



Copyright © 2018 Carolina Academic Press, LLC. All rights reserved.

Copyright © 2018  
Carolina Academic Press, LLC  
All Rights Reserved

Carolina Academic Press  
700 Kent Street  
Durham, North Carolina 27701  
Telephone (919) 489-7486  
Fax (919) 493-5668  
E-mail: [cap@cap-press.com](mailto:cap@cap-press.com)  
[www.cap-press.com](http://www.cap-press.com)

## TABLE OF CONTENTS

### Chapter 1 JUDICIAL POWER AND ITS LIMITS

#### § 1.02 LIMITING JUDICIAL POWER

- [A] The “Case or Controversy” Requirement
- [3] Other Conditions of Adjudication Requirements: Standing .....1

### Chapter 2 CONGRESSIONAL POWER

#### § 2.02 THE COMMERCE POWER AND ITS DEVELOPMENT

- [D] The Modern Commerce Power.....2

#### § 2.04 A COMPENDIUM OF POWERS

- [B] Other Powers .....3

### CHAPTER 3 FEDERALISM: NATIONAL POWER AS AFFECTING THE POWERS OF THE STATES

#### § 3.01 PREEMPTION OF STATE POWER BY CONGRESSIONAL ACTION: THE SUPREMACY CLAUSE .....5

#### § 3.02 THE NEGATIVE COMMERCE CLAUSE: RESTRICTIONS ON STATE POWER TO AFFECT INTERSTATE COMMERCE

- [B] The Modern Standard Under the Negative Commerce Clause
- [1] Discrimination Against Interstate Commerce .....5

### CHAPTER 4

#### § 4.02 THE MODERN CASES AND THE FOUR PART TEST .....7

### CHAPTER 5 PRESIDENTIAL POWER AND RELATED POWERS OF CONGRESS: SEPARATION OF POWERS

#### § 5.01 EXECUTIVE VERSUS LEGISLATIVE POWER

- [B] Sources of Executive Power .....8

#### § 5.03 FOREIGN OR EXTERNAL AFFAIRS

- [A] The Treaty Power .....10

#### § 5.06 THE APPOINTMENTS POWER, POWER OVER PERSONNEL, AND NATIONAL PROPERTY POWER

- [A] The Appointments Power .....11

### CHAPTER 9

### DUE PROCESS: SUBSTANTIVE RIGHTS OF “PRIVACY” AND PERSONAL AUTONOMY

#### § 9.02 REPRODUCTION, ABORTION, AND SEXUAL CONDUCT

- [E] The “Undue Burden” Standard of the Casey Decision
- Whole Woman’s Health v. Hellerstedt*, 136 S.Ct. 2292 .....13

#### § 9.03 THE FAMILY .....15

**Chapter 10 EQUAL PROTECTION**

§ 10.03 THE “UPPER TIER”: STRICT SCRUTINY AND “COMPELLING” GOVERNMENTAL INTERESTS

- [A] Race and Other “Suspect Clarifications”
  - [5] Affirmative Action: Addressing General Societal Effects by “Benign” Consideration of Race — or “Reverse Discrimination”
    - Schuette v. Coalition to Defend Affirmative Action* .....16
    - Notes and Questions** .....23
- [B] Fundamental Rights
  - [1] The Right to Vote
    - [b] Voting Apportionment: “One Person, One Vote” .....25

§ 10.04 THE “MIDDLE TIER”: SHIFTING AREAS OF GREATER-THAN-NORMAL (BUT NOT FUNDAMENTAL) PROTECTION

- [C] Sexual Orientation: The Arguments of Gays, Lesbians and Others
  - Obergefell v. Hodges* .....25
  - Notes and Questions** .....46

**Chapter 11 SPEECH, PRESS, AND ASSOCIATION**

§ 11.03 SOME GENERAL PRINCIPLES: THE TWO-TRACK SYSTEM

- [A] “Track One” and “Track Two” Analysis: Content-Based Regulation Versus Content-Neutral Regulation .....48

§ 11.04 UNPROTECTED SPEECH

- [F] “True Threats” as Unprotected Speech .....50

§ 11.06 Track Two Regulation

- [A] Time, Place, or Manner Regulations
  - [2] The Modern Time, Place, or Manner Doctrine .....50

§ 11.08 When Government Functions are Intertwined with Speech

- [B] Election Campaigns .....51
- [C] Government Speech: The Government as Speaker or the Government’s Message
  - [1] Government Subsidy and Speech .....53
  - [2] Speech by Government Employees .....53
  - [3] Government Employees’ or Licensees’ Freedom of Belief or Association.54

§ 11.10 THE RIGHT NOT TO SPEAK

- [A] Freedom Not to Speak and Loyalty Oaths .....55

**Chapter 12 FREEDOM OF RELIGION**

§ 12.02 THE ESTABLISHMENT CLAUSE

- [A] Aid to Religion or Religious Institutions
  - [2] Non-Financial Aid: “Accommodation” or Official Recognition .....56
  - Town of Greece, New York v. Galloway* .....56
  - Notes and Questions** .....64

12.03 THE FREE EXERCISE CLAUSE

- [C] Conflict with Nondiscriminatory Secular Regulation: The Modern Doctrine .....67
- Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n* .....68

**Chapter 14 CONGRESSIONAL ENFORCEMENT OF THE CIVIL RIGHTS  
AMENDMENTS**

§ 14.02 Enforcing the Fourteenth and Fifteenth Amendments Against State and  
Federal Action .....71

## CHAPTER 1

### JUDICIAL POWER AND ITS LIMITS

#### § 1.02 LIMITING JUDICIAL POWER

##### [A] The “Case or Controversy” Requirement

##### [3] Other Conditions of Adjudication Requirements: Standing

[At page 78, add the following as new Note (11):]

(11) *The Standing Requirement of Injury-in-Fact: Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334 (2014). An Ohio statute criminalized certain “false” statements made in the course of a political campaign and set up an agency to review complaints about false speech in political campaigns. Driehaus, a former Ohio Congressman, filed an administrative complaint against the Susan B. Anthony List (SBA), an advocacy organization. Driehaus claimed that SBA had made a “false statement” against him. SBA had stated in an ad that, when Driehaus voted for the Affordable Care Act (ACA), Driehaus had voted for “taxpayer funded abortion.” When Driehaus lost the election, the administrative complaint was dismissed.

Pursuing the issue, SBA and other plaintiffs filed this federal action challenging the constitutionality of the Ohio “false statement” statute. The District Court dismissed the action, concluding that SBA lacked standing (and for ripeness grounds). The Sixth Circuit affirmed on ripeness grounds. The unanimous Supreme Court, per Justice Thomas, disagreed and reversed.

