups fall outside this definition.

Tam's argument is refuted by the plain terms of the disparagement clause. The clause applies to marks that disparage "persons." A mark that disparages a "substantial" percentage of the members of a racial or ethnic group necessarily disparages many "persons," namely, members of that group. Tam's argument would fail even if the clause used the singular term "person," but Congress' use of the plural "persons" makes the point doubly clear.

Tam's narrow reading of the term "persons" also clashes with the breadth of the disparagement clause. By its terms, the clause applies to marks that disparage, not just "persons," but also "institutions" and "beliefs." 15 U.S. C. §1052(a). It thus applies to the members of any group whose members share particular "beliefs," such as political, ideological, and religious groups. It applies to marks that denigrate "institutions," and on Tam's reading it also reaches "juristic" persons such as corporations, unions, and other unincorporated associations. See §1127. Thus the clause is not limited to marks that disparage a particular natural person.

### III

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

#### A

The First Amendment prohibits Congress and other government entities and actors from "abridging the freedom of speech"; the First Amendment does not say that Congress and other government entities must abridge their own ability to speak freely. And our cases recognize that "[t]he Free Speech Clause . . . does not regulate government speech." *Pleasant Grove City v. Summum*,

As we have said, "it is not easy to imagine how government could function" if it were subject to the restrictions that the First Amendment imposes on private speech. *Summum*, see *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, (2015)

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

If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently. It is saying many unseemly things.

For example, if trademarks represent government speech, what does the Government have in mind when it advises Americans to "make.believe" (Sony), "Think different" (Apple), "Just do it" (Nike), or "Have it your way" (Burger King)<sup>1</sup>? Was the Government warning about a coming disaster when it registered the mark "EndTime Ministries"?

The PTO has made it clear that registration does not constitute approval of a mark. None of our government speech cases even remotely supports the idea that registered trademarks are government speech. Trademarks have not traditionally been used to convey a Government message. With the exception of the enforcement of 15 U. S. C. §1052(a), the viewpoint expressed by a mark has not played a role in the decision whether to place it on the principal register. And there is no evidence that the public associates the contents of trademarks with the Federal Government.

In sum, the federal registration of trademarks is vastly different from the beef ads in *Johanns*, the monuments in *Summum*, and even the specialty license plates in *Walker*. Holding that the registration of a trademark converts the mark into government speech would constitute a huge and dangerous extension of the government-speech doctrine. For if the registration of trademarks constituted government speech, other systems of government registration could easily be characterized in the same way. Perhaps the most worrisome implication of the Government's argument concerns the system of copyright registration. If federal registration makes a trademark government speech and thus eliminates all First Amendment protection, would the registration of the copyright for a book produce a similar transformation? The Government attempts to distinguish copyright on the ground that it is "the engine of free expression," but as this case illustrates, trademarks often have an expressive content. Companies spend huge amounts to create and publicize trademarks that convey a message. It is true that the necessary brevity of trademarks limits what they can say. But powerful messages can sometimes be conveyed in just a few words.

Trademarks are private, not government, speech.

## **B**

We next address the Government's argument that this case is governed by cases in which this Court has upheld the constitutionality of government programs that subsidized speech expressing a particular viewpoint.

Unlike the present case, the decisions on which the Government relies all involved cash subsidies or their equivalent. In *Rust v. Sullivan*, (1991), a federal law provided funds to private parties for family planning services. In *National Endowment for Arts v. Finley*, (1998), cash grants were awarded to artists. And federal funding for public libraries was at

issue in *United States v. American Library Assn., Inc.*, (2003). The federal registration of a trademark is nothing like the programs at issue in these cases.

The Government responds that registration provides valuable non-monetary benefits that "are directly traceable to the resources devoted by the federal government to examining, publishing, and issuing certificates of registration for those marks." But just about every government service requires the expenditure of government funds. This is true of services that benefit everyone, like police and fire protection, as well as services that are utilized by only some, *e.g.*, the adjudication of private lawsuits and the use of public parks and highways. Trademark registration is not the only government registration scheme. For example, the Federal Government registers copyrights and patents. State governments and their subdivisions register the title to real property and security interests; they issue driver's licenses, motor vehicle registrations, and hunting, fishing, and boating licenses or permits.

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

## C

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

Potentially more analogous are cases in which a unit of government creates a limited public forum for private speech. See, *e.g.*, *Good News Club v. Milford Central School*, (2001); *Rosenberger v. Rector and Visitors of Univ. of Va.*, (1995) When government creates such a forum, in either a literal or "metaphysical" sense, see *Rosenberger*, some content- and speaker-based restrictions may be allowed. However, even in such cases, what we have termed "viewpoint discrimination" is forbidden.

Our cases use the term "viewpoint" discrimination in a broad sense, and in that sense, the disparagement clause discriminates on the bases of "viewpoint." To be sure, the clause evenhandedly prohibits disparagement of all groups. It denies registration to any mark that is offensive to a substantial percentage of the members of any group. But in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint.

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

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

## IV

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

We need not resolve this debate between the parties because the disparagement clause cannot withstand even *Central Hudson* review. Under *Central Hudson*, a restriction of speech must serve "a substantial interest," and it must be "narrowly drawn." This means, among other things, that "[t]he regulatory technique may extend only as far as the interest it serves." The disparagement clause fails this requirement. It is claimed that the disparagement clause serves two interests. The first is phrased in a variety of ways in the briefs. Echoing language in one of the opinions below, the Government asserts an interest in preventing "'underrepresented groups'" from being "bombarded with demeaning messages in commercial advertising."

But no matter how the point is phrased, its unmistakable thrust is this: The Government has an interest in preventing speech expressing ideas that offend. And, as we have explained, that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate."

The second interest asserted is protecting the orderly flow of commerce. Commerce, we are told, is disrupted by trademarks that "involv[e] disparagement of race, gender, ethnicity, national origin, religion, sexual orientation, and similar demographic classification. A simple answer to this argument is that the disparagement clause is not "narrowly drawn" to drive out trademarks that support invidious discrimination. The clause reaches any trademark that disparages *any person, group, or institution*. It applies to trademarks like the following: "Down with racists," "Down with sexists," "Down with homophobes." It is not an anti-discrimination clause; it is a happy-talk clause. In this way, it goes much further than is necessary to serve the interest asserted.

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

\* \* \*

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

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

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

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

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

## II

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

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

To the extent trademarks qualify as commercial speech, they are an example of why that term or category does not serve as a blanket exemption from the First Amendment's requirement of viewpoint neutrality.

\* \* \*

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

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

In *Iancu v. Brunetti*, 588 U.S. \_\_\_\_ (2019), the Court held the Lanham Act's prohibition of federal registration of trademarks that are "immoral" or "scandalous" to violate the First Amendment's right of free expression. Brunetti sought trademark registration of the trademark, FUCT for his clothing line. The Patent and Trademark Office, asking whether a "substantial composite of the general public" would find the mark, among other things, "shocking to the sense of truth, decency, or propriety," or "giving offense to the conscience or moral feelings," determined that Brunetti's trademark violated the Act's prohibition on "immoral" or "scandalous" trademarks and therefore could not be registered. Brunetti brought a facial challenge to the statutory prohibition. In holding the prohibition unconstitutional, the Court, applying *Tam*, reasoned that a viewpoint-based ban is automatically unconstitutional. It found that the Lanham Act's provision in question "allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety....[T]he statute on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them."

### Add before note 3:

*FCC v. Fox TV Stations, Inc.*, 567 U.S. 239 (2012). The FCC's new indecency policy returned to the Supreme Court in 2012 after the Court of Appeals held that the new policy was void for vagueness. The Court went in a slightly different direction and held application of the new policy to prior incidents to be a violation of due process. Again, the Court declined to rule on the broader issues of First Amendment protection for fleeting indecency. Justice Kennedy wrote for the Court, pointing out that the policy in place at the time of the broadcasts gave the broadcasters no notice that a fleeting expletive or a brief shot of nudity could be actionably indecent. Given the lack of notice and consequent due process violation, there was no need for the Court to rule further on the "fleeting indecency" regulation.

## § 8.04 FREEDOM OF ASSOCIATION

### [B] Associating for Election

#### Purposes [1] Campaign Spending

### Add new note 6:

**6. *American Tradition Partnership v. Bullock*, 567 U.S. 516 (2012).** The Supreme Court rejected Montana's challenge to *Citizens United* in a summary reversal. The Montana Supreme Court, had upheld a state law prohibiting corporations from making political campaign contributions

supporting or opposing a political candidate. The U.S. Supreme Court in a *per curiam* opinion stated that this flew in the face of *Citizens United*, but the summary holding drew four dissents from Justices who believed that *Citizens United* should be revisited.

### **McCUTCHEON v. FEDERAL ELECTION COMMISSION**

134 S. Ct. 1434 (2014)

[The Supreme Court, per Chief Justice Roberts, speaking for a plurality, held that federal statutory limits on aggregate political contributions by individuals to all candidates or all committees violated the First Amendment. The Federal Election Campaign Act of 1971, as amended by the Bipartisan Campaign Reform Act of 2002, imposes two kinds of limits on campaign contributions - base limits and aggregate limits. Base limits restrict the amount of money an individual donor can contribute to a political candidate or committee. Aggregate limits restrict the amount of money a donor can contribute to all candidates or committees. Only the First Amendment validity of aggregate limits was at issue in this case. The Court declared: "The right to participate in democracy through political contributions is protected by the First Amendment but that right is not absolute. Congress may regulate campaign contributions to protect against corruption or the appearance of corruption. At the same time, we have made clear Congress may not regulate contributions simply to reduce the amount of money in politics or to restrict the political participation of some in order to enhance the relative influence of others. Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects." The Court had previously held that base limits were valid because they "served the permissible objective of combating corruption." The United States argued that aggregate limits no less than base limits served to prevent corruption by preventing "circumvention of the base limits." The Court disagreed: "[A]ggregate limits do little, if anything, to address that concern, while seriously restricting participation in the democratic process. The aggregate limits are therefore invalid under the First Amendment."]

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

[Chief Justice Roberts explained the federal statutory base limits and aggregate limits on individual political contributions as follows:]

For the 2013-2014 election cycle, the base limits in the Federal Election Campaign Act of 1971 (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), permit an individual to contribute up to \$2,600 per election to a candidate (\$5,200 total for the primary and general elections); \$32,400 per year to a national party committee; \$10,000 per year to a state or local party committee; and \$5,000 per year to a political action committee, or "PAC," 2 U.S.C. § 441a(a)(1); 78 Fed. Reg. 8532 (2013). A national committee, state or local party committee, or multicandidate PAC may in turn contribute up to \$5,000 per election to a candidate. § 441a(a)(2). The base limits apply with equal force to contributions that are "in any way earmarked or otherwise directed through an intermediary or conduit" to a candidate. § 441a(a)(8). If, for example, a donor gives money to a party committee but directs the party committee to pass the contribution along to a particular candidate, then the transaction is treated as a contribution from original donor to the specified candidate.

For the 2013-2014 election cycle, the aggregate limits in BCRA permit an individual to contribute a total of \$48,600 to federal candidates and a total of \$74,600 to other political committees. Of the \$74,600, only \$48,600 may be contributed to state or local party committees and PACs, as opposed to national party committees. § 441a(a)(3); 78 Fed.Reg. 8532. All told, an individual may contribute up to \$123,200 to candidate and noncandidate committee during each two-year election cycle. The base limits thus restrict how much money a donor may contribute to any particular candidate or committee; the aggregate limits have the effect of restricting how many candidates or committees the donor may support, to the extent permitted by the base limits.

In the 2011-2012 election cycle, appellant Shaun McCutcheon contributed a total of \$33,088 to 16 different federal candidates, in compliance with the base limits applicable to each. He alleges that he wished to contribute \$1,776 to each of 12 additional candidates but was prevented from doing so by the aggregate limit on contributions to candidates. McCutcheon also contributed a total of \$27,328 to several noncandidate political committees, in compliance with the base limits applicable to each. He alleges that he wished to contribute to various other political committees, including \$25,000 to each of the three Republican national party committees, but was prevented from doing so by the aggregate limit on contributions to political committees. McCutcheon further alleges that he plans to make similar contributions in the future. In the 2013-2014 election cycle, he again wishes to contribute at least \$60,000 to various candidates and \$75,000 to non-candidate political committees.

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

In June 2012, McCutcheon and the RNC filed a complaint before a three-judge panel of the U.S. District Court for the District of Columbia. See BCRA § 403(a), 116 Stat. 113-114. McCutcheon and the RNC asserted that the aggregate limits on contributions to candidates and to noncandidate political committees were unconstitutional under the First Amendment. They moved for a preliminary injunction against enforcement of the challenged provisions, and the Government moved to dismiss the case. The three judge District Court denied appellants' motion for a preliminary injunction and granted the Government's motion to dismiss. Assuming that the base limits appropriately served the Government's anticorruption interest, the District Court concluded that the aggregate limits survived First Amendment scrutiny because they prevented evasion of the base limits.

[R]egardless whether we apply strict scrutiny or *Buckley's* “closely drawn” test, we must assess the fit between the stated governmental objective and the means selected to achieve that objective. Or to put it another way, if a law that restricts political speech does not “avoid unnecessary abridgement” of First Amendment rights, *Buckley*, it cannot survive “rigorous” review. Because we find a substantial mismatch between the Government’s stated objective and the means selected to achieve it, the aggregate limits fail even under the “closely drawn” test. We therefore need not parse the difference between the two standards in this case.

Although *Buckley v. Valeo*, 424 U.S.1 (1976) provides some guidance, we think that its ultimate conclusion about the constitutionality of the aggregate limit in place under FECA does not control here. *Buckley* spent a total of three sentences analyzing that limit; in fact, the opinion pointed out

that the constitutionality of the aggregate limit “ha[d] not been separately addressed at length by the parties.” We are now asked to address appellants’ direct challenge to the aggregate limits in place under BCRA. BCRA is a different statutory regime, and the aggregate limits it imposes operate against a distinct legal backdrop. Most notably, statutory safeguards against circumvention have been considerably strengthened since *Buckley* was decided, through both statutory additions and the introduction of a comprehensive regulatory scheme. With more targeted anticircumvention measures in place today, the indiscriminate aggregate limits under BCRA appear particularly heavy-handed. An aggregate limit on how many candidates and committees an individual may support may support through contributions is not a “modest restraint” at all. The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.

The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse. To put it in the simplest terms, the aggregate limits prohibit an individual from fully contributing to the primary and general election campaigns of ten or more candidates, even if all contributions fall within the base limits. Congress views as adequate to protect against corruption. The individual may give up to \$5,200 each to nine candidates, but the aggregate limits constitute an outright ban on further contributions to any other candidate (beyond the additional \$1,800 that may be spent before reaching the \$48,600 aggregate limit). At that point, the limits deny the individual all ability to exercise his expressive and associational rights by contributing to someone who will advocate for his policy preferences. A donor must limit the number of candidates he supports, and may have to choose which of several policy concerns he will advance—clear First Amendment harms that the dissent never acknowledges.

The First Amendment burden is especially great for individuals who do not have ready access to alternative avenues for supporting their preferred politicians and policies. Other effective methods of supporting preferred candidates or causes without contributing money are reserved for a select few such as entertainers capable of raising hundreds of thousands of dollars in a single evening. The dissent faults this focus on “the individual’s right to engage in political speech,” saying that it fails to take into account “the public interest” in “collective (opinion of BREYER, J). This “collective” interest is said to promote “a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects.” The First Amendment does not protect the government, even when the government purports to act through legislation reflecting “collective speech.”

Second, the degree to which speech is protected cannot turn on a legislative or judicial determination that particular speech is useful to the democratic process. The First Amendment does not contemplate such “ad hoc balancing of relative social costs and benefits.” *United States v. Stevens*, 559 U.S. 460 (2010); see also *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (“What the Constitution says is that “value judgments” are for the individuals to make, not for the Government to decree, even with the mandate or approval of a majority”).