The Court concluded that, in these circumstances, SBA had alleged injury-in-fact based on the threat of enforcement by the Ohio state agency. It was important that the Ohio agency had a history of enforcing the Ohio false statement statute. Under this credible threat of enforcement, the Court concluded that SBA had satisfied the standing requirement of injury-in-fact. The Court remanded to the lower courts for a determination of the other standing requirements, as well as ripeness and any “prudential” factors.

The *Driehaus* decision appears to be a broader interpretation of the injury-in-fact requirement of standing as articulated in the *Lujan* decision, *supra*. (By “broader”, this means easier to satisfy.) On the substantive merits of this dispute, the case demonstrates some of the issues created by a regulatory scheme that would have an administrative agency acting as an “umpire” of truth in a political campaign.

A few years ago, Professor Day was asked to advise on the constitutionality of a proposal before the South Dakota Legislature to adopt a “false political statement” statutory scheme based on the Ohio regulatory scheme. He was approached by the proponents of the statute. Professor Day declined to support the proposal and suggested it would be unconstitutional. The proponents went forward and introduced the bill. In the South Dakota Legislature, the majority party killed the proposal in Committee without any decision on the proposal’s constitutionality. As is often the case, the proposal fell to politics, not any form of constitutional analysis.

## CHAPTER 2

### CONGRESSIONAL POWER

#### § 2.02 THE COMMERCE POWER AND ITS DEVELOPMENT

##### [D] The Modern Commerce Power

[At page 193, add the following squib:]

**MURPHY V. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION**, 138 S. Ct. 1461 (2018): *Congressional Prohibition of State Regulation of Sports Gambling*. Congress passed the Professional and Amateur Sports Protection Act (PASPA) which generally prohibited States from authorizing or licensing sports gambling. Since there is no power in Article I, Section 8 to regulate gambling, Congress passed PASPA pursuant to its power to regulate interstate commerce and its Necessary and Proper Clause powers. New Jersey passed legislation to lift (at least partially) the prohibitions on sports gambling. (Other states were also interested in raising revenue without raising income or property taxes.) Various professional and amateur sports leagues sought to enjoin New Jersey. The lower courts treated the case as a Supremacy Clause matter and upheld Congressional Power. The Supreme Court, per Justice Alito, reversed and held that PASPA’s general prohibition on state power to authorize sports gambling was unconstitutional because it violated the “anti-commandeering” doctrine.

Justice Alito was joined by the Chief Justice and Justices Kennedy, Thomas, Gorsuch, Kagan and (in part) Breyer. Justices Thomas and Breyer filed concurrences. Justice Ginsburg (for Sotomayor) dissented.

The anti-commandeering principle was originated by the late Justice Scalia in the 1997 *Printz* decision [see Chapter 2 *supra*] and the earlier, *New York v. United States* decision [see Chapter 2 *supra*]. The *Printz* Court used, in a 5-4 decision, a broader rationale: the anti-commandeering principle. In the *Murphy* decision, the anti-commandeering *principle* may have become the anti-commandeering *doctrine*.

#### NOTES AND QUESTIONS

(1) *The Anticommandeering Principle and Possible Broader Rationales*. The *Murphy* Court held that the federal regulation of state policies regarding sports gambling was unconstitutional because the federal government was commandeering state decision making.

The *Murphy* majority added, as part of its discussion, the following paragraph:

The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers

given to Congress is the power to issue direct orders to the governments of the states. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority.

This paragraph is stated by Justice Alito *without any citation to authority*. Some will think, moreover, that Justice Alito is inconsistent with *McCulloch v. Maryland*, *Gibbons v. Ogden*, *Wickard v. Filburn*, *Katzenbach v. Morgan*, *Heart of Atlanta Motel v. United States*, and *United States v. Darby* (the 10<sup>th</sup> Amendment is “but a truism”) (all in Chapter 2). These decisions hold that the powers of Congress are plenary in nature. One might support Justice Alito with a citation to *City of Boerne v. Flores* (Section 5 of the 14<sup>th</sup> Amendment is not a “plenary power”), but Justice Alito did not cite *Flores* (in Chapter 14). (On the other hand, the *Flores* Court decided that the Section 5 power was not plenary by *contrasting* the Section 5’s history to the history of Article 1, Section 8 powers.) In other words, the *Flores* court *assumed* that the Article I powers were plenary.

(2) *The Broader Rationale*. The explicit rationale for the *Murphy* decision is the anti-commandeering principle. This is a broad rationale, but not nearly as broad as the theory that Congressional powers are not plenary. Should we use the plenary powers doctrine of Chief Justice John Marshall (from *McCulloch* and *Ogden*) or a non-plenary power theory from the *Murphy* decision?

## § 2.04 A COMPENDIUM OF POWERS

### [B] Other Powers

[At page 234, add the following as new Notes (8) and (9):]

(8) *The Treaty Power: Bond v. United States*, 134 S.Ct. 2077 (2014). Carol Anne Bond went from being a “desperate housewife” to the protagonist in a major Court pronouncement about the scope of Congressional authority under the Treaty Power. Chief Justice Roberts concluded that this was a “curious” case.

In 1997, the United States had joined, pursuant to the Treaty Power, an international treaty aimed at abolishing Chemical Warfare, such as that seen in WWI: the Convention on Chemical Weapons. Pursuant to its Treaty Power, the Congress passed the Chemical Weapons Convention Implementation Act of 1998 (“the Act”) to implement the Convention.

Carol Anne Bond was, according to the Chief Justice, a “jilted wife” who sought to use certain chemicals to injure her husband’s paramour. The other woman, Bond’s best friend, had a baby with Bond’s husband. Bond could have been charged under state law. Instead, Bond was convicted under the Act of use of a chemical weapon – a federal felony. She appealed, challenging the constitutionality of the Act as outside the scope of Congressional power. See *Lopez, supra*, Chapter 2. Bond claimed that the Treaty Power was not a “plenary” power. This claim was inconsistent with *Missouri v. Holland* where Justice Holmes had held, *inter alia*, that the Treaty Power was a plenary power under *McCulloch v. Maryland, supra*. Bond also argued more narrowly that the Act did not apply to her conduct.



The federal government conceded that it had not prosecuted anyone under the Act, except for “terrorists.” The Chief Justice concluded that Bond was not a “terrorist” and that state law was adequate to address Bond’s assault on her husband’s lover. On these facts, the Chief Justice provided a narrowing interpretation of the Act, holding that the Act “did not reach the unremarkable local offense” of an attempt by a jilted wife to injure her husband’s lover. The Roberts Court thus avoided the constitutional challenge and the plenary power issue.

The Chief Justice’s opinion was joined by the four liberal Justices and Justice Kennedy. Justice Kennedy’s “split the atom of sovereignty” theory of federalism was a prominent part of the Chief Justice’s analysis.

Three Justices concurred only in the Court’s judgment: Scalia, Thomas and Alito. All three concurrences agreed that the Congressional authority under the Treaty Power was limited to “matters of international intercourse.” According to this approach, Bond’s attempts to injure her husband’s lover were not “matters of international intercourse” and, therefore, application of the Act to Bond was outside the scope of Congressional power. Justice Scalia pointedly criticized Chief Justice Roberts’ statutory analysis.

(9) *Some Implications of Bond: Preemption Doctrine.* The last major pronouncement on the Treaty Power had been in *Missouri v. Holland*, by Justice Oliver Wendell Holmes, Jr. In deciding *Bond*, the Chief Justice may have provided a narrow interpretation of the Act, but it was intertwined with the statement of several broad “background principles.” The Chief Justice asserted that any decision about statutory interpretation must involve consideration of background principles.

One implication of *Bond* may affect the Supremacy Clause doctrine. One of the background principles related to the Supremacy Clause and the preemption doctrines. The Court declared that:

It has long been settled, for example, that we presume federal statutes do not . . . preempt state law.

There would be considerable disagreement in the caselaw with the idea that the preemption doctrine contains a “presumption against preemption.” Certainly the text of the Supremacy Clause does not contain such an anti-Supremacy presumption. *See generally* Ch. 3.01.

## CHAPTER 3

### FEDERALISM: NATIONAL POWER AS AFFECTING THE POWERS OF THE STATES

#### § 3.01 PREEMPTION OF STATE POWER BY CONGRESSIONAL ACTION: THE SUPREMACY CLAUSE

[At page 243, add the following as new Note (8):]

(8) *No “Field Preemption” of State Antitrust Laws by Natural Gas Act: Oneok, Inc. v. Learject, Inc., 135 S.Ct. 1591 (2015).* In several state jurisdictions, retail buyers of natural gas sued natural gas traders, alleging that the traders were manipulating prices by reporting false information to price indices and engaging in wash sales in violation of various state antitrust laws and the federal Natural Gas Act (NGA). The traders defended on several grounds, including the theory that the NGA preempted the state antitrust laws. The Supreme Court, per Justice Breyer, disagreed and held that the NGA did not preempt the state laws.

Justice Breyer applied the traditional analysis. The Court stated that Congress may preempt state law in three basic ways: (1) expressly; (2) implicitly through “field preemption”; or (3) implicitly through “conflict preemption”. The Court treated the case as field preemption. The Court concluded that the purposes of state antitrust laws were different than the rate-setting provisions of NGA. It was important to the Court’s analysis that the state antitrust laws were targeted broadly at all businesses and not just natural gas companies (like the NGA).

Justice Thomas concurred in part and in the judgments. Justice Scalia (for Chief Justice Roberts) dissented. Justice Scalia’s response to the majority’s reasoning was: “So what?” He rejected the majority’s approach mainly on precedential grounds.

#### § 3.02 THE NEGATIVE COMMERCE CLAUSE: RESTRICTIONS ON STATE POWER TO AFFECT INTERSTATE COMMERCE

##### [B] The Modern Standard Under the Negative Commerce Clause

##### [1] Discrimination Against Interstate Commerce

[At page 269, add the following as new Note (4):]

(4) *State Income Tax Scheme Violates Dormant Commerce Clause: Comptroller of Treasury of Maryland v. Wynne, 135 S.Ct. 1787 (2015).* Despite many decisions to the contrary, the States continue to argue that the Dormant Commerce Clause does not apply to state taxes. The *Wynne* decision again repudiates this categorical claim. The *Wynne* decision also confirms that an in-state entity can bring a Dormant Commerce Clause claim.

In *Wynne*, certain Maryland residents challenged the Maryland state income tax scheme. The Maryland income tax had two parts: a “state” part and a “county” part. Maryland residents who earned income from out-of-state sources and paid income tax in that jurisdiction could receive a credit for the non-Maryland tax paid against the “state” part, but not against the “county” part. The Wynne’s received income from a Subchapter S corporation in another state, but they were denied any credit against the county part. While the lower state courts sided with Maryland, the Supreme Court, per Justice Alito, held that Maryland’s tax scheme violated the Dormant Commerce Clause. This 5-4 decision follows the traditional Dormant Commerce Clause doctrine, but it also demonstrates the continued division on the Roberts Court.

The Court analyzed the case under the traditional two-tier model. Justice Alito recognized that the DCC doctrine protected against both “discrimination” regarding interstate commerce and against state imposition of an “undue burden” on interstate commerce. The majority concluded that the Maryland tax scheme was facially discriminatory and that it had two impermissible effects: it constituted double taxation on certain income and created an incentive to opt for *intrastate* economic activity rather than *interstate* activity. Using an historical analysis, Justice Alito also concluded that the Maryland tax scheme (denial of the credit) was a “tariff”.

There were several dissents. Justice Scalia dissented on his traditional theory that only facial discrimination (based only on precedent) should be barred. Justice Thomas dissented on his theory that the entire Dormant Commerce Clause doctrine should be abandoned. Justice Ginsburg (for Kagan and Scalia) dissented on her assessment of the actual “effects” and on theory that objecting Maryland residents should use the political process – and not the federal judiciary – to resolve any problems with the Maryland tax scheme. As in-state residents, the challengers had access to Maryland’s political process.

## CHAPTER 4

### § 4.02 THE MODERN CASES AND THE FOUR PART TEST

[At page 340, add the following as a new Note:]

(5) *Overruling Quill Corp: South Dakota v. Wayfair, 138 S. Ct. \_\_\_\_ (2018)*. In a narrowly reasoned 5-4 decision, the Court, per Justice Kennedy, overruled *Quill Corp*. The dissent by Chief Justice Roberts agreed that *Quill Corp*. was wrong, but the dissenters argued that the reliance interests deserved more weight in the *stare decisis* analysis.

The State of South Dakota’s Attorney General, Marty Jackley, and the Governor’s Office designed the case as a classic “test case”. South Dakota focused on the change in the internet retail sales market since 1992 (the time of *Quill Corp*): from \$180 million to \$453.5 billion in 2018. South Dakota also argued that removal of the “physical presence” requirement would “even the playing field” between “main street” retailers and internet giants like Amazon. The Kennedy majority accepted both arguments as sufficient justification to overrule *Quill Corp*.