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

With the significant First Amendment costs for individual citizens in mind, we turn to the governmental interests asserted in this case. This Court has identified only one legitimate governmental interest for restricting campaign finances; preventing corruption or the appearance of corruption. The line between quid pro quo corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights. In addition, “[i]n drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.” The dissent laments that our opinion leaves only remnants of FECA and BCRA that are inadequate to combat corruption. Such rhetoric ignores the fact that we leave the base limits undisturbed. Those base limits remain the primary means of regulating campaign contributions—the obvious explanation for why the aggregate limits received a scant few sentences of attention in *Buckley*. When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.” Here, the Government seeks to carry that burden by arguing that the aggregate limits further the permissible objective of preventing *quid pro quo* corruption.

The difficulty is that once the aggregate limits kick in, they ban all contributions of any amount. But Congress’s selection of a \$5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption. If there is no corruption concern in giving candidates up to \$5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given \$1,801, and all other corruptible if given a dime. And if there is no risk that additional candidates will be corrupted by donations of up to \$5,200, then the Government must defend the aggregate limits by demonstrating that they prevent circumvention of the base limits. The problem is that they do not serve that function in any meaningful way. In light of the various statutes and regulations currently in effect, *Buckley*’s fear that an individual might “contribute massive amounts of money to a particular candidate through the use of un earmarked contributions” to entities likely to support the candidate, is far too speculative. And—importantly—we “have never accepted mere conjecture as adequate to carry a First Amendment burden.”

*Buckley* upheld aggregate limits only on the ground that they prevented channeling money to candidates beyond the base limits. The absence of such a prospect today belies the Government’s asserted objectives of preventing corruption or its appearance. The improbability of circumvention indicates that the aggregate limits instead further the impermissible objective of simply limiting the amount of money in political campaigns.

Quite apart from the foregoing, the aggregate limits violate the First Amendment because they are not “closely drawn to avoid unnecessary abridgment of associational freedoms.” *Buckley*. In the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require “a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is “in proportion to the interest served,” . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.” Here, because the statute is poorly tailored to the Government’s interest in preventing circumvention of the base limits, it impermissibly restricts participation in the political process.

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

receive. Importantly, there are multiple alternatives available to Congress that would server the Government’s anticircumvention interest, while avoiding “unnecessary abridgment” of First Amendment rights. *Buckley*. The most obvious might involve targeted restrictions on transfer among candidates and political committees. There are currently no such limits on transfers among party committees and from candidates to party committees.

An oral argument, the Government shifted its focus from *Buckley’s* anticircumvention rationale to an argument that the aggregate limits deter corruption regardless of their ability to prevent circumvention of the base limits. The Government argued that there is an opportunity for corruption whenever a large check is given to a legislator, even if the check consists of contributions within the base limits to be appropriately divided among numerous candidates and committees. The aggregate limits, the argument goes, ensure that the check amount does not become too large. That new rationale for the aggregate limits—embraced by the dissent, does not wash. It dangerously broadens the circumscribed definition of *quid pro quo* corruption articulated in our prior cases, and targets as corruption the general, broad-based support of political party. The Government suggests that it is the *solicitation* of large contributions that poses the danger of corruption but the aggregate limits are not limited to any direct solicitation by an officeholder or candidate. We have no occasion to consider a law that would specifically ban candidates from soliciting donations— within the base limits—that would go to many other candidates, and would add up to a large sum. For our purposes here, it is enough that the aggregate limits at issue are not directed specifically to candidate behavior.

For the past 40 years, our campaign finance jurisprudence has focused on the need to preserve authority for the Government to combat corruption, without at the same time compromising the political responsiveness at the heart of the democratic process, or allowing the Government to favor some participants in that process over others. The Government has a strong interest, no less critical to our democratic system, in combatting corruption and its appearance. We have, however, held that this interest must be limited to a specific kind of corruption—*quid pro quo* corruption—in order to ensure that the Government’s efforts do not have the effect of restricting the First Amendment right of citizens to choose who shall govern them. For the reasons set forth, we conclude that the aggregate limits on contributions do not further the only governmental interest this Court accepted as legitimate in *Buckley*. They instead intrude without justification on a citizen’s ability to exercise “the most fundamental First Amendment activities.”

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

**JUSTICE THOMAS, concurring in the judgment.**

*Buckley* itself recognized that both contribution and expenditure limits “operate in an area of the most fundamental First Amendment activities” and “implicate fundamental First Amendment interests.” But instead of treating political spending alike, *Buckley* distinguished the two, embracing a bifurcated standard of review under which contribution limits receive less rigorous scrutiny. In sum, what remains of *Buckley* is a rule without a rationale. Contributions and expenditures are simply “two sides of the same First Amendment coin,” and our efforts to distinguish the two have produced mere “word games” rather than any cognizable principle of constitutional law. For that reason, I would overrule *Buckley* and subject the aggregate limits in BCRA to strict scrutiny, which they would surely fail. This case represents yet another missed opportunity to right the course of our campaign finance jurisprudence by restoring a standard that is faithful to the First Amendment. Until we undertake that reexamination, we remain in a “halfway house” of our own design.

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

Nearly 40 years ago in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), this Court considered the constitutionality of laws that imposed limits upon the overall amount a single person can contribute to all federal candidates, political parties, and committees taken together. The Court held that those limits did not violate the Constitution. Today a majority of the Court overrules this holding. It is wrong to do so. Its conclusion rests upon its own, not a record-based, view of the facts. Its legal analysis is faulty: It misconstrues the nature of the competing constitutional interests at stake. It understates the importance of protecting the political integrity of our governmental institutions. It creates a loophole that will allow a single individual to contribute millions of dollars to a political party or to a candidate's campaign. Taken together with *Citizens United v. Federal Election Comm'n*, today's decision eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve.

The plurality concludes that the aggregate contribution limits “ ‘unnecessr[ily]’ abridge[e]’ ” First Amendment rights. (quoting *Buckley*). It notes that some individuals will wish to “spen[d] ‘substantial amounts of money in order to communicate [their] political ideas through sophisticated’ means.” Aggregate contribution ceilings limit an individual's ability to engage in such “broader participation in the democratic process,” while insufficiently advancing any legitimate governmental objective. Hence, the plurality finds, they violate the Constitution. The plurality's first claim—that large aggregate contributions do not “give rise” to “corruption”—is plausible only because the plurality defines “corruption” too narrowly. The plurality describes the constitutionally permissible objective of campaign finance regulation as follows: “Congress may target only a specific type of corruption—‘*quid pro quo*’ corruption.” It then defines *quid pro quo* corruption to mean no more than “a direct exchange of an official act for money”— an act akin to bribery. It adds specifically that corruption does *not* include efforts to “garner ‘influence over or access to’ elected officials or political parties.” Moreover, the Government's efforts to prevent the “appearance of corruption” are “equally confined to the appearance of *quid pro quo* corruption,” as narrowly defined. In the plurality's view, a federal statute could not prevent an individual from writing a million dollar check to a political party (by donating to its various committees), because the rationale for any limit would “dangerously broade[n] the circumscribed definition of *quid pro quo* corruption articulated in our prior cases.”

This critically important definition of “corruption” is inconsistent with the Court's prior case law (with the possible exception of *Citizens United*, as I will explain below). The Court in *McConnell v. Federal Election Commission* 540 U.S. 93 (2002) upheld these new [BCRA] contribution restrictions under the First Amendment for the very reason the plurality today discounts or ignores. Namely, the Court found they thwarted a significant risk of corruption— understood not as *quid pro quo* bribery, but as privileged access to and pernicious influence upon elected representatives.

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

added benefit. The plurality is wrong. Here, as in *Buckley*, in the absence of limits on aggregate political contributions, donors can and likely will find ways to channel millions of dollars to parties and to individual candidate, producing precisely the kind of “corruption” or “appearance of corruption” that previously led the Court to hold aggregate limits constitutional. Those opportunities for circumvention will also produce the type of corruption that concerns the plurality today. The methods for using today’s opinion to evade the law’s individual contribution limits are complex, but they are well known, or will become well known, to party fundraisers.

The plurality concludes that even if circumvention were a threat, the aggregate limits are “poorly tailored” to address it. The First Amendment requires “ ‘a fit that is . . . reasonable,’ ” and there is no such “fit” here because there are several alternative ways Congress could prevent evasion of the base limits. For instance, the plurality posits, Congress (or the FEC) could “tighten . . . transfer rules”; it could require “contributions above the current aggregate limits to be deposited into segregated, nontransferable accounts and spent only by their recipients”; it could define “how many candidates a PAC must support in order to ensure that ‘a substantial portion’ of a donor’s contribution is not rerouted to a certain candidate”; or it could prohibit “donors who have contributed the current maximum sums from further contributing to political committees that have indicated they will support candidates to whom the donor has already contributed.”

The plurality, however, does not show, or try to show, that these hypothetical alternatives could effectively replace aggregate contribution limits. Indeed, it does not even “opine on the validity of any particular proposal,” presumably because these proposals themselves could be subject to constitutional challenges. For the most part, the alternatives the plurality mentions were similarly available at the time of *Buckley*. In sum, the explanation of why aggregate limits are needed is complicated, as is the explanation of why other methods will not work. But the conclusion is simple: There is no “substantial mismatch” between Congress’ legitimate objective and the “means selected to achieve it.” The Court, as in *Buckley*, should hold that aggregate contribution limits are constitutional.

The justification for aggregate contribution restrictions is strongly rooted in the need to assure political integrity and ultimately in the First Amendment itself. The threat to that integrity posed by the risk of special access influence remains real. Even taking the plurality on its own terms and considering solely the threat of *quid pro quo* corruption (i.e., money-for-votes exchanges), the aggregate limits are a necessary tool to stop circumvention. And there is no basis for finding a lack of “fit” between the threat and the means used to combat it, namely the aggregate limits. The plurality reaches the opposite conclusion. The result, as I said at the outset, is a decision that substitutes judges’ understandings of how the political process works for the understanding of Congress; that fails to recognize the difference between influence resting upon public opinion and influence bought by money alone; that overturns key precedent; that creates huge loopholes in the law; and that undermines, perhaps devastates, what remains of campaign finance reform.

## [C]                    **The Right of Nonassociation and Compelled Speech**

**Add at the end of note 6:**

***Knox v. Service Employees International Union, 567 U.S. 310 (2012).*** In *Teachers v. Hudson*, 475 U.S. 292 (1986), the Supreme Court set forth a requirement that unions must provide notice in order to collect regular fees from nonmembers. Absent such notice, the rights of

nonmembers are violated. After giving notice and observing the requisite objection period, the union then announced a temporary increase in fees specifically for campaigning on ballot initiatives and partisan candidates. The union did not provide a new opportunity for nonmembers to decide whether they wished to contribute to this effort. The Court held that this impinged on nonmembers' First Amendment associational rights because the union should have sent out a new *Hudson* notice allowing nonmembers to opt in to the special fee rather than requiring them to opt out. In addition, the union required nonmembers to pay the same percentage of the special assessment as they paid of regular dues, a clear violation because the special assessment was intended only for campaign purposes.

In **Janus v. American Federation of State, County, and Municipal Employees**, 138 S. Ct. 2448 (2018), the Supreme Court, per Justice Alito, 5-4, reversed *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and held that its requirement that non-union members of a public sector employee union shop must pay an agency fee for the collective bargaining activities of the union violates the First Amendment.

Mark Janus brought suit in the federal district court against a public-sector union. Janus is an Illinois state employee whose unit is represented by a public sector union, the American Federation of State, County and Municipal Employees, Council 31. Mark Janus did not join the union. However, his unit's collective bargaining agreement required him to pay an agency fee to the union. Under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), a non-union member employee like Janus must pay a fee for the union's expenses pursuant to its collective bargaining activities. But he is not obliged to pay for expenditures chargeable to the union's political and ideological purposes and programs. The rationale for this distinction was that it resolved the free-rider problem.

Janus contended in the federal district court that all "nonmember fee deductions are coerced political speech" and that "the First Amendment forbids coercing any money from the nonmembers." Janus declined to join the union because he opposed many of its policy positions. He was particularly critical of the union's positions in collective bargaining which were not appreciative of the "current fiscal crisis in Illinois" and which, therefore, did not represent either his interests or those of the Illinois citizenry.

In his lengthy opinion for the Court, Justice Alito justified the majority's decision to reverse the *Abood* case, a forty-year old precedent, on a number of different grounds: "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning." In addition, *Knox v. Service Employees*, 567 U.S. 298 (2012), recognized that First Amendment rights are significantly infringed when non-union public employees are required to subsidize positions which the union takes in collective bargaining "that have powerful political and civic consequences."

The Court said the doctrine of *stare decisis* did not require retaining *Abood*. The traditional factors overruling a longstanding precedent were present here. For example, the rules that *Abood* set forth were not workable. The line between the collective bargaining expenses that a public sector union could charge to a non-union member and the political or ideological activity charges that it could not charge to such a non-union member were impossibly imprecise. Justice Alito rejected the union argument that it and other unions had strongly relied on the *Abood* precedent:

[P]ublic-sector unions have been on notice for years regarding this Court's misgivings about *Abood*. In *Knox*, decided in 2012, we described *Abood* as a First Amendment "anomaly." Two years later in *Harris [v. Quinn]*, 134 S. Ct. 2618 (2014), we were asked to overrule *Abood*, and while we found it unnecessary to take that step, we cataloged *Abood's* many weaknesses. During this period of time, any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was

uncertain.

An Illinois law permits a public-sector collective bargaining agreement to include an agency-fee provision whereby “the union certifies to the employer the amount of the fee.” This amount is then automatically deducted from the wages of the non-union member.

Employee consent for this deduction is not required. The Court ruled that this “procedure violates the First Amendment and cannot continue.” In these circumstances, the First Amendment requires that “employees clearly and affirmatively consent before any money is taken from them.” The Court held that “*Abood* was wrongly decided and is now overruled.” The decision of the Seventh Circuit to the contrary was reversed.

Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor dissented. Justice Kagan protested the Court’s overruling of *Abood*, a 40-year old precedent: “Rarely if ever has the Court overruled a decision – let alone one of the this import – with so little regard for the usual principles of *stare decisis*.” Many States have enacted laws predicated on the rules set for in *Abood*: “Those laws underpin thousands of ongoing contracts involving millions of employees. Reliance interests do not come any stronger than those surrounding *Abood*.”

Justice Kagan rejected the Court’s contention that the parties were on notice that the *Abood* precedent was vulnerable.: “*Abood*’s holding was square. It was unabandoned before today. It was, in other words, the law – however much some were marking time to make it not.” Furthermore, Justice Kagan objected to the reliance by the majority on the criticism of *Abood* found in *Knox and Harris*: “Don’t like a decision? Just throw some criticisms into a couple of opinions and a few years later point to them as ‘special justifications.’” Justice Kagan declared that the majority opinion cannot be sugarcoated.

The decision prevents the States and their citizens “from making important choices about workplace governance.” This result is accomplished “by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.” Justice Kagan accused the majority of “turning the First Amendment into a sword.” Nor is this the first time the Court has done this. Furthermore, it threatens not to be the last time:

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.

## § 8.02 CALIBRATING FIRST AMENDMENT PROTECTION

### [B] Obscene and Indecent Speech

#### [5] Indecency Regulation on the Internet

Casebook p. 1290 Add before [b]

4. *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). The Court held that a North Carolina law which prohibited registered sex offenders from visiting social media websites such as Facebook was so unnecessarily broad that it violated the First Amendment.