Despite efforts by the federal Justice Department, the *Wayfair* Court avoided a broader doctrinal analysis. There were concurrences by Justices Thomas and Gorsuch (indicating he may follow Justice Thomas). The Chief Justice’s dissent included a discussion about “Twix” and “Snickers” candy bars that rivals his famous discussion of required eating of “broccoli” in the Affordable Care Act decision.

## CHAPTER 5

### PRESIDENTIAL POWER AND RELATED POWERS OF CONGRESS: SEPARATION OF POWERS

#### § 5.01 EXECUTIVE VERSUS LEGISLATIVE POWER

##### [B] Sources of Executive Power

[At page 351, add the following as new Note (6):]

(6) *The Return to Youngstown Sheet & Tube – the Jackson Three-Part Standard and the Frankfurter Acquiescence Theory: Zivotofsky v. Kerry, 135 S.Ct. 2076 (2015)*. You have previously examined the facts of this case regarding the “political question” doctrine. See § 1.02[B], page 102 *supra*. Now the Supreme Court addressed the substantive issues under the separation of powers doctrine. This is a classic conflict between Executive and Legislative power.

The Executive branch had exercised its “recognition power” and decided that no United States passport holder, born in Jerusalem, can list “Israel” as a place of birth. The place of birth is left blank. Presidents (of both parties) have adopted this policy to avoid controversies in the Middle East (especially between Israel and the Palestinians). In contrast, Congress passed, pursuant to its plenary powers, the Foreign Relations Authorization Act (FRAA) which would allow the passport holder to decide whether to list “Israel”. The question created by the FRAA was whether Congress could alter the Executive’s exercise of its Article II recognition power.

The Supreme Court, per Justice Kennedy, ruled in favor of the Executive’s recognition power. It was a 5-1-3 decision, with the Court “liberals” joining Justice Kennedy. Justice Thomas concurred in the judgment in part, and the other Justices dissented.

The *Zivotofsky* Court’s analysis marked a return to the use of the Jackson three-part standard. The Court concluded that the dispute fell within the third category of Congressional “disapproval” of the Executive action. Justice Kennedy stated that, for the Executive to prevail in the zone of disapproval, the Executive power must be “exclusive” and “conclusive”.

The Court decided that the recognition power was “exclusive” to the Executive. In reaching this conclusion, Justice Kennedy relied on textual, structural, historical, and precedential reasoning. (Part of the opinion was essentially an original intentionist analysis.) The Court also found a “flaw” in FRAA in that Congress had the purpose “to infringe on the President’s exclusive” power. Finally, using the *Steel Seizure* analysis from Justice Frankfurter’s concurring opinion, the Court concluded that Congress had “acquiesced” in the Executive exercise of the recognition power.

Justice Breyer concurred. The Court’s reliance on the Jackson three-part standard and the Court’s application of the standard triggered several dissents. The dissents disagreed with the Jackson three-part standard. The dissent by Chief Justice Roberts tracked the earlier criticism of the Jackson standard by former Chief Justice Rehnquist. See the *Iranian Assets* decision, *supra*

page 392. Justice Jackson, of course, was one of the New Deal Court’s legendary judicial figures. You have seen his work in *Wickard v. Fillburn* (Ch. 2) and *Barnette* (Ch. 12). Former Chief Justice Rehnquist was a law clerk to Justice Jackson (at the time of the *Steel Seizure* decision). Chief Justice Roberts was a law clerk to Justice Rehnquist.

[At page 386, add the following Note as new Note (4):]

(4) *Congressional Action to Undercut the Financial Basis of Iran-sponsored Terrorism Did Not Violate Separation of Powers: Bank Markazi v. Peterson*, 136 S.Ct 1310 (2016). As part of the response to terrorism, Congress created federal court jurisdiction for Americans seeking money damages from states that sponsor terrorism—including Iran. To assure that certain assets were available for the satisfaction of judgments, Congress passed the Iran Threat Reduction and Syria Human Rights Act of 2012 (“the Act”). Over 1,000 judgment holders sought to enforce their judgments under the Act by forcing the Bank Markazi (Iran’s Central Bank) to turnover \$1.75 billion in bond assets. The Bank resisted and argued that the Act was a Congressional usurpation of the judicial role. The Court, per Justice Ginsburg, disagreed with the Bank and held that there was no violation of separation of powers. Chief Justice Roberts (for Justice Sotomayor) dissented.

[At page 386, add the following as new Note (5):]

(5) *Realpolitcs and The Travel Ban Case: Trump v. Hawaii*, 137 S.Ct. \_\_\_\_ (2017). The Travel Ban Cases may have been the most visible cases for the public in the Term. President Trump, in the interest of protecting against terrorism, issued an Executive Order (“EO-1”) changing practices concerning entry of foreign nationals and refugees. The Order (EO-1) was enjoined, and the Trump Administration issued a second Executive Order (EO-2) which was arguably narrower and crafted to be a facially neutral and generally applicable regulation. EO-2 was again challenged by various States, groups, and individuals, generally arguing the EO-2 violated the challengers Establishment Clause, Equal Protection and Free Exercise rights. The District Courts again issued preliminary injunctions and denied the Government’s applications to stay. The Courts of Appeal affirmed. The U.S. Supreme Court, in a *per curiam* opinion, granted the Government’s applications for stays.

Three Justices (Thomas, Alito and Trump appointee Gorsuch) would have gone further and granted the stays in their entirety. The Court scheduled the cases for full review in October.

Full review will start with the proposition that the powers of the Executive are “plenary.” In this situation, the Executive is also approved by Congress. The challengers must, therefore, overcome the presumptive constitutionality of the Executive Order. They must show either a purposeful burden of the plaintiffs’ religious rights or that EO-2 is a mere pretext.

Remember: the Government only needs two more votes to win the majority.

The Court’s distinction between foreign nationals with “connections” to the United States versus foreign nationals “without connection” may prove problematic. There will be numerous challenges to the Court’s distinction.

[At page 396, add the following as Note (3):]

(3) *The Trump Administration’s Travel Ban: Trump v. Hawaii*, 138 S.Ct. \_\_\_\_ (2018).

In 2017, President Trump issued the third version of his Travel Ban (Proclamation No. 9645). The travel ban III was designed to improve vetting procedures for foreign nationals traveling to the United States. The travel ban III was much more comprehensive and nuanced than the earlier travel bans. Nevertheless, travel ban III was challenged by States and individuals as an intentional discrimination against Muslims and as impermissible discrimination under the Establishment Clause.

The travel ban III involved a comprehensive review by the State Department. Eight countries (Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela and Yemen) were subjected to the ban. Not all these countries are “Muslim.” The President consulted with multiple Cabinet members about the scope of the travel ban. The travel ban III had some exemptions and also had a “waiver” provision. The DHS was required to review the ban every 180 days. In fact, the countries of Chad, Sudan and Iraq were removed from the ban by the time it reached the Supreme Court.

The Supreme Court, per Chief Justice Roberts, used the rational basis standard of review. The Court’s five conservatives emphasized the careful and nuanced nature of travel ban III. Because the challengers would have at least three alternatives, the Court upheld the travel ban. The majority did not reach the Establishment Clause.

The four liberal Justices dissented. Justice Sotomayor’s dissent argued that the *effect* of travel ban III discriminated against Muslims. She (and Justice Breyer’s dissent) viewed the travel ban as a pretext for religious discrimination.

The Chief Justice demonstrated a careful appreciation for the facts and crafted a posture of neutrality. The majority did not give any weight to candidate Trump’s campaign rhetoric. His opinion put the challengers in the position where “effect alone is not enough.”

### **§ 5.03 FOREIGN OR EXTERNAL AFFAIRS**

#### **[A] The Treaty Power**

For treatment of *Bond v. United States*, 134 S.Ct. 2077 (2014), see Chapter 2, § 2.04[B] above.

## § 5.06 THE APPOINTMENTS POWER, POWER OVER PERSONNEL, AND NATIONAL PROPERTY POWER

### [A] The Appointments Power

[At page 413, add the following as new Note (1):]

(1) *Recess Appointments by the President: N.L.R.B. v. Noel Canning, 134 S.Ct. 2550 (2014).* The Framers of Article II were practical persons. They anticipated that the Congress would “recess” each year for several months. They also realized that, during the Congressional “recess,” the government, under the President, would need to continue to function. They provided, in an era of slow and difficult transportation, that the President could make “recess” appointments to positions that would otherwise require Senatorial approval. The Constitution also provides that neither House can recess for more than three days without the consent of the other House. Of course, much has changed since 1789. In the *Noel Canning* decision, the Court had to interpret the term “recess”, in a world far different than 1789.

Many Presidents have used recess appointments: Bill Clinton made 139; George W. Bush made 171. President Obama had made only 32 in five years, but he was the first President to make “recess” appointments (3 appointees to the National Labor Relations Board) when the Senate had announced that it was *not* going into a constitutional recess, but rather just a series of three day “breaks.” The Obama Administration argued that the 3-day breaks constituted a “recess” for purposes of the Recess Appointments Clause.

The Court, per Justice Breyer, for the Court’s liberal wing plus Justice Kennedy, rejected the President’s position. The Court further held that a Congressional “break” must be a minimum length of time (*i.e.*, ten days) to constitute a “recess.” The Court held that the President could make recess appointments both: (1) during intersession breaks; and (2) during intra-session breaks as long as the break was long enough (*i.e.*, at least ten days). On the related issue, the Court ruled that the “vacancy” could arise both before and during a “recess.” The Court held, in a narrow ruling, that the President could not do recess appointments when Congress has explicitly said that it was *not* in recess. The four conservative Justices concurred in the judgment in an opinion by Justice Scalia. The concurrences would have gone further and held that the recess appointment can only be made during the once-a-year recess between Congressional Sessions.

Even though Justice Breyer wrote the opinions, the decision relied on textual and historical analysis much like an original intentionist opinion. The textual analysis of the majority was limited, however, because the majority explicitly found that the text was “ambiguous.” See *Brown v. Board of Education, infra*, Chapter 10. Justice Breyer’s historical analysis was not the “history of the text.” Rather his was the “history of the implementation of the text” since its adoption. This type of historical analysis seems more like Justice Frankfurter’s approach in the *Steel Seizure*



decision than an original intentionist approach. The position of the Court, however, is narrower than the restriction pursued by the Court's four conservatives.

## CHAPTER 9

### DUE PROCESS: SUBSTANTIVE RIGHTS OF “PRIVACY” AND PERSONAL AUTONOMY

#### § 9.02 REPRODUCTION, ABORTION, AND SEXUAL CONDUCT

##### [E] The “Undue Burden” Standard of the *Casey* Decision

[At page 668, add the following as a new squib:]

**WHOLE WOMAN’S HEALTH V. HELLERSTEDT, 136 S.Ct. 2292 (2016).** *Hellerstedt* is the Court’s latest decision regarding the post-*Casey* “undue burden” standard. While the *Hellerstedt* decision did not directly address the contrast between *Carhart I* and *Carhart II*, the Court, per Justice Breyer, clarified the application of the undue burden standard.

##### The Facts

The State of Texas established two separate regulations on access to legal, previability abortion. One regulation was the “admitting-privileges requirement.” This regulation required that any physician performing abortions at clinic must have admitting privileges at a “hospital” within 30 miles of the clinic. Texas contended that the “admitting-privileges requirement” was justified as providing health benefits to women seeking abortions. Texas contended that access to a near- by hospital was necessary in case the out-patient woman experienced “complications” at the clinic. The second regulation was aimed at the quality of the clinic facilities. Texas law established that an abortion clinic had to satisfy the “surgical-center requirement” where such clinics had to meet standards for “ambulatory surgical centers.” Abortion clinics had not previously had to satisfy these “hospital-like” standards; it would be quite costly for a clinic to upgrade. Again the second regulation was justified as protecting women’s health.

##### The Majority: Undue Burden Analysis

The Court first examined the purported benefit of the Texas regulations: to improve the health of women seeking previability abortions. The Court agreed with the District Court that abortions in the clinics were “extremely safe” and had “very low rates of complications.” The Court concluded that the Texas requirements would not actually advance women’s health.

The Court focused on the “effect” of the two requirements. Based on the findings of fact by the District Court (after discovery and a trial), the Court concluded that the admitting privileges adversely affected the number of abortion clinics in Texas—reducing the 40 clinics to approximately 20. (The 40 clinics performed 62-70,000 legal abortions per year.) The Court then determined that the effect of the surgical-center requirement was to reduce the number of abortion clinics from 20 to 7 or 8. The Court concluded that the drastic reduction in the number of clinics would adversely affect the availability of services for the 62-70,000 thousand women seeking services. The Court also concluded that, at the level of 8, all 8 clinics would be located in large

cities. This dramatically reduced access to abortion services for “rural” women—particularly in less populated Western Texas.

Besides the geographic burden, the Court determined that access would also be adversely burdened by the cost of expanding and upgrading the permitted facilities. The Court concluded that expansion costs would average \$1.5 million and that many clinics could not afford such costs.

The Court then declared that, in the undue analysis, the State’s claimed benefits would be judicially balanced against the burdens imposed by the regulatory scheme. Under the circumstances, the Court concluded that the Texas regulations were an impermissible undue burden on the right of access to abortion services.