When Lester Packingham was a 21-year old college student, he had sex with a 13 year old

girl. He pleaded guilty to the crime of taking indecent liberties with a child. North Carolina law required him to register as a sex offender. North Carolina law, § 14-202.5 makes it a felony with some substantial exceptions for a sex offender “to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages.” Packingham posted on Facebook a statement on his personal profile indicating that a court had dismissed a traffic ticket against him. As a registered sex offender, Packingham was then convicted by a State trial court for violating § 14-202.5. Packingham appealed to the State Court of Appeals which ruled that § 14-202.5 violated the First Amendment. The North Carolina Supreme Court reversed and held the statute to be entirely constitutional. The North Carolina Supreme Court said that § 14-202.5 was “carefully tailored – to prohibit registered sex offenders from accessing only those Web Sites that allow them the opportunity to gather information about minors.” The Supreme Court of the United States reversed.

Justice Kennedy, speaking for the Court, declared: “While in the past there may have been difficulty in identifying the most important places in a spatial sense, for the exchange of views, today the answer is clear. It is cyberspace – the ‘vast democratic forums of the Internet’ in general.” *Reno v. American Civil Liberties Union* (1997). The Court further observed that users of social media access sites such as Facebook to engage “in a wide array of protected First Amendment activity on topics ‘as diverse as human thought.’” Caution in evaluating Internet regulation must be exercised “before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.” Even if it is assumed that the statute at issue is content neutral and therefore required under an intermediate scrutiny standard, it is still not valid. Under that standard, a law must be “narrowly tailored to serve a significant governmental interest.” The law cannot “burden substantially more speech than is necessary” to implement legitimate governmental interests.

Justice Kennedy made two important points about this case. First, the “broad wording” of the North Carolina statute could deny access “not only to commonplace social media websites but also to websites as varied as Amazon.com, Washington Post.com, and Webmd.com.” Second, States are still free to enact “more specific laws than the one at issue.” Here the statute provides for a “prohibition unprecedented in the scope of First Amendment speech it burdens.” This North Carolina law prohibits sex offenders from using websites which are now primary sources for learning about current events, employment opportunities, and for participating in the “modern public square” as well as exploring “vast realms of human thought and knowledge.”

The State defends the statute on grounds that it is necessary in order to keep “convicted sex offenders away from vulnerable victims.” But the State had not shown that “this sweeping law” is needed to implement that objective. Furthermore, government may not “suppress lawful speech as the means to suppress unlawful speech.” *Ashcroft v. Free Speech Coalition*.

Justice Alito, joined by Chief Justice Roberts and Justice Thomas, concurred in the judgment. Justice Alito said he could not join the Court’s opinion “because of its undisciplined dicta.” He complained that the Court appears “to equate the entirety of the internet with public streets and parks.” The Court’s language thus may be interpreted to suggest that “the States are largely powerless to restrict even the most dangerous sexual predators” from visiting internet sites” such as “teenage age dating sites” and sites where “minors discuss personal problems with their peers.” The really “fatal problem” with § 14-202.5 is that its broad sweep denies access to many websites which are quite unlikely “to facilitate the commission of a sex crime against a child.”

## Chapter 9 FREEDOM OF RELIGION: ESTABLISHMENT AND FREE EXERCISE

### § 9.01 THE ESTABLISHMENT CLAUSE

Page 1459: Add before *Edwards v. Aguillard*:

#### TOWN OF GREECE, NEW YORK v. GALLOWAY 134 S. Ct. 1811 (2014)

The Court held that Greece, New York did not violate the Establishment Clause by opening the monthly meetings of the town board with a prayer. Justice Kennedy delivered the opinion of the Court except as to Part II-B. Chief Justice Roberts and Justice Alito joined the opinion in full and Justices Scalia and Thomas joined the opinion except as to Part II-B. The procedure for selecting prayer givers was that a “town employee would call the congregations listed in a local directory until she found a minister available for that month’s meeting.” No minister of any faith was turned away. However, almost every congregation in town was Christian and almost all of the ministers participating were Christian. The composition of the prayer was left to the minister and was not reviewed by the town authorities. The prayers given sometimes “spoke in a distinctly Christian idiom.”

Two town citizens attending town board meetings objected to the prayers as “offensive.” The town then offered opportunities to clergymen of non-Christian religions. Nonetheless, the citizens brought suit in the federal district court and contended in their complaint that the town board’s prayer practices violated the Establishment Clause “by preferring Christians over other prayer givers and by sponsoring sectarian prayers, such as those given in Jesus’ name.” The citizens did not seek an end to the monthly prayers but instead sought an injunction limiting the town to ecumenical prayers which would refer “only to a ‘generic God’” and which would not “associate the government with any one faith or belief.” The district court found the town policy to be consistent with the Establishment Clause. The United States Court of Appeals for the Second Circuit reversed and “concluded that the steady drumbeat of Christian prayer, unbroken by invocations from other faith traditions, tended to affiliate the town with Christianity.”

The Supreme Court reversed the Court of Appeals relying on *Marsh v. Chambers*, 463 U.S. 783 (1983) which upheld opening the sessions of the Nebraska legislature with a prayer delivered by a chaplain paid by the state. Justice Kennedy said that *Marsh* should be understood as meaning that it is not required that “the precise boundary of the Establishment Clause be identified where, as in that case, “history shows that the specific practice is permitted.” However, respondents claimed the Greece’s prayer exercises impermissibly fell outside this tradition for two reasons. First, they argue that *Marsh* did not approve sectarian prayers such as those given before the town board in Greece. These prayers spoke of the “death, resurrection, and ascension of the Savior Jesus Christ.” Second, respondents contend “that the setting and conduct of the board meetings” created social pressures on non-adherents who would fear to leave the room or pretend to participate for fear of “offending the representatives who sponsor the prayer and will vote on matters citizens bring before the board.”

Respondents say that for prayers to be constitutionally acceptable they “must be nonsectarian or not identifiable with any one religion.” Justice Kennedy rejected this contention: “*Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content. To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town’s current practice of neither editing or approving prayers in advance nor criticizing their content after the fact.”

Prayers at the opening of a legislature are “meant to lend gravity to the occasion.” If the practice of legislative prayers shows that the invocations “denigrate nonbelievers or religious minorities” or attempt to proselytize, that would be a different case. It is true that in the town of Greece almost all of the congregations were Christian. But as long as the town policy is one of nondiscrimination, the town does not have to go “beyond its borders” to find non-Christian prayer givers. Such a quest would involve the government in a “form of entanglement” which would be “far more troublesome than the current approach.”

In Part II-B of the opinion, Justice Kennedy, Chief Justice Roberts and Justice Alito concluded that a “fact-sensitive inquiry” which considered the settings of the prayers and the audience shows that the prayer practices of the town of Greece did not compel its citizens “to engage in a religious observance.” The record here unlike that in *Lee v. Weisman* [text, p. 1461] shows that “members of the public were not dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest.”

The Court ruled that the town board’s practice of “opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents” did not violate the First Amendment. The Court reversed the judgment of the U.S. Court of Appeals for the Second Circuit.

JUSTICE THOMAS, joined by JUSTICE SCALIA, concurred in part and concurred in the judgment except as Part II. They contended “to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts – not the ‘subtle coercion pressures’” complained about by the respondents in this case. In another part of his concurrence which Justice Scalia did not join, Justice Thomas reiterated his view that the Establishment Clause is not “incorporated” against the States: “If the Establishment Clause is not incorporated, then it has no application here, where only municipal action is at issue.”

**JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting:**

I respectfully dissent from the Court’s opinion because I think the Town of Greece’s prayer practice violate that norm of religious equality—the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian. I do not content that principle translates here into a bright separationist line. To the contrary, I agree with the Court’s decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), upholding the Nebraska Legislature’s tradition of beginning each session with a

chaplain’s prayer. And I believe that pluralism and inclusion in a town hall can satisfy the constitutional requirement of neutrality; such a forum need not become a religion-free zone. But still, the Town of Greece should lose this case. The practice at issue here differs from the one sustained in *Marsh* because Greece’s town meetings involve participation by ordinary citizens and the invocation given—directly to those citizens—were predominately sectarian in content. Still more, Greece’s Board did nothing to recognize religious diversity: In arranging for clergy members to open each meeting, the Town never sought (except briefly when this suit was filed) to involve, accommodate, or in any way reach out to adherents of non-Christian religions. So month in and month out for over a decade, prayers steeped in only one faith, addressed toward members of the public, commenced meetings to discuss local affairs and distribute governmental benefits. In my view that practice does not square with the First Amendment’s promise that every citizen, irrespective of her religion, owns an equal share in her government.

## § 9.02 FREE EXERCISE OF RELIGION

### [B] Sabbath Celebration as a Free Exercise Problem

Add before § 9.02 [C]:

#### HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH v. EEOC 565 U.S. 171 (2012)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Certain employment discrimination laws authorize employees who have been wrongfully terminated to sue their employers for reinstatement and damages. The question presented is whether the Establishment and *Free Exercise Clauses of the First Amendment* bar such an action when the employer is a religious group and the employee is one of the group ministers.

### I

#### A

Petitioner Hosanna-Tabor Evangelical Lutheran Church and School is a member congregation of the Lutheran Church-Missouri Synod, the second largest Lutheran denomination in America. Hosanna-Tabor operated a small school in Redford, Michigan, offering a “Christ-centered education” to students in kindergarten through eighth grade.

The Synod classifies teachers into two categories: “called” and “lay.” “Called” teachers are regarded as having been called to their vocation by God through a congregation. To be eligible to receive a call from a congregation, a teacher must satisfy certain academic requirements. One way of doing so is by completing a “colloquy” program at a Lutheran college or university. The program requires candidates to take eight courses of theological study, the endorsement of their local Synod district, and pass an oral examination by a faculty committee. A teacher who meets these requirements may be called by a congregation. Once called, a teacher receives the formal title “Minister of Religion, Commissioned.” A commissioned minister serves for an openended term; at Hosanna-Tabor, a call could be rescinded only for cause and by a super majority of the congregation.

“Lay” or “contract” teachers, by contrast, are not required to be trained by the Synod or even to be Lutheran. At Hosanna-Tabor, they were appointed by the school board, without a vote of the congregation, to one-year renewable terms. Although teachers at the school generally performed the same duties regardless of whether they were lay or called, lay teachers were hired only when called teachers were unavailable.

Respondent Cheryl Perich was first employed by Hosanna-Tabor as a lay teacher in 1999. After Perich completed her colloquy later that school year, Hosanna-Tabor asked her to become a called teacher. Perich accepted the call and received a “diploma of vocation” designating her a commissioned minister.

Perich taught kindergarten [and fourth grade for 5 years]. She also taught a religion class four days a week, led the students in prayer and devotional exercises each day, and attended a weekly school-wide chapel service. Perich led the chapel service herself about twice a year.

Perich became ill in June 2004 with what was eventually diagnosed as narcolepsy. Symptoms included sudden and deep sleeps from which she could not be roused. Because of her illness, Perich began the 2004–2005 school year on disability leave. On January 27, 2005, however, Perich notified the school principal, Stacey Hoeft, that she would be able to report to work the following month. Hoeft responded that the school had already contracted with a lay teacher to fill Perich’s position for the remainder of the school year. Hoeft also expressed concern that Perich was not yet ready to return to the classroom.

On January 30, Hosanna-Tabor held a meeting of its congregation at which school administrators stated that Perich was unlikely to be physically capable of returning to work that school year or the next. The congregation voted to offer Perich a “peaceful release” from her call, whereby the congregation would pay a portion of her health insurance premiums in exchange for her resignation as a called teacher. Perich refused to resign and produced a note from her doctor stating that she would be able to return to work on February 22. The school board urged Perich to reconsider, informing her that the school no longer had a position for her, but Perich stood by her decision not to resign.

On the morning of February 22 — the first day she was medically cleared to return to work — Perich presented herself at the school. Hoeft asked her to leave but she would not do so until she obtained written documentation that she had reported to work. Later that afternoon, Hoeft called Perich at home and told her that she would likely be fired. Perich responded that she had spoken with an attorney and intended to assert her legal rights.

Following a school board meeting that evening, board chairman Scott Salo sent Perich a letter stating that Hosanna-Tabor was reviewing the process for rescinding her call in light of her “regrettable” actions. Salo subsequently followed up with a letter advising Perich that the congregation would consider whether to rescind her call at its next meeting. As grounds for termination, the letter cited Perich’s “insubordination and disruptive behavior” on February 22, as well as the damage she had done to her “working relationship” with the school by “threatening to take legal action.” The congregation voted to rescind Perich’s call on April 10, and Hosanna-Tabor sent her a letter of termination the next day.

## B

Perich filed a charge with the Equal Employment Opportunity Commission, alleging that her employment had been terminated in violation of the Americans with Disabilities Act. The ADA prohibits an employer from discriminating against a qualified individual on the basis of disability. It also prohibits an employer from retaliating “against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA].”<sup>3</sup>

The EEOC [and Perich] brought suit against Hosanna-Tabor, alleging that Perich had been fired in retaliation for threatening to file an ADA lawsuit. Hosanna-Tabor moved for summary judgment. Invoking what is known as the “ministerial exception,” the Church argued that the suit was barred by the First Amendment because the claims at issue concerned the employment relationship between a religious institution and one of its ministers. According to the Church, Perich was a minister, and she had been fired for a religious reason — namely, that her threat to sue the Church violated the Synod’s belief that Christians should resolve their disputes internally.

## II

The First Amendment provides, in part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” We have said that these two Clauses “often exert conflicting pressures,” and that there can be “internal tension ... between the Establishment Clause and the Free Exercise Clause.” Not so here. Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.

## A

Controversy between church and state over religious offices is hardly new. In 1215, the issue was addressed in the very first clause of Magna Carta. There, King John agreed that “the English church shall be free, and shall have its rights undiminished and its liberties unimpaired.” The King in particular accepted the “freedom of elections,” a right “thought to be of the greatest necessity and importance to the English church.”

That freedom in many cases may have been more theoretical than real.

Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church. By forbidding the “establishment of religion” and guaranteeing the “free exercise thereof,” the Religion Clauses ensured that the new Federal Government — unlike the English Crown — would have no role in filling ecclesiastical offices.

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<sup>3</sup>[1] The ADA itself provides religious entities with two defenses to claims of discrimination that arise under subchapter I of the Act. The first provides that “[t]his subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities.” The second provides that “[u]nder this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.” The ADA’s prohibition against retaliation appears in a different subchapter. The EEOC and Perich contend, and Hosanna-Tabor does not dispute, that these defenses therefore do not apply to retaliation claims.

The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.

## B

Given this understanding of the Religion Clauses — and the absence of government employment regulation generally — it was some time before questions about government interference with a church’s ability to select its own ministers came before the courts. This Court touched upon the issue indirectly, however, in the context of disputes over church property. Our decisions in that area confirm that it is impermissible for the government to contradict a church’s determination of who can act as its ministers.

Confronting the issue under the Constitution for the first time in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U. S. 94 (1952), the Court recognized that the “[f]reedom to select the clergy, where no improper methods of choice are proven,” is “part of the free exercise of religion” protected by the First Amendment against government interference. At issue in *Kedroff* was the right to use a Russian Orthodox cathedral in New York City. The Russian Orthodox churches in North America had split from the Supreme Church Authority in Moscow, out of concern that the Authority had become a tool of the Soviet Government. The North American churches claimed that the right to use the cathedral belonged to an archbishop elected by them; the Supreme Church Authority claimed that it belonged instead to an archbishop appointed by the patriarch in Moscow. New York’s highest court ruled in favor of the North American churches, based on a state law requiring every Russian Orthodox church in New York to recognize the determination of the governing body of the North American churches as authoritative.

This Court reversed, concluding that the New York law violated the First Amendment. We explained that the controversy over the right to use the cathedral was “strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America.” By “pass[ing] the control of matters strictly ecclesiastical from one church authority to another,” the New York law intruded the “power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment.” Accordingly, we declared the law unconstitutional because it “directly prohibit[ed] the free exercise of an ecclesiastical right, the Church’s choice of its hierarchy.”

This Court reaffirmed these First Amendment principles in *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U. S. 696 (1976), a case involving a dispute over control of the American-Canadian Diocese of the Serbian Orthodox Church, including its property and assets. [T]his Court explained that the First Amendment “permit[s] hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters.” When ecclesiastical tribunals decide such disputes, we further explained, “the Constitution requires that civil courts accept their decisions as binding upon them.” We thus held that by inquiring into whether the Church had followed its own procedures, the State Supreme Court had “unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals” of the Church.

## C

Until today, we have not had occasion to consider whether this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment. The Courts of Appeals, in contrast, have had extensive experience with this issue. Since the passage of Title VII of the Civil Rights Act of 1964, and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a “ministerial exception,” grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers.

We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

The EEOC and Perich acknowledge that employment discrimination laws would be unconstitutional as applied to religious groups in certain circumstances. They grant, for example, that it would violate the First Amendment for courts to apply such laws to compel the ordination of women by the Catholic Church or by an Orthodox Jewish seminary. According to the EEOC and Perich, religious organizations could successfully defend against employment discrimination claims in those circumstances by invoking the constitutional right to freedom of association — a right “implicit” in the First Amendment. *Roberts v. United States Jaycees*. The EEOC and Perich thus see no need — and no basis — for a special rule for ministers grounded in the Religion Clauses themselves.

We find this position untenable. The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC’s and Perich’s view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization’s freedom to select its own ministers.

The EEOC and Perich also contend that our decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith* precludes recognition of a ministerial exception. In *Smith*, two members of the Native American Church were denied state unemployment benefits after it was determined that they had been fired from their jobs for ingesting peyote, a crime under Oregon law. We held that this did not violate the Free Exercise Clause, even though the peyote had been ingested for sacramental purposes, because the “right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”

It is true that the ADA’s prohibition on retaliation, like Oregon’s prohibition on peyote

use, is a valid and neutral law of general applicability. But a church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. See [*Smith*], at 877 (distinguishing the government's regulation of "physical acts" from its "lend[ing] its power to one or the other side in controversies over religious authority or dogma"). The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.

### III

Having concluded that there is a ministerial exception grounded in the Religion Clauses of the First Amendment, we consider whether the exception applies in this case. We hold that it does.

Every Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of a religious congregation, and we agree. We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.

To begin with, *Hosanna-Tabor* held Perich out as a minister, with a role distinct from that of most of its members. Perich held herself out as a minister of the Church by accepting the formal call to religious service, according to its terms. She did so in other ways as well. For example, she claimed a special housing allowance on her taxes that was available only to employees earning their compensation " 'in the exercise of the ministry.' " In a form she submitted to the Synod following her termination, Perich again indicated that she regarded herself as a minister at *Hosanna-Tabor*, stating: "I feel that God is leading me to serve in the teaching ministry. . . . I am anxious to be in the teaching ministry again soon."

In fulfilling these responsibilities, Perich taught her students religion four days a week, and led them in prayer three times a day. Once a week, she took her students to a school-wide chapel service, and — about twice a year — she took her turn leading it, choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible. During her last year of teaching, Perich also led her fourth graders in a brief devotional exercise each morning. As a source of religious instruction, Perich performed an important role in transmitting the Lutheran faith to the next generation.

In light of these considerations — the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church — we conclude that Perich was a minister covered by the ministerial exception.

Although the Sixth Circuit did not adopt the extreme position pressed here by the EEOC, it did regard the relative amount of time Perich spent performing religious functions as largely determinative. The issue before us, however, is not one that can be resolved by a stopwatch. The amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations discussed above.

Because Perich was a minister within the meaning of the exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer. The EEOC and Perich originally sought an order reinstating Perich to her former position as a called teacher. By requiring the Church to accept a minister it did not want, such an order would have plainly violated the Church's freedom under the Religion Clauses to select its own ministers.

The EEOC and Perich suggest that Hosanna-Tabor's asserted religious reason for firing Perich — that she violated the Synod's commitment to internal dispute resolution — was pretextual. That suggestion misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful — a matter “strictly ecclesiastical,” — is the church's alone.

#### IV

The EEOC and Perich foresee a parade of horrors that will follow our recognition of a ministerial exception to employment discrimination suits. According to the EEOC and Perich, such an exception could protect religious organizations from liability for retaliating against employees for reporting criminal misconduct or for testifying before a grand jury or in a criminal trial. What is more, the EEOC contends, the logic of the exception would confer on religious employers “unfettered discretion” to violate employment laws by, for example, hiring children or aliens not authorized to work in the United States.

Hosanna-Tabor responds that the ministerial exception would not in any way bar criminal prosecutions for interfering with law enforcement investigations or other proceedings. Nor, according to the Church, would the exception bar government enforcement of general laws restricting eligibility for employment, because the exception applies only to suits by or on behalf of ministers themselves. Hosanna-Tabor also notes that the ministerial exception has been around in the lower courts for 40 years, and has not given rise to the dire consequences predicted by the EEOC and Perich.

The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.

The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

#### **THOMAS, J., concurring.**

I join the Court's opinion. I write separately to note that, in my view, the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's

good-faith understanding of who qualifies as its minister. As the Court explains,

the Religion Clauses guarantee religious organizations autonomy in matters of internal governance, including the selection of those who will minister the faith. A religious organization’s right to choose its ministers would be hollow, however, if secular courts could second-guess the organization’s sincere determination that a given employee is a “minister” under the organization’s theological tenets. Our country’s religious landscape includes organizations with different leadership structures and doctrines that influence their conceptions of ministerial status. The question whether an employee is a minister is itself religious in nature, and the answer will vary widely. Judicial attempts to fashion a civil definition of “minister” through a bright-line test or multifactor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the “Mainstream” or unpalatable to some. Moreover, uncertainty about whether its ministerial designation will be rejected, and a corresponding fear of liability, may cause a religious group to conform its beliefs and practices regarding “ministers” to the prevailing secular understanding.

The Court thoroughly sets forth the facts that lead to its conclusion that Cheryl Perich was one of Hosanna-Tabor’s ministers, and I agree that these facts amply demonstrate Perich’s ministerial role. But the evidence demonstrates that Hosanna-Tabor sincerely considered Perich a minister. That would be sufficient for me to conclude that Perich’s suit is properly barred by the ministerial exception.

**JUSTICE ALITO, with whom JUSTICE KAGAN joins, concurring.**

I join the Court’s opinion, but I write separately to clarify my understanding of the significance of formal ordination and designation as a “minister” in determining whether an “employee” of a religious group falls within the so-called “ministerial” exception. The term “minister” is commonly used by many Protestant denominations to refer to members of their clergy, but the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists. In addition, the concept of ordination as understood by most Christian churches and by Judaism has no clear counterpart in some Christian denominations and some other religions. Because virtually every religion in the world is represented in the population of the United States, it would be a mistake if the term “minister” or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one. Instead, courts should focus on the function performed by persons who work for religious bodies.

The First Amendment protects the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith. Accordingly, religious groups must be free to choose the personnel who are essential to the performance of these functions.

The “ministerial” exception should be tailored to this purpose. It should apply to any “employee” who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith. If a religious group believes that the ability of such an employee to perform these key functions has been compromised, then the constitutional guarantee of religious freedom protects the group’s right to remove the employee from his or her position.

**TRINITY LUTHERAN CHURCH v. COMER**  
137 St. 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.

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, and the surrounding area. Established as a nonprofit organization in 1980, the 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: slides, swings, jungle gyms, monkey bars, and sandboxes. Almost the entire surface beneath and surrounding the play equipment is coarse pea gravel. Youngsters, of course, often fall on the playground or tumble from the equipment. And when they do, the gravel can be unforgiving.

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. Run by the State's Department of Natural Resources to reduce the number of used tires destined for landfills and dump sites, the program offers reimbursement grants to qualifying nonprofit organizations that purchase playground surfaces made from recycled tires. It is funded through a fee imposed on the sale of new tires in the State.

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, which provides: "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

In a letter rejecting the Center's application, the program director explained that, under Article I, Section 7 of the Missouri Constitution, the Department could not provide financial assistance directly to a church. The Department ultimately awarded 14 grants as part of the 2012 program. Because the Center was operated by Trinity Lutheran Church, it

did not receive a grant. The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The parties agree that the Establishment Clause of that Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program. That does not, however, answer the question under the Free Exercise Clause, because we have recognized that there is "play in the joints" between what the Establishment Clause permits and the Free Exercise Clause compels. *Locke [v. Davey]* 540 U. S., 712 at 718 (2004)

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*, 508 U. S. 520, 533, 542 (1993) (internal quotation marks omitted). 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." *McDaniel v. Paty*, 435 U. S. 618, 628 (1978) (plurality opinion) (quoting *Wisconsin v. Yoder*, 406 U.S.205, 215 (1972)).

In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U. S. 872 (1990), 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. Along the same lines as our decision in *Lyng*, we held that the Free Exercise Clause did not entitle the church members to a special dispensation from the general criminal laws on account of their religion. At the same time, we again made clear that the Free Exercise Clause *did* guard against the government's imposition of "special disabilities on the basis of religious views or religious status." (citing *McDaniel*, 435 U. S. 618).<sup>2</sup>

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.

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<sup>2</sup> This is not to say that any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause. Recently, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U. S. 171 (2012), this Court held that the Religion Clauses required a ministerial exception to the neutral prohibition on employment retaliation contained in the Americans with Disabilities Act. Distinguishing *Smith*, we explained that while that case concerned government regulation of physical acts, "[t]he present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself." 565 U.S., at 190.

The Department contends that merely declining to extend funds to Trinity Lutheran does not *prohibit* the Church from engaging in any religious conduct or otherwise exercising its religious rights. In this sense, says the Department, its policy is unlike the ordinances struck down in *Lukumi*, which outlawed rituals central to Santeria. Here the Department has simply declined to allocate to Trinity Lutheran a subsidy the State had no obligation to provide in the first place. That decision does not meaningfully burden the Church's free exercise rights. And absent any such burden, the argument continues, the Department is free to heed the State's antiestablishment objection to providing funds directly to a church.

It is true the Department has not criminalized the way Trinity Lutheran worships or told the Church that it cannot subscribe to a certain view of the Gospel. But, as the Department itself acknowledges, the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions."

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 express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant. Trinity Lutheran is a member of the community too, and the State's decision to exclude it for purposes of this public program must withstand the strictest scrutiny.

The Department attempts to get out from under the weight of our precedents by arguing that the free exercise question 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.

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." 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.<sup>3</sup>

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.

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<sup>3</sup> 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.

The Missouri Department of Natural Resources has not subjected anyone to chains or torture on account of religion. And the result of the State's policy is nothing so dramatic as the denial of political office. The consequence is, in all likelihood, a few extra scraped knees. But the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.

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

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

This Court's endorsement in *Locke* of even a "mil[d] kind," of discrimination against religion remains troubling. But because the Court today appropriately construes *Locke* narrowly, and because no party has asked us to reconsider it, I join nearly all of the Court's opinion. I do not, however, join footnote 3, for the reasons expressed by JUSTICE GORSUCH, *post*, p. 1 (opinion concurring in part).

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

I am unable to join the footnoted observation, n. 3, that "[t]his case involves express discrimination based on religious identity with respect to playground resurfacing." Of course the footnote is entirely correct, but I worry that some might mistakenly read it to suggest that only "playground resurfacing" cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court's opinion. Such a reading would be unreasonable for our cases are "governed by general principles, rather than ad hoc improvisations." *Elk Grove Unified School Dist. v. Newdow*, 542 U. S. 1, 25 (2004) (Rehnquist, C. J., concurring in judgment). 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." 330 U. S., at 17-18. 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. We need not go further. Public benefits come in many shapes and sizes. I would leave the application of the Free Exercise Clause to other kinds of public benefits for another day.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

To hear the Court tell it, this is a simple case about recycling tires to resurface a playground. The stakes are higher. 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.

JUSTICE BREYER's concurrence offers a narrower rule that would limit the effects of today's decision, but that rule does not resolve this case. JUSTICE BREYER, like the Court, thinks that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order." Few would disagree with a literal interpretation of this statement. To fence out religious persons or entities from a truly generally available public benefit—one provided to all, no questions asked, such as police or fire protections—would violate the Free Exercise Clause. This explains why Missouri does not apply its constitutional provision in that manner. Nor has it done so here. The Scrap Tire Program offers not a generally available benefit but a selective benefit for a few recipients each year. In this context, the comparison to truly generally available benefits is inapt.

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, in this area of law, to "sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent." *Town of Greece v. Galloway*, (2014). It makes clear today that this principle applies only when preference suits.

The Religion Clauses of the First Amendment contain a promise from our government and a backstop that disables our government from breaking it. The Free Exercise Clause extends the promise. We each retain our inalienable right to "the free exercise" of religion, to choose for ourselves whether to believe and how to worship. And the Establishment Clause erects the backstop. Government cannot, through the enactment of a "law respecting an establishment of religion," start us down the path to the past, when this right was routinely abridged.

The Court today dismantles a core protection for religious freedom provided in these Clauses. It holds not just that a government may support houses of worship with taxpayer funds, but that—at least in this case and perhaps in others, —it must do so when-ever it decides to create a funding program. History shows that the Religion Clauses separate the public treasury from religious coffers as one measure to secure the kind of freedom of conscience that benefits both religion and government. If this separation means anything, it means that the government cannot, or at the very least need not, tax its citizens and turn that money over to houses of worship. The Court today blinds itself to the outcome this history requires and leads us instead to a place where separation of church and state is a constitutional slogan, not a constitutional commitment. I dissent.

[C] **FREE EXERCISE AND ACCOMMODATION**

**Page 1527: Add after Note 6. *Church of the Lukumi Babalu Aye, Inc. v. Hialeah***

**MASTERPIECE CAKESHOP, LTD., v. COLORADO CIVIL RIGHTS COMMISSION,**

138 S. Ct. 1719 (2018)

JUSTICE KENNEDY delivered the opinion of the Court.

In 2012 a same-sex couple visited Masterpiece Cakeshop, a bakery in Colorado, to make inquiries about ordering a cake for their wedding reception. The shop’s owner told the couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriages—marriages the State of Colorado itself did not recognize at that time. The couple filed a charge with the Colorado Civil Rights Commission alleging discrimination on the basis of sexual orientation in violation of the Colorado Anti-Discrimination Act.

The Commission determined that the shop’s actions violated the Act and ruled in the couple’s favor. The Colorado state courts affirmed the ruling and its enforcement order, and this Court now must decide whether the Commission’s order violated the Constitution.

The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.

The freedoms asserted here are both the freedom of speech and the free exercise of religion. The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.

Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission’s consideration of this case was inconsistent with the State’s obligation of religious neutrality. The reason and motive for the baker’s refusal were based on his sincere religious beliefs and convictions. The Court’s precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.

Given all these considerations, it is proper to hold that whatever the outcome of some future

controversy involving facts similar to these, the Commission's actions here violated the Free Exercise Clause; and its order must be set aside.

Masterpiece Cakeshop, Ltd., is a bakery in Lakewood, Colorado, a suburb of Denver. The shop offers a variety of baked goods, ranging from everyday cookies and brownies to elaborate custom-designed cakes for birthday parties, weddings, and other events.

Jack Phillips is an expert baker who has owned and operated the shop for 24 years. Phillips is a devout Christian. To Phillips, creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs.

Phillips met Charlie Craig and Dave Mullins when they entered his shop in the summer of 2012. Craig and Mullins were planning to marry. At that time, Colorado did not recognize same-sex marriages, so the couple planned to wed legally in Massachusetts and afterwards to host a reception for their family and friends in Denver. To prepare for their celebration, Craig and Mullins visited the shop and told Phillips that they were interested in ordering a cake for "our wedding." They did not mention the design of the cake they envisioned.