### The Ginsburg Concurrence

While Justice Breyer’s opinion relied on the “effects” prong of the undue burden standard, Justice Ginsburg’s concurrence relied on the “purpose” prong of the undue burden standard. Justice Ginsburg cited to various amicus briefs and asserted “In truth ‘complications from an abortion are rare and rarely dangerous.’” From this factual conclusion, Justice Ginsburg concluded that “it is beyond rational belief that [the Texas requirements] could genuinely protect the health of women . . . .” Justice Ginsburg also warned that “women in desperate circumstances may resort to unlicensed rogue practitioners . . . .” As such, she alluded to the pre-*Roe* era when illegal abortions were a national criminal racket—like illegal gambling. Justice Ginsburg had lived through the pre-*Roe* era. It should be noted that she was not joined by the other female Justices— who are considerably younger.

### The Dissents

There were three dissenters. Justice Thomas dissented on grounds of standing. He criticized the Majority for creating “special exceptions for special rights . . . .”

Justices Alito’s dissent focused on the “res judicata” (claim preclusion) argument. The dissent will appear in many Civil Procedure casebooks. Justice Breyer’s response for the majority was that “JUSTICE ALITO’s dissenting opinion is simply wrong . . . .”

### The Civil Procedure Issue

There was a threshold “civil procedure” issue before the Court addressed the substantive due process questions. The first action filed by the abortion providers was a “facial” challenge to the admitting-privilege requirement. The Courts rejected the facial challenge (because there was at least one conceivable set of facts supporting the law). The second challenge (Hellerstedt) was aimed at both requirements, and it was an “as-applied” challenge. Texas argued that the facial claim constituted res judicata (claim preclusion) regarding the second (as-applied) claim. Justice Breyer, the former Harvard law professor, presented a “lecture” on res judicata and emphatically rejected the argument.

### § 9.03 THE FAMILY

*[At page 691, add the following as new Note (2) and renumber the remaining Notes:]*

(2) *The Right to Marriage is a Fundamental Right: Obergefell v. Hodges, 135 S.Ct. 2584 (2015)*. In the *Same-Sex Marriage* decision, the Court cited to *Loving* and *Zablocki* and confirmed that, for purposes of substantive due process, the right to marriage is a fundamental right. Since marriage was an individual fundamental right, same-sex individuals could have access to civil marriage on equal terms as opposite-sex individuals. The Court, per Justice Kennedy in a 5-4 decision, struck down prohibitions on same-sex marriage in the 12 States where same-sex marriage had not been legalized by either the political process or by the judicial process.

There were four dissents by the Court’s “conservatives”: The decision, and extensive Notes, is found in Chapter 10, § 10.04[C] *infra*. You should review it there. That Section has the Court’s other “gay rights” decisions – all authored by Justice Kennedy. The Court in *Obergefell* relied on both substantive due process and equal protection rationales.

## CHAPTER 10

### EQUAL PROTECTION

#### § 10.03 THE “UPPER TIER”: STRICT SCRUTINY AND “COMPELLING” GOVERNMENTAL INTERESTS

##### [A] Race and Other “Suspect Clarifications”

##### [5] Affirmative Action: Addressing General Societal Effects by “Benign” Consideration of Race – or “Reverse Discrimination”

*[At page 808, add the following after the Gratz Notes and Questions:]*

#### **SCHUETTE v. COALITION TO DEFEND AFFIRMATIVE ACTION . . . ET AL.** 134 S.Ct. 1623 (2014)

JUSTICE KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE AND JUSTICE ALITO join.

The Court in this case must determine whether an amendment to the Constitution of the State of Michigan, approved and enacted by its voters, is invalid under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. . . .

Under the terms of the amendment, race-based preferences cannot be part of the admissions process for state universities. That particular prohibition is central to the instant case.

The ballot proposal was called Proposal 2 and, after it passed by a margin of 58 percent to 42 percent, the resulting enactment became Article I, § 26, of the Michigan Constitution. As noted, the amendment is in broad terms. Section 26 states, in relevant part, as follows:

“(1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

“(2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

“(3) For the purposes of this section ‘state’ includes, but is not necessarily limited to, the state itself, any city, county, any public

college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.”

Section 26 was challenged in two cases. Among the plaintiffs in the suits were the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN); . . .

Before the Court addresses the question presented, it is important to note what this case is not about. It is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education. The consideration of race in admissions presents complex questions, in part addressed last Term in *Fisher v. University of Texas at Austin*, 570 U.S. — (2013). In *Fisher*, the Court did not disturb the principle that the consideration of race in admissions is permissible, provided that certain conditions are met. In this case, as in *Fisher*, that principle is not challenged. The question here concerns not the permissibility of race-conscious admissions policies under the Constitution but whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions. . . .

In Michigan, the State Constitution invests independent boards of trustees with plenary authority over public universities, including admissions policies. Although the members of the boards are elected, some evidence in the record suggests they delegated authority over admissions policy to the faculty. But whether the boards or the faculty set the specific policy, Michigan’s public universities did consider race as a factor in admissions decisions before 2006. [Note that Justice Breyer’s concurrence *infra* disagrees with this position.]

In holding § 26 invalid in the context of student admissions at state universities, the Court of Appeals relied in primary part on *Seattle, supra*, which it deemed to control the case. But that determination extends *Seattle*’s holding in a case presenting quite different issues to reach a conclusion that is mistaken here. Before explaining this further, it is necessary to consider the relevant cases that preceded *Seattle* and the background against which *Seattle* itself arose. . . .

*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*. Although there had been no judicial finding of *de jure* segregation with respect to *Seattle*’s school district, it appears as though school segregation in the district in the 1940’s and 1950’s may have been the partial result of school board policies that “permitted white students to transfer out of black schools while restricting the transfer of black students into white schools.”

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. . . . It is this reading of *Seattle* that the Court of Appeals found to be controlling here. And that reading must be rejected. . . .

By approving Proposal 2 and thereby adding § 26 to their State Constitution, the Michigan voters exercised their privilege to enact laws as a basic exercise of their democratic power. In the federal system States “respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times.” *Bond*, 564 U.S., at ——. Michigan voters used the initiative system to bypass public officials who were deemed not responsive to the concerns of a majority of the voters with respect to a policy of granting race-based preferences that raises difficult and delicate issues.

The freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power. The mandate for segregated schools, *Brown v. Board of Education*, 347 U.S. 483 (1954); a wrongful invasion of the home, *Silverman v. United States*, 365 U.S. 505 (1961); or punishing a protester whose views offend others, *Texas v. Johnson*, 491 U.S. 397 (1989); and scores of other examples teach that individual liberty has constitutional protection, and that liberty’s full extent and meaning may remain yet to be discovered and affirmed. Yet freedom does not stop with individual rights. Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure. Here Michigan voters acted in concert and statewide to seek consensus and adopt a policy on a difficult subject against a historical background of race in America that has been a source of tragedy and persisting injustice. That history demands that we continue to learn, to listen, and to remain open to new approaches if we are to aspire always to a constitutional order in which all persons are treated with fairness and equal dignity. Were the Court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the electorate; or that the policies at issue remain too delicate to be resolved save by university officials or faculties, acting at some remove from immediate public scrutiny and control; or that these matters are so arcane that the electorate’s power must be limited because the people cannot prudently exercise that power even after a full debate, that holding would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common. It is the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process.

The respondents in this case insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate in an election campaign. Quite in addition to the serious First Amendment implications of that position with respect to any particular election, it is inconsistent with the underlying premises of a responsible, functioning democracy. One of those premises is that a democracy has the capacity—and the duty—to learn from its past mistakes; to discover and confront persisting biases; and by respectful, rationale deliberation to rise above those flaws and injustices. That process is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues. 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. The process of public discourse and political debate should not be foreclosed even if there is a risk that during a public campaign there will be those, on both sides, who seek to use racial division and discord to their own political advantage. An informed public can, and must, rise above this. The idea of democracy is that it can, and must, mature. Freedom embraces the right, indeed the

duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people. These First Amendment dynamics would be disserved if this Court were to say that the question here at issue is beyond the capacity of the voters to debate and then to determine. . . .

This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters. Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters' reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate.

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

*It is so ordered.*

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

CHIEF JUSTICE ROBERTS, concurring. . . .

The dissent states that “[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race.” And it urges that “[r]ace matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: ‘I do not belong here.’ ” But it is not “out of touch with reality” to conclude that racial preferences may themselves have the debilitating effect of reinforcing precisely that doubt, and—if so—that the preferences do more harm than good. To disagree with the dissent's views on the costs and benefits of racial preferences is not to “wish away, rather than confront” racial inequality. People can disagree in good faith on this issue, but it similarly does more harm than good to question the openness and candor of those on either side of the debate.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

It has come to this. Called upon to explore the jurisprudential twilight zone between two errant lines of precedent, we confront a frighteningly bizarre question: Does the Equal Protection Clause of the Fourteenth Amendment *forbid* what its text plainly *requires*? Needless to say (except that this case obliges us to say it), the question answers itself. “The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.” *Grutter v. Bollinger*, 539 U.S. 306 (2003) (SCALIA, J., concurring in part and dissenting in part). It is precisely this understanding—the correct understanding—of the federal Equal Protection Clause that the people of the State of Michigan have adopted for their own fundamental law. By adopting it, they did not simultaneously *offend* it. . . .



## B

Patently atextual, unadministrable, and contrary to our traditional equal-protection jurisprudence, *Hunter* and *Seattle* should be overruled. . . .

## C

Moving from the appalling to the absurd, I turn now to the second part of the *Hunter–Seattle* analysis—which is apparently no more administrable than the first, compare *post*, at 1650 – 1651 (BREYER, J., concurring in judgment) (“This case ... does not involve a reordering of the political process”), with *post*, at 1664 – 1667 (SOTOMAYOR, J., dissenting) (yes, it does). This part of the inquiry directs a court to determine whether the challenged act “place[s] effective decisionmaking authority over [the] racial issue at a different level of government.” *Seattle*, 458 U.S., at 474. The laws in both *Hunter* and *Seattle* were thought to fail this test. In both cases, “the effect of the challenged action was to redraw decisionmaking authority over racial matters—and only over racial matters—in such a way as to place comparative burdens on minorities.” This, we said, a State may not do. . . .

## II

I part ways with *Hunter*, *Seattle*, and (I think) the plurality for an additional reason: Each endorses a version of the proposition 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. . . .

Thus, the question in this case, as in every case in which neutral state action is said to deny equal protection on account of race, is whether the action reflects a racially discriminatory purpose. *Seattle* stresses that “singling out the political processes affecting racial issues for uniquely disadvantageous treatment inevitably raises dangers of impermissible motivation.” True enough, but that motivation must be proved. . . .

\* \* \*

As Justice Harlan observed over a century ago, “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.” *Plessy v. Ferguson*, 163 U.S. 537 (1896) (dissenting opinion). The people of Michigan wish the same for their governing charter. It would be shameful for us to stand in their way.

JUSTICE BREYER, concurring in the judgment.

Michigan has amended its Constitution to forbid state universities and colleges to “discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” Mich. Const., Art. I, § 26. We here focus on the prohibition of “grant[ing] ... preferential treatment ... on the basis of race ... in ... public education.” I agree with

the plurality that the amendment is consistent with the Federal Equal Protection Clause. U.S. Const., Amdt. 14. But I believe this for different reasons. . . .

The Constitution allows local, state, and national communities to adopt narrowly tailored race-conscious programs designed to bring about greater inclusion and diversity. But the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates about the merits of these programs. . . .

This case, in contrast, does not involve a reordering of the *political* process; it does not in fact involve the movement of decisionmaking from one political level to another. . . . The amendment took decisionmaking authority away from these unelected actors and placed it in the hands of the voters. . . .

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

We are fortunate to live in a democratic society. But without checks, democratically approved legislation can oppress minority groups. For that reason, our Constitution places limits on what a majority of the people may do. This case implicates one such limit: the guarantee of equal protection of the laws. Although that guarantee is traditionally understood to prohibit intentional discrimination under existing laws, equal protection does not end there. Another fundamental strand of our equal protection jurisprudence focuses on process, securing to all citizens the right to participate meaningfully and equally in self-government. That right is the bedrock of our democracy, for it preserves all other rights.

Yet to know the history of our Nation is to understand its long and lamentable record of stymieing the right of racial minorities to participate in the political process. At first, the majority acted with an open, invidious purpose. Notwithstanding the command of the Fifteenth Amendment, certain States shut racial minorities out of the political process altogether by withholding the right to vote. This Court intervened to preserve that right. The majority tried again, replacing outright bans on voting with literacy tests, good character requirements, poll taxes, and gerrymandering. The Court was not fooled; it invalidated those measures, too. The majority persisted. This time, although it allowed the minority access to the political process, the majority changed the ground rules of the process so as to make it more difficult for the minority, and the minority alone, to obtain policies designed to foster racial integration. Although these political restructurings may not have been discriminatory in purpose, the Court reaffirmed the right of minority members of our society to participate meaningfully and equally in the political process. .

..