Phillips informed the couple that he does not "create" wedding cakes for same-sex weddings. *Ibid.* He explained, "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings." The couple left the shop without further discussion. Today, the Colorado Anti-Discrimination Act (CADA) carries forward the state's tradition of prohibiting discrimination in places of public accommodation.

CADA establishes an administrative system for the resolution of discrimination claims. Complaints of discrimination in violation of CADA are addressed in the first instance by the Colorado Civil Rights Division.

Craig and Mullins filed a discrimination complaint against Masterpiece Cakeshop and Phillips in August 2012, shortly after the couple's visit to the shop. The complaint alleged that Craig and Mullins had been denied "full and equal service" at the bakery because of their sexual orientation, and that it was Phillips' "standard business practice" not to provide cakes for same-sex weddings.

The Civil Rights Division opened an investigation. The investigator found that "on multiple occasions," Phillips "turned away potential customers on the basis of their sexual orientation, stating that he could not create a cake for a same-sex wedding ceremony or reception" because his religious beliefs prohibited it and because the potential customers "were doing something illegal" at that time. The investigation found that Phillips had declined to sell custom wedding cakes to about six other same-sex couples on this basis. Based on these findings, the Division found probable cause that Phillips violated CADA and referred the case to the Civil Rights Commission.

The Commission found it proper to conduct a formal hearing, and it sent the case to a State ALJ. Finding no dispute as to material facts, the ALJ entertained cross-motions for summary judgment and ruled in the couple's favor. The ALJ first rejected Phillips' argument that declining to make or create a wedding cake for Craig and Mullins did not violate Colorado law. It was undisputed that the shop is subject to state public accommodations laws. And the ALJ determined that Phillips' actions constituted prohibited discrimination on the basis of sexual orientation, not

simply opposition to same-sex marriage as Phillips contended.

Phillips raised two constitutional claims before the ALJ. He first asserted that applying CADA in a way that would require him to create a cake for a same-sex wedding would violate his First Amendment right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed. The ALJ rejected the contention that preparing a wedding cake is a form of protected speech and did not agree that creating Craig and Mullins' cake would force Phillips to adhere to "an ideological point of view." Applying CADA to the facts at hand, in the ALJ's view, did not interfere with Phillips' freedom of speech.

Phillips also contended that requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion, also protected by the First Amendment. Citing this Court's precedent in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990), the ALJ determined that CADA is a "valid and neutral law of general applicability" and therefore that applying it to Phillips in this case did not violate the Free Exercise Clause. The ALJ thus ruled against Phillips and the cakeshop and in favor of Craig and Mullins on both constitutional claims. The Commission affirmed the ALJ's decision in full. The Commission ordered Phillips to "cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [they] would sell to heterosexual couples."

Phillips appealed to the Colorado Court of Appeals, which affirmed the Commission's legal determinations and remedial order. The court rejected the argument that the "Commission's order unconstitutionally compels" Phillips and the shop "to convey a celebratory message about same sex marriage." The court also rejected the argument that the Commission's order violated the Free Exercise Clause. Relying on this Court's precedent in *Smith, supra*, the court stated that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability" on the ground that following the law would interfere with religious practice or belief. The court concluded that requiring Phillips to comply with the statute did not violate his free exercise rights. The Colorado Supreme Court declined to hear the case.

Phillips sought review here, and this Court granted certiorari. He now renews his claims under the Free Speech and Free Exercise Clauses of the First Amendment.

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in *Obergefell v. Hodges*, "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.

It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment.

Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law.

Phillips claims, however, that a narrower issue is presented. He argues that he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation. As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. In this context the baker likely found it difficult to find a line where the customers' rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.

Phillips' dilemma was particularly understandable given the background of legal principles and administration of the law in Colorado at that time. His decision and his actions leading to the refusal of service all occurred in the year 2012. At that point, Colorado did not recognize the validity of gay marriages performed in its own State. At the time of the events in question, this Court had not issued its decisions either in *United States v. Windsor*, 570 U. S. 744 (2013), or *Obergefell*. Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State.

At the time, state law also afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive. Indeed, while enforcement proceedings against Phillips were ongoing, the Colorado Civil Rights Division itself endorsed this proposition in cases involving other bakers' creation of cakes, concluding on at least three occasions that a baker acted lawfully in declining to create cakes with decorations that demeaned gay person or gay marriages.

The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.

That hostility surfaced at the Commission's formal, public hearings, as shown by the record. On May 30, 2014, the seven-member Commission convened publicly to consider Phillips' case. At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community. One commissioner suggested that Phillips can believe "what he wants to believe," but cannot act on his religious beliefs "if he decides to do business in the state." A few moments later, the commissioner restated the same position: "[I]f a businessman wants to do business in the state and he's got an issue with the— the law's impacting his personal belief system, he needs to look at being able to compromise." Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views. On the other hand, they might be seen as inappropriate and dismissive comments showing lack of due

consideration for Phillips’ free exercise rights and the dilemma he faced. In view of the comments that followed, the latter seems the more likely.

On July 25, 2014, the Commission met again. This meeting, too, was conducted in public and on the record. On this occasion another commissioner made specific reference to the previous meeting’s discussion but said far more to disparage Phillips’ beliefs. The commissioner stated:

“I would also like to reiterate what we said in the hearing or the last meeting. 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, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.”

To describe a man’s faith as “one of the most despicable pieces of rhetoric that people can use” is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips’ invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado’s anti-discrimination law—a law that protects discrimination on the basis of religion as well as sexual orientation.

The record shows no objection to these comments from other commissioners. And the later state-court ruling reviewing the Commission’s decision did not mention those comments, much less express concern with their content. Nor were the comments by the commissioners disavowed in the briefs filed in this Court. For these reasons, the Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission’s adjudication of Phillips’ case.

Another indication of hostility is the difference in treatment between Phillips’ case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.

As noted above, on at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the Division, the requested cake included “word- ing and images [the baker] deemed derogatory,”

The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission’s treatment of Phillips’ objection. The Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism. Additionally, the Division found no violation of CADA in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips’ willingness to sell “birthday cakes, shower cakes, [and] cookies and brown- ies,” to gay and lesbian customers as irrelevant. The treatment of the other cases and

Phillips' case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished. In short, the Commission's consideration of Phillips' religious objection did not accord with its treatment of these other objections.

Before the Colorado Court of Appeals, Phillips protested that this disparity in treatment reflected hostility on the part of the Commission toward his beliefs. He argued that the Commission had treated the other bakers' conscience-based objections as legitimate, but treated his as illegitimate—thus sitting in judgment of his religious beliefs themselves. The Court of Appeals addressed the disparity only in passing and relegated its complete analysis of the issue to a footnote. There, the court stated that “[t]his case is distinguishable from the Colorado Civil Rights Division’s recent findings that [the other bakeries] in Denver did not discriminate against a Christian patron on the basis of his creed” when they refused to create the requested cakes. In those cases, the court continued, there was no impermissible discrimination because “the Division found that the bakeries . . . refuse[d] the patron’s request . . . because of the offensive nature of the requested message.”

A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness. Just as “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,” *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 642 (1943), it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. See *Matal v. Tam*, 582 U. S. (2017) (opinion of ALITO, J.) The Colorado court's attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs. The court's footnote does not, therefore, answer the baker's concern that the State's practice was to disfavor the religious basis of his objection.

For the reasons just described, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.

In *Church of Lukumi Babalu Aye, [v. Hialeah]*, 508 U.S. 520 (1993), the Court made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even “subtle departures from neutrality” on matters of religion. Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs.

Factors relevant to the assessment of governmental neutrality include “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.” In view of these factors the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of Phillips' religious beliefs. The Commission gave “every appearance,” of adjudicating Phillips' religious objection based on a negative normative “evaluation of the particular justification” for his objection and the religious grounds for it. It hardly requires restating that government has no role in deciding or even suggesting whether the religious

ground for Phillips’ conscience- based objection is legitimate or illegitimate. On these facts, the Court must draw the inference that Phillips’ religious objection was not considered with the neutrality that the Free Exercise Clause requires.

While the issues here are difficult to resolve, it must be concluded that the State’s interest could have been weighed against Phillips’ sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. The official expressions of hostility to religion in some of the commissioners’ comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires. The Commission’s disparate consideration of Phillips’ case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside.

The Commission’s hostility was inconsistent with the First Amendment’s guarantee that our laws be applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided. In this case the adjudication concerned a context that may well be different going forward in the respects noted above. However later cases raising these or similar concerns are resolved in the future, for these reasons the rulings of the Commission and of the state court that enforced the Commission’s order must be invalidated.

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.

The judgment of the Colorado Court of Appeals is reversed.

JUSTICE KAGAN, with whom JUSTICE BREYER joins, concurring.

JUSTICE GORSUCH, with whom JUSTICE ALITO joins, concurring.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring in part and concurring in the judgment.

While Phillips rightly prevails on his free-exercise claim, I write separately to address his free-speech claim. Nor does the fact that this Court has now decided *Obergefell v. Hodges*, 576 U. S. \_\_\_\_ (2015), somehow diminish Phillips’ right to free speech. This Court is not an authority on matters of conscience, and its decisions can (and often should) be criticized. The First Amendment gives individuals the right to disagree about the correctness of *Obergefell* and the morality of same-sex marriage. *Obergefell* itself emphasized that the traditional understanding of marriage “long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.” If Phillips’ continued adherence to that understanding makes him a minority after *Obergefell*, that is all the more reason to insist that his speech be protected.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, dissenting.

There is much in the Court’s opinion with which I agree.

I strongly disagree, however, with the Court’s conclusion that Craig and Mullins should lose this case.

The different outcomes the Court features do not evidence hostility to religion of the kind we have previously held to signal a free-exercise violation, nor do the comments by one or two members of one of the four decision making entities considering this case justify re- versing the judgment below.

On March 13, 2014—approximately three months after the ALJ ruled in favor of the same-sex couple, Craig and Mullins, and two months before the Commission heard Phillips’ appeal from that decision—William Jack visited three Colorado bakeries. His visits followed a similar pattern. He requested two cakes

“made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. [He] requested that one of the cakes include an image of two groomsmen, holding hands, with a red ‘X’ over the image. On one cake, he requested [on] one side[,] . . . ‘God hates sin. Psalm 45:7’ and on the opposite side of the cake ‘Homosexuality is a detestable sin. Leviticus 18:2.’ On the second cake, [the one] with the image of the two groomsmen covered by a red ‘X’ [Jack] requested [these words]: ‘God loves sinners’ and on the other side ‘While we were yet sinners Christ died for us. Romans 5:8.’” see *id.*, at 300a, 310a.

In contrast to Jack, Craig and Mullins simply requested a wedding cake: They mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold.

One bakery told Jack it would make cakes in the shape of Bibles, but would not decorate them with the requested messages; the owner told Jack her bakery “does not dis- criminate” and “accept[s] all humans.” The second bakery owner told Jack he “had done open Bibles and books many times and that they look amazing,” but declined to make the specific cakes Jack described because the baker regarded the messages as “hateful.” The third bakery, according to Jack, said it would bake the cakes, but would not include the re- quested message.

The Court concludes that “the Commission’s consideration of Phillips’ religious objection did not accord with its treatment of [the other bakers’] objections.” See (GORSUCH, J., concurring). But the cases the Court aligns are hardly comparable. The bakers would have refused to make a cake with Jack’s requested message for any customer, regardless of his or her religion. And the bakers visited by Jack would have sold him any baked goods they would have sold anyone else. The bakeries’ refusal to make Jack cakes of a kind they would not make for any customer scarcely resembles Phillips’ refusal to serve Craig and Mullins: Phillips would *not* sell.

The fact that Phillips might sell other cakes and cookies to gay and lesbian customers<sup>4</sup> was irrelevant to the issue Craig and Mullins’ case presented. What matters is that Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple. In contrast, the other bakeries’ sale of other goods to Chris- tian customers was relevant: It shows that there were no goods the bakeries would sell to a non-Christian customer that they would refuse to sell to a Christian customer.

Nor was the Colorado Court of Appeals’ “difference in treatment of these two instances . . . based on the government’s own assessment of offensiveness.” Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it. The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the re- requested product would literally display. As the Court recognizes, a refusal “to design a special cake with words or images . . . might be different from a refusal to sell any cake at all.” The Colorado Court of Appeals did not distinguish Phillips and the other three bakeries based simply on its or the Division’s finding that messages in the cakes Jack requested were offensive while any message in a cake for Craig and Mullins was not. The Colorado court distinguished the cases on the ground that Craig and Mullins were denied service based on an aspect of their identity that the State chose to grant vigorous protection from discrimination.

Statements made at the Commission’s public hearings on Phillips’ case provide no firmer support for the Court’s holding today. Whatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips’ refusal to sell a wedding cake to Craig and Mullins. The proceedings involved several layers of independent decisionmaking, of which the Commission was but one.

What prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say. Phillips’ case is thus far removed from the only precedent upon which the Court relies, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520 (1993), where the government action that violated a principle of religious neutrality implicated a sole decisionmaking body, the city council,

\* \* \*

For the reasons stated, sensible application of CADA to a refusal to sell any wedding cake to a gay couple should occasion affirmance of the Colorado Court of Appeals’ judgment. I would so rule.

**Page 1529: Add before *Locke v. Davey*:**

**BURWELL v. HOBBY LOBBY STORES**  
134 S. Ct. 2751 (2014)

**JUSTICE ALITO delivered the opinion of the Court.**

We must decide in these cases whether the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U. S. C. §2000bb *et seq.*, permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies’ owners. We hold that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.

In holding that the HHS mandate is unlawful, we reject HHS’s argument that the owners of the companies forfeited all RFRA protection when they decided to organize their

businesses as corporations rather than sole proprietorships or general partnerships.

Since RFRA applies in these cases, we must decide whether the challenged HHS regulations substantially burden the exercise of religion, and we hold that they do. The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as \$1.3 million per day, or about \$475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would.

Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS regulations satisfy this requirement. But in order for the HHS mandate to be sustained, it must also constitute the least restrictive means of serving that interest, and the mandate plainly fails that test. There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all FDA-approved contraceptives.

In fact, HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage. The employees of these religious non-profit corporations still have access to insurance coverage without cost sharing for all FDA-approved contraceptives; and according to HHS, this system imposes no net economic burden on the insurance companies that are required to provide or secure the coverage.

Although HHS has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections. We therefore conclude that this system constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty. And under RFRA, that conclusion means that enforcement of the HHS contraceptive mandate against the objecting parties in these cases is unlawful.

As this description of our reasoning shows, our holding is very specific. We do not hold, as the principal dissent alleges, that for-profit corporations and other commercial enterprises can “opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.” (opinion of GINSBURG, J.). Nor do we hold, as the dissent implies, that such corporations have free rein to take steps that impose “disadvantages . . . on others” or that require “the general public [to] pick up the tab.” The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing. Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty. RFRA's enactment came three years after this Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, (1990), which largely repudiated the method of analyzing free-exercise claims that had been used in cases like *Sherbert v. Verner*, (1963), and *Wisconsin v. Yoder*, 406 U. S. 205 (1972). In determining whether challenged government actions violated the Free Exercise Clause

of the First Amendment, those decisions used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest. In *Smith*, however, the Court rejected “the balancing test set forth in *Sherbert*.” The Court therefore held that, under the First Amendment, “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.” *City of Boerne v. Flores*, (1997).

Congress responded to *Smith* by enacting RFRA. “[L]aws [that are] ‘neutral’ toward religion,” Congress found, “may burden religious exercise as surely as laws intended to interfere with religious exercise.” In order to ensure broad protection for religious liberty, RFRA provides that “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.” If the Government substantially burdens a person’s exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” §2000bb–1(b).

As enacted in 1993, RFRA applied to both the Federal Government and the States, but the constitutional authority invoked for regulating federal and state agencies differed. As applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency’s work, but in attempting to regulate the States and their subdivisions, Congress relied on its power under Section 5 of the Fourteenth Amendment to enforce the First Amendment. In *City of Boerne*, however, we held that Congress had overstepped its Section 5 authority because “[t]he stringent test RFRA demands” “far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*.”

Following our decision in *City of Boerne*, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U. S. C. §2000cc *et seq.* RLUIPA amended RFRA’s definition of the “exercise of religion.” See §2000bb–2(4) (importing RLUIPA definition). Before RLUIPA, RFRA’s definition made reference to the First Amendment. See §2000bb–2(4) (1994 ed.) (defining “exercise of religion” as “the exercise of religion under the First Amendment”). In RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the “exercise of religion” to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” And Congress mandated that this concept “be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” §2000cc–3(g).

At issue in these cases are HHS regulations promulgated under the Patient Protection and Affordable Care Act of 2010 (ACA), 124 Stat. 119. ACA generally requires employers with 50 or more full-time employees to offer “a group health plan or group health insurance coverage” that provides “minimum essential coverage.” Any covered employer that does not provide such coverage must pay a substantial price. Specifically, if a covered employer provides group health insurance but its plan fails to comply with ACA’s group-health-plan requirements, the employer may be required to pay \$100 per day for each affected “individual.” And if the employer decides to stop providing health insurance altogether and at least one full-time employee enrolls in a health plan and qualifies for a subsidy on one of the government-run ACA exchanges, the employer must pay \$2,000 per year for each of its full-time employees.

Unless an exception applies, ACA requires an employer's group health plan or group-health-insurance coverage to furnish "preventive care and screenings" for women without "any cost sharing requirements." Congress itself, however, did not specify what types of preventive care must be covered. Instead, Congress authorized the Health Resources and Services Administration (HRSA), a component of HHS, to make that important and sensitive decision. The HRSA in turn consulted the Institute of Medicine, a nonprofit group of volunteer advisers, in determining which preventive services to require.

In August 2011, based on the Institute's recommendations, the HRSA promulgated the Women's Preventive Services Guidelines. The Guidelines provide that nonexempt employers are generally required to provide "coverage, without cost sharing" for "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling." Although many of the required, FDA-approved methods of contraception work by preventing the fertilization of an egg, four of those methods (those specifically at issue in these cases) may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus.

HHS also authorized the HRSA to establish exemptions from the contraceptive mandate for "religious employers." In addition to these exemptions for religious organizations, ACA exempts a great many employers from most of its coverage requirements. Employers providing "grandfathered health plans"—those that existed prior to March 23, 2010, and that have not made specified changes after that date—need not comply with many of the Act's requirements, including the contraceptive mandate. 42 U. S. C. §§18011(a), (e). And employers with fewer than 50 employees are not required to provide health insurance at all.

All told, the contraceptive mandate "presently does not apply to tens of millions of people." This is attributable, in large part, to grandfathered health plans: Over one-third of the 149 million nonelderly people in America with employer-sponsored health plans were enrolled in grandfathered plans in 2013. The count for employees working for firms that do not have to provide insurance at all because they employ fewer than 50 employees is 34 million workers.

Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church, a Christian denomination. The Mennonite Church opposes abortion and believes that "[t]he fetus in its earliest stages . . . shares humanity with those who conceived it." Fifty years ago, Norman Hahn started a wood-working business in his garage, and since then, this company, Conestoga Wood Specialties, has grown and now has 950 employees. Conestoga is organized under Pennsylvania law as a for-profit corporation. The Hahns exercise sole ownership of the closely held business; they control its board of directors and hold all of its voting shares. One of the Hahn sons serves as the president and CEO.

The Hahns believe that they are required to run their business "in accordance with their religious beliefs and moral principles." As explained in Conestoga's board-adopted "Statement on the Sanctity of Human Life," the Hahns believe that "human life begins at conception." The Hahns have accordingly excluded from the group-health-insurance plan they offer to their employees certain contraceptive methods that they consider to be abortifacients.

The Hahns and Conestoga sued HHS and other federal officials and agencies under RFRA and the Free Exercise Clause of the First Amendment, seeking to enjoin application of ACA's contraceptive mandate insofar as it requires them to provide health-insurance coverage

for four FDA- approved contraceptives that may operate after the fertilization of an egg. These include two forms of emergency contraception commonly called “morning after” pills and two types of intrauterine devices.

In opposing the requirement to provide coverage for the contraceptives to which they object, the Hahns argued that “it is immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs.” David and Barbara Green and their three children are Christians who own and operate two family businesses. Forty-five years ago, David Green started an arts-and-crafts store that has grown into a nationwide chain called Hobby Lobby. Hobby Lobby is organized as a for-profit corporation under Oklahoma law. One of David’s sons started an affiliated business, Mardel, which operates 35 Christian bookstores and employs close to 400 people. Mardel is also organized as a for-profit corporation under Oklahoma law. Though these two businesses have expanded over the years, they remain closely held, and David, Barbara, and their children retain exclusive control of both companies. Like the Hahns, the Greens believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that proposed. The Greens, Hobby Lobby, and Mardel sued HHS and other federal agencies and officials to challenge the contraceptive mandate under RFRA and the Free Exercise Clause.

RFRA prohibits the “Government [from] substantially burden[ing] *a person’s* exercise of religion even if the burden results from a rule of general applicability” unless the Government “demonstrates that application of the burden to *the person*—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U. S. C. §§2000bb–1(a), (b) (emphasis added). The first question that we must address is whether this provision applies to regulations that govern the activities of for-profit corporations like Hobby Lobby, Conestoga, and Mardel.

HHS contends that neither these companies nor their owners can even be heard under RFRA. According to HHS, the companies cannot sue because they seek to make a profit for their owners, and the owners cannot be heard because the regulations, at least as a formal matter, apply only to the companies and not to the owners as individuals. HHS’s argument would have dramatic consequences.

As we will show, Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA’s definition of “persons.” But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. Protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.

As we noted above, RFRA applies to “a person’s” exercise of religion, 42 U. S. C. §§ 2000bb–1(a), (b), and RFRA itself does not define the term “person.” Under the Dictionary Act, “the wor[d] ‘person’ . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” According to HHS and the dissent, these corporations are not protected by RFRA because they cannot exercise religion. Neither HHS nor the dissent, however, provides any persuasive explanation for this conclusion. The dissent suggests that nonprofit corporations are special because furthering their religious “autonomy . . . often furthers individual religious freedom as well.” But this principle applies equally to for-profit corporations: Furthering their religious freedom also “furthers individual religious freedom.”

HHS would draw a sharp line between nonprofit corporations (which, HHS concedes, are protected by RFRA) and for-profit corporations (which HHS would leave un-protected), but the actual picture is less clear-cut. Not all corporations that decline to organize as nonprofits do so in order to maximize profit. HHS and the principal dissent make one additional argument in an effort to show that a for-profit corporation cannot engage in the “exercise of religion” within the meaning of RFRA: HHS argues that RFRA did no more than codify this Court’s pre-*Smith* Free Exercise Clause precedents, and because none of those cases squarely held that a for-profit corporation has free-exercise rights, RFRA does not confer such protection. This argument has many flaws.

First, nothing in the text of RFRA as originally enacted suggested that the statutory phrase “exercise of religion under the First Amendment” was meant to be tied to this Court’s pre-*Smith* interpretation of that Amendment. Second, if the original text of RFRA was not clear enough on this point—and we think it was—the amendment of RFRA through RLUIPA surely dispels any doubt. That amendment deleted the prior reference to the First Amendment, see 42 U. S. C. §2000bb–2(4) (2000 ed.) (incorporating §2000cc–5), and neither HHS nor the principal dissent can explain why Congress did this if it wanted to tie RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases. Third, the one pre-*Smith* case involving the free-exercise rights of a for-profit corporation suggests, if anything, that for-profit corporations possess such rights. In *Gallagher v. Crown Kosher Super Market of Mass., Inc.*, (1961), the Massachusetts Sunday closing law was challenged by a kosher market that was organized as a for-profit corporation, by customers of the market, and by a rabbi. Finally, the results would be absurd if RFRA merely restored this Court’s pre-*Smith* decisions in ossified form and did not allow a plaintiff to raise a RFRA claim unless that plaintiff fell within a category of plaintiffs one of whom had brought a free-exercise claim that this Court entertained in the years before *Smith*.

Finally, HHS contends that Congress could not have wanted RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere “beliefs” of a corporation. HHS goes so far as to raise the specter of “divisive, polarizing proxy battles over the religious identity of large, publicly traded corporations such as IBM or General Electric.” These cases, however, do not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims. In any event, we have no occasion in these cases to consider RFRA’s applicability to such companies. The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs.

Because RFRA applies in these cases, we must next ask whether the HHS contraceptive mandate “substantially burden[s]” the exercise of religion. 42 U. S. C. §2000bb–1(a). We have little trouble concluding that it does. As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs. If the Hahns and Greens and their companies do not yield to this demand, the economic consequences will be severe. If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed \$100 per day for each affected individual. 26 U. S. C. §4980D. For Hobby Lobby, the bill could amount to \$1.3 million per day or about \$475 million per year; for Conestoga,

the assessment could be \$90,000 per day or \$33 million per year; and for Mardel, it could be \$40,000 per day or about \$15 million per year. These sums are surely substantial. It is true that the plaintiffs could avoid these assessments by dropping insurance coverage altogether and thus forcing their employees to obtain health insurance on one of the exchanges established under ACA. But if at least one of their full-time employees were to qualify for a subsidy on one of the government-run exchanges, this course would also entail substantial economic consequences.

Although these totals are high, *amici* supporting HHS have suggested that the \$2,000 per employee penalty is actually less than the average cost of providing health insurance, and therefore, they claim, the companies could readily eliminate any substantial burden by forcing their employees to obtain insurance in the government exchanges. In sum, we refuse to sustain the challenged regulations on the ground—never maintained by the Government—that dropping insurance coverage eliminates the substantial burden that the HHS mandate imposes. We doubt that the Congress that enacted RFRA—or, for that matter, ACA—would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans.

In taking the position that the HHS mandate does not impose a substantial burden on the exercise of religion, HHS’s main argument (echoed by the principal dissent) is basically that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated. HHS and the dissent note that providing the coverage would not itself result in the destruction of an embryo; that would occur only if an employee chose to take advantage of the coverage and to use one of the four methods at issue. This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable). Similarly, in these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our “narrow function . . . in this context is to determine” whether the line drawn reflects “an honest conviction,” and there is no dispute that it does.

Since the HHS contraceptive mandate imposes a substantial burden on the exercise of religion, we must move on and decide whether HHS has shown that the mandate both “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA, and we will proceed to consider the final prong of the RFRA test, *i.e.*, whether HHS has shown that the contraceptive mandate is “the least restrictive means of furthering that compelling governmental interest.”

The least-restrictive-means standard is exceptionally demanding, see *City of Boerne*, and it is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases. See §§2000bb–1(a), (b) (requiring the Government to “demonstrat[e] that application of [a substantial] burden to *the person* . . . is the least restrictive means of

furthering [a] compelling governmental interest” (emphasis added)).

The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers’ religious objections. This would certainly be less restrictive of the plaintiffs’ religious liberty, and HHS has not shown, see §2000bb–1(b)(2), that this is not a viable alternative.

In the end, however, we need not rely on the option of a new, government-funded program in order to conclude that the HHS regulations fail the least-restrictive-means test. As we explained above, HHS has already established an accommodation for nonprofit organizations with religious objections. Under that accommodation, the organization can self-certify that it opposes providing coverage for particular contraceptive services. We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims. At a minimum, however, it does not impinge on the plaintiffs’ religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS’s stated interests equally well. HHS and the principal dissent argue that a ruling in favor of the objecting parties in these cases will lead to a flood of religious objections regarding a wide variety of medical procedures and drugs, such as vaccinations and blood transfusions, but HHS has made no effort to substantiate this prediction.

In any event, our decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer’s religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.

In its final pages, the principal dissent reveals that its fundamental objection to the claims of the plaintiffs is an objection to RFRA itself. The dissent worries about forcing the federal courts to apply RFRA to a host of claims made by litigants seeking a religious exemption from generally applicable laws, and the dissent expresses a desire to keep the courts out of this business. But Congress, in enacting RFRA, took the position that “the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.” 42 U. S. C. §2000bb(a)(5). The wisdom of Congress’s judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful. The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by Conestoga and the Hahns.

**JUSTICE KENNEDY, concurring.** [opinion omitted.]

**JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, and with whom JUSTICE BREYER and JUSTICE KAGAN join as to all but Part III–C–1, dissenting.**

In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others, hold no sway, the Court decides, at least when there is a “less restrictive alternative.” And such an alternative, the Court suggests, there always will be whenever, in lieu of tolling an enterprise claiming a religion-based exemption, the government, *i.e.*, the general public, can pick up the tab.

The Court does not pretend that the First Amendment’s Free Exercise Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score. Instead, the Court holds that Congress, in the Religious Freedom Restoration Act of 1993 (RFRA), 42 U. S. C. §2000bb *et seq.*, dictated the extraordinary religion-based exemptions today’s decision endorses. In the Court’s view, RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners’ religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court’s judgment can introduce, I dissent.

No doubt the Greens and Hahns and all who share their beliefs may decline to acquire for themselves the contraceptives in question. But that choice may not be imposed on employees who hold other beliefs. Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah’s Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)? According to counsel for Hobby Lobby, “each one of these cases . . . would have to be evaluated on its own . . . apply[ing] the compelling interest-least restrictive alternative test.” Not much help there for the lower courts bound by today’s decision.

The Court, however, sees nothing to worry about. Today’s cases, the Court concludes, are “concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer’s religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.” But the Court has assumed, for RFRA purposes, that the interest in women’s health and well being is compelling and has come up with no means adequate to serve that interest, the one motivating Congress to adopt the Women’s Health Amendment.

There is an overriding interest, I believe, in keeping the courts “out of the business of evaluating the relative merits of differing religious claims.” Indeed, approving some religious claims while deeming others unworthy of accommodation could be “perceived as favoring one religion over another,” the very “risk the Establishment Clause was designed to preclude.” The Court, I fear, has ventured into a minefield, by its immoderate reading of RFRA. I would

confine religious exemptions under that Act to organizations formed “for a religious purpose,” “engage[d] primarily in carrying out that religious purpose,” and not “engaged . . . substantially in the exchange of goods or services for money beyond nominal amounts.”

**JUSTICE BREYER and JUSTICE KAGAN, dissenting.**

We agree with JUSTICE GINSBURG that the plaintiffs’ challenge to the contraceptive coverage requirement fails on the merits. We need not and do not decide whether either for-profit corporations or their owners may bring claims under the Religious Freedom Restoration Act of 1993. Accordingly, we join all but Part III–C–1 of JUSTICE GINSBURG’s dissenting opinion.

**Note**

***Holt v. Hobbs*, 135 S.Ct. 853 (2014).**

The Court held unanimously that a prisoner’s religious claim for growing a short beard was wrongfully denied by the Arkansas prison system.

Petitioner Gregory Holt, also known as Abdul Maalik Muhammad, is an Arkansas inmate and a devout Muslim who wishes to grow a 1/2-inch beard in accordance with his religious beliefs. Petitioner’s objection to shaving his beard clashes with the Arkansas Department of Correction’s grooming policy, which prohibits inmates from growing beards unless they have a particular dermatological condition. We hold that the Department’s policy, as applied in this case, violates the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §2000cc et seq., which prohibits a state or local government from taking any action that substantially burdens the religious exercise of an institutionalized person unless the government demonstrates that the action constitutes the least restrictive means of furthering a compelling governmental interest.

We conclude in this case that the Department’s policy substantially burdens petitioner’s religious exercise. Although we do not question the importance of the Department’s interests in stopping the flow of contraband and facilitating prisoner identification, we do doubt whether the prohibition against petitioner’s beard furthers its compelling interest about contraband. And we conclude that the Department has failed to show that its policy is the least restrictive means of furthering its compelling interests.

The RLUIPA is a statutory mandate that does not attempt to undo *Smith* except in the two limited situations identified in the statute’s title. The Court has acceded to Congressional power in these areas as a matter of enforcement of individual rights.

**3. *American Legion v. American Humanist Ass’n*, 586 U.S. \_\_\_\_ (2019):** The Supreme Court held that a post-World War I memorial to commemorate the fallen soldiers did not violate the First Amendment’s Establishment Clause, even though it included a cross standing 32 feet high. Though the memorial was originally constructed by a community committee which received private donations, both the memorial and the surrounding land were taken over by the Maryland-National Capital Park and Planning Commission in 1961. Since acquiring the memorial, the Commission has

provided funds totaling more than \$110,000 to maintain and repair it.

In reaching its conclusion, the plurality opinion rejected application of the test of *Lemon v. Kurtzman*, finding that the test is plagued by too many shortcomings to effectively evaluate “longstanding monuments, symbols, and practices,” which, the plurality concluded, should benefit from a “presumption of constitutionality.” The opinion thus distinguished between memorials that have stood for many years and those created in recent times. Is there any principled basis for such a distinction?

The plurality pointed to four justifications for its conclusion: (1) Due to the memorial’s age, it is impossible to determine the original purpose in erecting it [Note: should an inquiry into purpose matter when a religious symbol such as a cross is used?]; (2) purpose can change over time, so it is possible that what was once a religious symbol is no longer one; (3) the memorial’s public message may change over time, leading it to mean something completely different to its surrounding community in the present than it did at the time of its creation, and (4) because the cross memorial has become such a part of the community in which it stands, its removal may no longer appear to be a neutral act but rather an act of aggression or hostility toward one religion, in contravention of the Free Exercise Clause. Justice Ginsburg, joined by Justice Sotomayor, dissented. She reasoned that the mere fact that a cross was used as a war memorial does not mean that it lacks religious meaning. Its use for a secular purpose, she argued, “does not transform it into a secular symbol.”

***Insert in p. 1564, at end of note 5:***

In *Manhattan Community Access Corp. v. Halleck*, 587 U.S. \_\_\_\_ (2019), the Supreme Court read the public function theory of state action narrowly. New York State law requires the State’s cable operators to set aside certain channels on their system for public access. These channels must be provide free of charge and on a first-come-first-serve basis. State law dictates that the cable operator will operate the public access channels unless the area’s local government chooses to operate the public access channels itself or delegates the task to a private entity. In accordance with state law, New York City designated Manhattan Neighborhood Network (MNN) to operate the public access channels that the private cable operator was required to provide.

Petitioners produce public access programs in Manhattan. After receiving complaints about one of their films, MNN suspended petitioners temporarily from using the public access channels, and ultimately suspended them from having access to all of its facilities. Petitioners sued, alleging violation of their First Amendment rights. The Court rejected the argument because of a lack of state action.

According to the majority, a private actor can be considered a state actor only when it exercises a function “traditionally, exclusively reserved to the State.” Hence the majority framed the question as whether or not operating public access channels is such a function. The majority answered no. The mere fact that a private entity opens its property to speech by others, it reasoned, does not mean that it is automatically transformed into a state actor. The majority also rejected the argument that the public access channels are the property of New York City.

Speaking for four justices, Justice Sotomayor dissented. She deemed the case to be “about an organization appointed by the government to administer a constitutional public forum.”

## Chapter 11 LIMITATIONS ON JUDICIAL REVIEW

### § 11.02 CONSTITUTIONAL AND POLICY LIMITATIONS

#### [A] The Case or Controversy Requirement

Compare to *Klein* the Court's recent decision in *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016). A provision of the Iran Threat Reduction and Syria Human Rights Act of 2012 was enacted in response to this particular suit, which was brought by over 1,000 individuals against the bank. The statute facilitated the turnover of \$1.75 billion of the bank's assets as compensatory damages for judgments against Iran. The Court rejected the separation-of-powers challenge to the provision based on *Klein*. It held that *Klein* and its progeny do not prohibit Congress from amending legal standards. Even though the statute had retroactive effect, it created new substantive standards and did not direct a specific result. The mere fact that the statute referred specifically to the instant case by docket number and does not govern any others is not constitutionally problematic. Though the legislative branch usually promulgates generally applicable laws, the Court pointed to precedents that upheld laws that "governed one or a very small number of specific subjects." In any event, the Court refused to accept that the legislation governed one case only, because 16 separate judgments were combined in this action.

#### Add following note 2:

3. *Adverseness and governmental refusal to enforce the law.* In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Court was faced with the following situation: The surviving spouse in a same-sex marriage performed in Ontario, Canada, sought to claim the federal estate tax exemption for surviving spouses, but was barred from doing so by section 3 of the federal Defense of Marriage Act (DOMA), which amended the Dictionary Act to define "marriage" and "spouse" as excluding same-sex partners. The individual paid the tax and sought a refund, which the Internal Revenue Service denied. She then brought a suit in federal court, seeking the refund and contending that DOMA violates the equal protection guarantee grounded in the Fifth Amendment's Due Process Clause. While the suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives that the Department of Justice would no longer defend the constitutionality of the challenged provision. In response, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend the provision's constitutionality. Limited intervention was allowed, and the district court ruled against the United States on the merits of the constitutional challenge. The Court requested argument on the questions of whether the United States' agreement with the plaintiff's legal position precludes further review and whether BLAG had standing to seek review in the court of appeals and the Supreme Court.

The Court concluded that "the United States retains a stake sufficient to support Article III jurisdiction on appeal and in proceedings before this Court. The judgment in question orders the United States to pay [the respondent] the refund she seeks. An order directing the Treasury to pay money is 'a real and immediate economic injury.'" The Court referred to the concern over adverseness to be purely a "prudential" matter, which may be impacted by "the extent to which adversarial presentation of the issues is assured by the participation of *amici curiae* prepared to

defend with vigor the constitutionality of the legislative act,” a factor of great importance in the present case because BLAG had so effectively advocated on behalf of DOMA’s constitutionality.

In dissent, Justice Scalia argued that the majority had improperly converted constitutionally required adverseness into a discretionary element of standing. “The authorities the majority cites fall miles short of supporting the counter intuitive notion that an Article III ‘controversy’ can exist without disagreement between the parties.” He found “wryly amusing” that the majority sought “to dismiss the requirement of party-adverseness as nothing more than a ‘prudential’ aspect of the sole Article III requirement of standing. He noted that “[r]elegating a jurisdictional requirement to ‘prudential’ status is a wondrous device, enabling courts to ignore the requirement whenever they believe it ‘prudent’ — which is to say, a good idea.”

### **§ 11.03 JUSTICIABILITY LIMITATIONS**

#### **[A] The Standing Limitation: Who Can Litigate?**

##### **[2] Determining the Existence of Injury and Causation**

#### **Add right before *Lujan*:**

More recently, in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), the Court considered the issue of standing of private individuals to defend the constitutionality of a state law when government officials refuse to either to defend the law at the trial level or pursue the suit after losing at the trial level. The citizens of California, by means of a ballot initiative, enacted an amendment to the California Constitution known as Proposition 8. The provision defined marriage as a union between a man and a woman. Same-sex couples who wish to marry filed suit in federal court, challenging the constitutionality of Proposition 8 under due process and equal protection grounds and naming as defendants the state’s Governor and other state and local officials responsible for enforcing the state’s marriage laws. The state officials refused to defend the law, so the district court allowed the initiative’s official proponents (the petitioners) to intervene. After plaintiffs prevailed in the district court, the government officials refused to appeal, so petitioners did. The court of appeals certified to the California Supreme Court the question whether official proponents of a ballot initiative have authority to assert the state’s interest in defending the constitutionality of the initiative when public officials refuse to do so, and that court answered in the affirmative. On the basis of that answer, the court of appeals found that petitioners had standing, but the Supreme Court reversed.

The Chief Justice, speaking for the Court, reasoned that “petitioners had no ‘direct stake’ in the outcome of their appeal. Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law.” Such a generalized grievance, “no matter how sincere, is insufficient to confer standing.” The Court rejected petitioners’ argument that the California Constitution and its election laws provided them with a “unique,” “special,” and “distinct” role in the initiative process. However, once the initiative process was completed, the Chief Justice reasoned, “petitioners have no role — special otherwise — in the enforcement of Proposition 8.” He also rejected petitioners’ argument that

they were representing the interests of the State of California, noting that as a general matter, a litigant must assert his own rights and interests, not those of others.

Writing on behalf of himself and three other members of the Court, Justice Kennedy dissented. The State of California, he pointed out, had sustained a concrete injury sufficient to satisfy the requirements of Article III. “Under California law,” he noted, “a proponent has the authority to appear in court and assert the State’s interest in defending an enacted initiative when the public officials charged with the duty refuse to do so.” The State Supreme Court’s ruling on this issue, Justice Kennedy argued, “is binding on this Court.” Add after note 15:

**16. *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013).** Congress enacted the Foreign Intelligence Surveillance Act [FISA] in 1978. As part of that legislative program, Congress established the Foreign Intelligence Surveillance Court [FISC] with the power to approve FISA warrants for international surveillance, and the Foreign Intelligence Surveillance Court of Review, with the power to review denials of government requests for warrants. In 2008 Congress amended the Act to authorize a less restrictive framework for obtaining FISC approval than had existed under the original statute.

Respondents, “attorneys and human rights, labor, legal, and media organizations whose work allegedly requires them to engage in sensitive and sometimes privileged telephone and email communications with colleagues, clients, sources, and other individuals located abroad,” brought suit in federal court the day the 2008 amendment went into effect, challenging its constitutionality. The plaintiffs asserted that some of the people with whom they exchange foreign intelligence information are likely targets of surveillance that could be authorized under the revised version of FISA. The Supreme Court, by a vote of five to four, dismissed due to lack of standing on the part of the respondents, who had prevailed in the Second Circuit.

Respondents asserted two bases for Article III standing. First, “they claim that there is an objectively reasonable likelihood that their communications will be acquired under [FISA, as revised] at some point in the future, thus causing them injury.” Second, they maintained that “the risk of surveillance under [the statute] is so substantial that they have been forced to take costly and burdensome measures to protect the confidentiality of their international communications.” However, the Court’s majority dismissed on the grounds that respondents’ theory of future injury “is too speculative to satisfy the well-established requirement that threatened injury must be ‘certainly impending.’” The chain of events leading to a future injury, the Court stated, was “highly attenuated,” because respondents could not establish “specific facts demonstrating that the communications of their foreign contacts will be targeted,” but only allege that they assumed that their communications would in fact be targeted. Moreover, respondents could not show that the government would authorize surveillance specifically pursuant to the amendment to FISA, rather than by some other legal means. Nor could they show that even if surveillance would be sought under the amended statute, that FISC would approve issuance of the warrant. The Court noted that it has “been reluctant to endorse standing theories that require guesswork as to how independent decision makers will exercise their judgment.” The Court also rejected respondents’ second argument that they suffer a present economic injury, because they “cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.”

Justice Breyer, dissenting, found the harm not to be speculative. To the contrary, he argued, “it is as likely to take place as are most future events that commonsense inference and ordinary knowledge of human nature tell us will happen. Respondents, he noted, “have engaged, and continue to engage, in electronic communications of a kind that the 2008 amendment, but not the prior Act, authorizes the Government to intercept.” He finally pointed to the government’s “strong motive” to listen to the respondents’ communications.

**17. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014).** Congressman Steve Driehaus complained to the Ohio Elections Commission that Susan B. Anthony List (SBA), a pro-life advocacy organization, had violated an Ohio law that prohibited “certain ‘false statements’ during the course of a political campaign.” The SBA planned to display a billboard which would have stated: “Shame on Steve Driehaus! Driehaus voted FOR taxpayer – funded abortion.” However, the owner of the billboard space refused to allow SBA to display that message after Driehaus threatened to bring legal proceedings. Driehaus alleged that SBA had issued a press release stating that his vote in Congress for the Patient Protection and Affordable Care Act (ACA) was a vote for ‘taxpayer funded abortion.’ ” The SBA charge was made during Driehaus’s unsuccessful campaign for re-election. The Ohio Election Commission by a 2-1 vote found “probable cause that a violation [of the false statement law] had been committed.” Since Driehaus lost the election, the Commission dismissed his complaint.

SBA brought a separate suit in the federal district court contending that the Ohio false statement law violated the First Amendment. Another organization, Coalition Opposed to Additional Spending and Taxes (COAST), also filed a First Amendment challenge to the Ohio law in the federal district court. COAST alleged it intended to disseminate a similar message concerning Congressman Driehaus but did not do so because of the Ohio Election Commission proceedings brought by Congressman Driehaus against SBA. The two suits were consolidated by the federal district court and dismissed as non-justiciable on standing and ripeness grounds. The Sixth Circuit affirmed on the ripeness issue.

A unanimous Supreme Court, per Justice Thomas, reversed on the ground that the pre-enforcement challenge to the Ohio false statement law was justiciable. The Court ruled that petitioners had alleged a sufficiently imminent injury. Justice Thomas stated the three-part test for constitutional standing set forth in *Lujan v. Defenders of Wildlife* [text, p. 1658]: “To establish Article III standing, a plaintiff must show (1) an ‘injury in fact,’ (2) a sufficient ‘causal connection between the injury and the conduct complained of,’ and (3) a ‘likelihood that the injury will be redressed by a favorable decision.’ ” The case involved the injury-in-fact requirement of Article III standing: “An allegation of future injury may suffice if the threatened injury is ‘certainly impending’ or there is a ‘substantial risk’ that the harm will occur.”

The Court declared:

One recurring issue in our cases is determining when the threatened enforcement of a law creates an Article III injury. When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law . . . . Specifically, we have held that a plaintiff

satisfies the injury-in-fact requirement where he alleges “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.”

The Court agreed with SBA and COAST that the “threat of enforcement of the false statement statute amount to an Article III injury in fact.” The petitioners have alleged a credible threat of enforcement for several reasons. First, they “ ‘alleged an intention to engage in a course of conduct arguably affected with a constitutional interest.’ ” Both organizations intend to make statements similar to those at issue here in future election cycles. This “intended future conduct concerns political speech.” Furthermore, the intended future conduct of the petitioners is prohibited by the Ohio false statement law: “The Ohio false statement law sweeps broadly, and covers the subject matter of petitioners’ intended speech.” Indeed, an Ohio Election Commission panel has already found “probable cause to believe that SBA violated the statute when it stated that Driehaus had supported ‘taxpayer-funded abortion’ -- the same sort of statements petitioners plan to disseminate in the future.” As a result, it is likely that “similar speech in the future will result in similar proceedings, notwithstanding SBA’s belief in the truth of its allegations.”

Here there is a substantial threat of future enforcement of the Ohio false statement law: “[P]ast enforcement against the same conduct is good evidence that the threat of enforcement is not ‘chimerical.’ ” Moreover, the Ohio false statement law allows any person to file a complaint. In addition, Justice Thomas pointed out that the “Spector of enforcement [was] so substantial that the owner of the billboard refused to display SBA’s message after receiving a letter threatening Commission proceedings.” Justice Thomas pointed out that the petitioners faced the threat in the future not only of “burdensome Commission proceedings” but of criminal prosecution as well: “We conclude that the combination of those two threats suffices to create an Article III injury under the circumstances of this case ... In sum, we find that both SBA and COAST have alleged a credible threat of enforcement.”

The Sixth Circuit had ruled that the petitioners’ case was not ripe. However, since the Supreme Court concluded that the petitioners had alleged a sufficient Article III injury, Justice Thomas said it was not necessary to “resolve the continuing vitality of the prudential ripeness doctrine in this case because the ‘fitness’ and ‘hardship’ factors are easily satisfied here.” Accordingly, since the petitioners have “demonstrated an injury in fact sufficient for Article III standing,” the judgment of the Sixth Circuit is reversed. The case was remanded “for further proceedings including a determination whether the remaining Article III standing requirements are met.”

**18. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).** Robins sued Spokeo, a consumer reporting agency that pools all information about an individual that can be found online, under the Fair Credit Reporting Act of 1970 (FCRA). The profile created by Spokeo for Robins was inaccurate, allegedly misstating Robins’ education, family status and salary, errors which Robins alleged could harm his job prospects.

The FCRA requires consumer reporting agencies to “follow reasonable procedures to assure maximum possible accuracy of” consumer reports and imposes liability on “[a]ny person

who willfully fails to comply with a requirement [of the Act] with respect to any” individual. The Ninth Circuit held that Robins had standing to sue under Article III, because Spokeo allegedly violated his individualized rights.

The Supreme Court reversed and remanded, because the Ninth Circuit’s standing analysis was incomplete. In order to establish standing for purposes of Article III, the Court reasoned, the plaintiff must show that he has suffered “an invasion of a legally protected interest” that is “concrete and particularized.” While the Ninth Circuit’s analysis considered “particularization,” it failed to focus on the extent to which the injury was also “concrete.” A concrete injury, the Court said, need not be a tangible injury, but still must actually exist. Although Congress is well positioned to identify intangible harms that satisfy Article III requirements, the Court reasoned, a plaintiff does not automatically satisfy the injury-in-fact requirement simply because a statute grants a right and purports to authorize a suit to vindicate it. The Court remanded in order for the Ninth Circuit to determine if such actual injury or threat of actual injury existed. Robins could not satisfy the demands of Article III merely by alleging a bare procedural violation of a congressionally granted right.

**19. *Wittman v. Personhuballah*, 136 S. Ct.1732 (2016).** The Court unanimously held that three Republican members of the United States House of Representatives from Virginia lacked standing to appeal a three-judge panel’s decision to strike down a redistricting plan for racial gerrymandering in District 3 of the state. Voters from the state’s Congressional District 3 had filed the original suit against the state, and the three-judge panel agreed with their claims and struck down the redistricting plan. Intervenor Republican Representatives sought appeal to the Supreme Court and that Court remanded for reconsideration. Once again, the three-judge court found the plan unconstitutional. Three of the Representatives—Forbes, Wittman and Brat— continued the appeal after the Court asked for specific arguments to demonstrate standing.

The Court initially noted the importance of the case-or-controversy requirement, pointing out that an intervenor is not permitted to step into the shoes of the original party unless the intervenor independently satisfies the requirements of Article III. Representative Forbes initially argued that he had standing because the newest plan would “completely transform” his district (District 4) into a Democratic one, and he would therefore be forced to run in another district (District 2), if the three-judge panel’s decision was allowed to stand. However, his counsel notified the Court after oral argument that Forbes had decided to run in District 2 regardless of the outcome of the case. In light of this fact, the Court determined that whether or not Forbes possessed standing initially, “he does not possess standing now.”

Wittman represented District 1 and Brat represented District 7—neither of which were involved in the current controversy, which involved solely District 3. These Representatives argued that some of the voters in their districts were going to be replaced with “unfavorable Democratic voters,” but the Court found insufficient evidence to support those claims. The Court noted that the parties seeking to invoke jurisdiction have the burden of establishing injury in fact, and found that that burden was not satisfied.

**20. *Bank of America v. City of Miami, Florida*, 137 S. Ct.1296\_ (2017).** The Court, per Justice Breyer, took a broad view of two aspects of the law of standing – the “zone of interests” covered by a statute and the scope of a statutory “aggrieved person” provision. At the same time,

the Court took a narrow of the causation requirement. The Fair Housing Act (FHA) prohibits racial discrimination in the sale or rental of real estate or with regard to any business engaging in “real estate-related transactions.” 42 U.S.C. § 3604(b), § 3605(a). The FHA permits an “aggrieved person” to bring a civil suit for damages for violation of the Act. The definitions of an “aggrieved person” in the FHA include “any person” who alleges injury as a result of a “discriminatory housing practice.” 42 U.S.C. § 3613(a)(1)A, (c)(1).

The City of Miami brought lawsuits in federal court against two banks, Bank of America and Wells Fargo, alleging that they violated the FHA when they “intentionally issued riskier mortgages on less favorable terms to African-American and Latino customers than they issued to similarly situated white, non-Latino customers.” The City of Miami alleged that the bank practices disproportionately caused “foreclosures and vacancies” in the city’s majority-minority neighborhoods. Among the harms caused to the city of Miami as a result of these practices was that they thwarted the city’s efforts to achieve racial integration. These practices reduced the city’s property-tax revenue, and increased the financial burden on municipal services such as those provided by the Police and Fire Departments.

The federal district court dismissed Miami’s complaints on the ground that they were not within the zone of interests protected by the FHA and also that the complaints did not show a sufficient causal connection between the injuries alleged by Miami and the discriminatory conduct of the banks. The Eleventh Circuit reversed.

On the zone of interests issued, Justice Breyer declared:

The question is whether the statute grants this plaintiff the cause of action he asserts. In answering that question, we presume that a statute ordinarily provides a cause of action “only to plaintiffs whose interests fall within the zone of interest protected by the law invoked.” Here we concluded that the City’s claims of financial injury in their amended complaints – specifically, lost tax revenue and extra municipal expenses – satisfy the “cause of action” (or “prudential standing”) requirement . . . . This Court has repeatedly written that the FHA’s definition of a person aggrieved” reflects a congressional intent to confer standing broadly.

Furthermore, Justice Breyer did not accept the argument of the banks that the claims asserted against them were too remote and did not fall within the “zone of interests” embraced by the FHA and that, therefore, the city of Miami was not an “aggrieved person” under the FHA. Justice Breyer summarized the argument of the banks on this point as follows:

The Bank says it would be similarly farfetched if restaurants, plumbers, utility companies, or any other participant in the local economy could sue the Banks to recover business they lost when people had to give up their homes and leave the neighborhood as a result of the Banks’ discriminatory lending practices. That, they believe, cannot have been the intent of the Congress that enacted or amended the FHA.

Justice Breyer said that even if there was some validity to this argument, the Court still concluded that the financial injuries asserted by the city fell “within the zone interests that the FHA protects.” The city of Miami was an “aggrieved person” under the FHA. These conclusions were supported by the Court’s previous FHA cases. For example, the successful claims advanced by the Village of Bellwood in *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979) were very similar to the claims of Miami here.

The Eleventh Circuit had accepted the argument of the city of Miami that there was a sufficient causal connection between the racially discriminatory conduct of the banks and the injuries alleged by the city. The Eleventh Circuit believed that the injuries complained of by Miami were foreseeable consequences of the wrongful conduct of the banks. However, Justice Breyer concluded that the Eleventh Circuit had “erred in holding that foreseeability is sufficient to establish proximate cause under the FHA.” The Supreme Court declared that “foreseeability alone does not guarantee the close connection required by the need to show proximate cause.” A violation of the FHA may cause “ripples of harm.” However, there is nothing in the FHA which indicates that “Congress intended to provide a remedy wherever these ripples travel.”

In light of the foregoing, the Supreme Court vacated the judgment of the Eleventh Circuit and remanded the case.

Justice Thomas, joined by Justice Kennedy and Alito, concurred in part and dissented in part. Justice Thomas agree “with the Court’s conclusions about proximate cause, as far as they go.” However, he disagreed with its zone of interest holding:

A plaintiff seeking to bring suit under a federal statute must show not only that he has standing under Article III, but also that his ‘complaint fall[s] within the zone of interests protected by the law’.... In my view, Miami’s asserted injuries are “so marginally related to or inconsistent with the purposes of the FHA that they fall outside the zone of interest.”..... The quintessential “aggrieved person” in cases involving violations of the FHA is a prospective home buyer or lessee discriminated against during the home-buying or leasing process.... [N]othing in the text of the FHA suggests that Congress was concerned about decreased property values, foreclosures, and urban blight, much less about strains on municipal budgets that might follow.... The FHA’s zone of interests is not so expansive as to include those kinds of injuries.

**21. *Gill v Whitford*, 138 S. Ct. 1916** (2018) involved a Wisconsin legislative redistricting plan which was enacted by a Republican-dominated legislature which was struck down by a three judge federal district court as an unconstitutional partisan gerrymander. The federal district court decision was reversed and remanded by the Supreme Court, per Justice Roberts, on the ground that the plaintiffs failed to demonstrate standing. Chief Justice Roberts cited *Baker v. Carr*, 369 U.S. 186, 204 (1962), for the principle that a plaintiff suing in federal court must show that he has standing to do so, including that he has a "personal stake in the outcome." Furthermore, such a showing must be different than "a 'generally available grievance about government.'" The rationale for these principles is to ensure "that we act as *judges*, and do not engage in policymaking properly left to elected representatives." *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013). Chief Justice Roberts declared:

Certain of the plaintiffs before us alleged that they had such a personal stake in this case, but never followed up with the requisite proof. The District Court and this Court therefore lack the power to resolve their claims.

Twelve Democratic Party voter plaintiffs filed a complaint in the federal district court in Wisconsin against state election officials. They alleged that following the 2010 census the Republican dominated legislature enacted a new legislative redistricting plan [Act 43], with the objective of "diminishing the ability of Wisconsin Democrats to convert Democratic votes into

Democratic seats in the legislature." In so doing, the Wisconsin Democratic voter plaintiffs contended that the Wisconsin legislature had violated their rights under the First and Fourteenth Amendments. The plaintiffs contended that "Act 43 is a partisan gerrymander" which unfairly advantaged Republican Party voters and candidates. Furthermore, the plaintiffs contended this result was achieved by "cracking" and "packing" Democratic voters throughout the State. These terms were explained by the plaintiffs as follows:

"Cracking means dividing a party's supporters among multiple districts so they fall short of a majority in each one. Packing means concentrating one party's backers in a few districts that they win by overwhelming margins."

The plaintiffs contended that the extent to which "packing and cracking" favors one party over another can be illustrated "by a single calculation" which they call an "efficiency gap" which compares the "wasted" votes of each party against all the state's legislative districts: "Wasted" votes are those cast for a losing candidate or for a winning candidate in excess of what that candidate needs to win." The result, the plaintiffs complained, was an "unusually large efficiency gap that favored Republicans."

In response, the defendant state election officials moved to dismiss the complaint on the ground, *inter alia*, that the plaintiffs lacked standing "to challenge the constitutionality of Act 43 as a whole because, as individual voters, their legally protected interests extend only to the makeup of the legislative districts in which they vote." A three-judge federal district court panel denied the defendants' motion to dismiss. The three judge district court ruled that the injury sustained by the plaintiffs did not involve just their inability to elect a Democratic legislator in their own legislative district but also involved "their reduced opportunity to be represented by Democratic legislators across the state." The District Court concluded that since the injury suffered by the plaintiffs "relates to their statewide representations, they should, therefore be permitted to bring a statewide claim."

Plaintiffs insisted the Supreme Court was the only institution which could solve the problem of partisan gerrymandering. Chief Justice Roberts rejected this contention:

Such invitations must be answered with care.

"Failure of political will does not justify unconstitutional remedies."

Chief Justice Roberts said the Court's prior cases leave two questions unresolved: "[What is necessary to show standing in a case of this sort, and whether those claims are justiciable.]" But since the plaintiffs have failed to show standing, it was not necessary to decide the justiciability issue. On the standing issue, the Court said to the degree that the harm complained of by the plaintiffs is that their votes have been diluted, their injury is specific to the legislative district in which they vote:

An individual voter in Wisconsin is placed in a single district. He votes for a single representative. The boundaries of the district and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked. This "dis- advantage to [the voter] as [an] individual," *Baker v. [Carr]*, 369 U.S. a 206, therefore results from the boundaries of the particular district in which he resides. And a plaintiff's remedy must be "limited to the inadequacy that produced [his] injury in fact." In this case the remedy that is proper and sufficient

lies in the revision of the individual's own district.

The plaintiffs' claims of partisan gerrymandering "turn on allegations that their votes have been diluted." Such harm, Chief Justice Roberts, declared "arises from the particular composition of the voter's own district which causes his vote" whether packed or cracked "to carry less weight than it would carry in another hypothetical district." But a remedy for such claims does not necessarily require restructuring every legislative district in the State. What is required is to "reshape the voter's district –so that the voter may be unpacked or uncracked, as the case may be."

The Court rejected the plaintiffs' claim that their legal injury extends beyond the injury they have sustained as individual voters but also to their interest "in their collective representation in the legislature" and to their interest in influencing the legislature's composition and in policymaking. But under existing Supreme Court case law such interests do not present the individual and personal injury which Article III requires:

A citizen's interests in the overall composition of the legislature is embodied in his right to vote for his representative. And the citizen's abstract interest in policies adopted by the legislature on the facts here is a nonjusticiable "general interest common to all members of the public."

The Court declared that the fundamental difficulty with the plaintiffs is that they assert "group political interests, not individual legal rights." However, the Court is responsible for vindicating individual rights of the people who appear before it. It is "not responsible for vindicating generalized political preferences."

Chief Justice Roberts summarized by observing that normally where a plaintiff fails to show standing the case is dismissed. However, this is an unusual case and involves "an unsettled kind of claim this Court has not agreed upon, the contours of which are unresolved." Some of the plaintiffs have alleged that they "live in districts where Democrats like them have been packed or cracked." In such circumstances, the Court declines to order dismissal. The Court remanded the case to the federal district court so that plaintiffs would "have an opportunity to prove concrete and particularized injuries using evidence -unlike the bulk of the evidence presented thusfar -that would tend to demonstrate a burden on their individual votes."

The parting words of Chief Justice Roberts were these:

We express no view on the merits of the plaintiffs' case.

We caution, however, that "standing is not dispensed in gross."

A plaintiff's remedy must be tailored to redress the plaintiff's particular injury.

Justice Kagan, joined by Justices Ginsburg, Breyer and Sotomayor, concurred in both the Court's opinion and judgement. She wrote separately in order to describe the kind of evidence future plaintiffs must show to support a partisan gerrymandering claim based on a vote dilution theory. She suggested that on remand plaintiffs should assert an associational claim and try to satisfy the "different standing requirement" such a theory would involve.

Justice Thomas, joined by Justice Gorsuch, concurred in part and concurred in the judgment, but did not join that portion of the Court's opinion "which gives the plaintiffs another

chance to prove their standing on remand."

22. *Benisek v. Lamone*, 138 S. Ct. 1942 (2018), involved a claim by some Maryland Republican voters of unconstitutional partisan gerrymandering by the Democratic controlled Maryland legislature. In *Benisek*, as in *Gill v. Whitford*, *supra*, the Court in a *per curiam* opinion avoided resolving the constitutional merits of the claim presented by affirming the federal district court's denial of a preliminary injunction to enjoin Maryland election officials from holding elections under a 2011 map drawn by the Maryland state legislature. The Supreme Court affirmed the decision of the federal district court primarily because the plaintiffs seeking the preliminary injunction failed to show either that irreparable injury would result if the preliminary relief they sought was not granted or that the "balance of equities" was in their favor.

Some of the plaintiffs in this case filed an amended complaint in 2016 which was a very substantial time after the original complaint had been filed. The amended complaint alleged that Maryland officials had "intentionally retaliated against them" by way of partisan redistricting "because of their political views." The Court responded that the plaintiffs could have asked for a preliminary injunction much earlier. Their gerrymandering complaint was filed in 2013. The "unnecessary years-long delay" weighed against the request by plaintiffs for redress with respect to their retaliation claim. Finally, the Court noted that when the federal district court in *Benisek* made its decision, *Gill v. Whitford*, *supra*, was still pending and the federal district court was understandably reluctant to decide the constitutional merits of the partisan gerrymandering claim until *Gill* was decided.