## I

For much of its history, our Nation has denied to many of its citizens the right to participate meaningfully and equally in its politics. This is a history we strive to put behind us. But it is a history that still informs the society we live in, and so it is one we must address with candor. Because the political-process doctrine is best understood against the backdrop of this history, I will briefly trace its course. . . .

1

Section 26 has a “racial focus.” *Seattle*. That is clear from its text, which prohibits Michigan’s public colleges and universities from “grant[ing] preferential treatment to any individual or group on the basis of race.” . . .

2

Section 26 restructures the political process in Michigan in a manner that places unique burdens on racial minorities. It establishes a distinct and more burdensome political process for the enactment of admissions plans that consider racial diversity. . . .

IV

My colleagues claim that the political-process doctrine is unadministrable and contrary to our more recent equal protection precedents. See *ante*, at 1644 – 1647 (plurality opinion); *ante*, at 1642 – 1648 (SCALIA, J., concurring in judgment). It is only by not acknowledging certain strands of our jurisprudence that they can reach such a conclusion.

A

. . .

Race matters. Race matters in part because of the long history of racial minorities’ being denied access to the political process. See Part I, *supra* ; see also *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (describing racial discrimination in voting as “an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution”). And although we have made great strides, “voting discrimination still exists; no one doubts that.” *Shelby County*, 570 U.S., at \_\_\_\_.

Race also matters because of persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities. . . .

And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a young man’s view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman’s sense of self when she states her hometown, and then is pressed, “No, where are you *really* from?”, regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: “I do not belong here.”

In my colleagues’ view, examining the racial impact of legislation only perpetuates racial

discrimination. This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race *does* matter. . . .

I respectfully dissent.

## NOTES AND QUESTIONS

(1) *The “Colorblindness” Michigan Case: Schuette v. BAMN, 134 S.Ct. 1623 (2014)*. In the *Grutter v. Gratz* decisions, *supra*, the Court confirmed that the governing standard for a state university admissions system that used racial preferences would be “strict scrutiny.” The *Grutter/Gratz* companion cases held that “educational diversity” would be considered a compelling state interest for purposes of strict scrutiny. In *Gratz*, the University of Michigan’s undergraduate college failed the least restrictive means prong of strict scrutiny. In *Grutter*, The Michigan Law School’s admissions program – which featured individualized review of every applicant and used race in a non-determinative fashion – survived the means prong.

In response to *Grutter* and *Gratz*, opponents of affirmative action (racial preferences) sponsored a state constitutional amendment (§ 26) that required public university admissions be race-neutral (or “colorblind”). Other states (*e.g.*, California) had passed similar state law provisions. The colorblind amendment won 58 to 42 percent.

The opponents of § 26 filed an action, alleging that § 26 violated the federal Equal Protection Clause. Although the court of appeals had ruled for the opponents of § 26, the Supreme Court, per Justice Kennedy, reversed. Justice Kennedy said that the issue here was whether and under what conditions the voters of Michigan could prohibit the use of racial preferences in state government decisionmaking, including public university federal admissions. The Court reinterpreted certain precedents (the “political process” cases) and ruled that the people’s vote did not violate equal protection.

The Kennedy plurality was joined by concurrences by Justice Scalia and Chief Justice Roberts. Justice Scalia argued that § 26, which was facially racially neutral, could not violate equal protection unless the challengers (opponents of § 26) proved that it was purposeful discrimination under *Washington v. Davis, supra*. Another concurrence by one of the Court’s liberals, Justice Breyer, approached from a narrower perspective, but Justice Breyer argued that, under these circumstances, the electoral results of the political process did not violate equal protection doctrine.

(2) *Justice Sotomayor’s Dissent*. The other two participating liberal Justices, in a long dissent by Justice Sotomayor, pursued two basic theories. First, the dissent contended that § 26 was “intentional” or purposeful discrimination against racial minorities. The dissent, second, argued that the Court should look at the “effect” of § 26 and not just its “purpose.” Generally, the dissent would have recognized that the “effect” of putting the ban on racial preferences in the state

constitution created a “double” burden on political participation by minorities (in favor of racial preferences) and that such a double burden constituted a denial of equal protection. The Justices in the majority rejected this argument partly because, under *Washington v. Davis*, effect alone is not enough to constitute a “denial” of equal protection.

Justice Sotomayor’s analysis starts from a fundamentally divergent approach than that of the majority. As she says, she is reflecting the concern of “members of historically marginalized groups which rely on the federal courts to protect their constitutional rights” . . . against majoritarian suppression. In contrast, the Court’s majority reflects the premise that, in the democracy, the majority rules. The Court’s majority does not presume that the political majority is repressive, at least when the majority regulates in a facially neutral, general applicable manner. The Court’s majority will not presume that the political majority’s adoption of a “colorblind” approach to admissions in public universities is a violation of the Equal Protection Clause. The majority adopts a notion of “participatory” democracy. The majority seems to give the voters credit for being capable of resolving highly controversial issues – including race relations – in a democratic exchange.

[At page 810, add the following to Notes as new Note (3):]

(3) *The Fisher Decision on Remand: Fisher v. University of Texas, 136 S.Ct 2198 (2016)* (“*Fisher II*”). The *Fisher I* Court remanded to determine if the University’s use of a “Personal Achievement Index” (“PAI”) satisfied the narrow tailoring means prong of strict scrutiny. The PAI was a holistic review of numerous non-academic factors including race. The University applied it to only 25% of the entering freshman class because of the racially-neutral State Top Ten Percent law that governed admissions. In a 4-3 decision, the Court, per Justice Kennedy, held that the University’s PAI program satisfied the means prong of strict scrutiny.

The *Fisher II* Court confirmed, from *Grutter* and *Fisher I*, that “the educational benefits that flow from student body diversity” was a compelling governmental interest. In the Court’s means prong analysis, the facts were important to the majority. The Court emphasized that the University had carefully studied the diversity issues created by *Grutter* and *Gratz* for over a year and prepared a 39-page report regarding the PAI and admissions program. The Court also emphasized: (1) that the PAI was used only in a “small portion” of admissions; and (2) that none of the race-neutral alternatives proposed by the challengers were “workable.” Under these facts, the Court concluded that the PAI satisfied the narrow tailoring prong.

Justice Thomas and Justice Alito (for C.J. Roberts) dissented. The dissenters disagreed about whether PAI satisfied the means analysis. The dissenters appear to be calling for the overruling of *Grutter* or at least the abandonment of “educational diversity” as a compelling interest.

As of 2016, the standard for diversity programs that use a racial preference remains strict scrutiny. “Educational diversity” (from *Grutter, supra*) remains a compelling state interest. (As you saw in *Bakke*, there are other compelling interests.) The means prong of strict scrutiny requires the state to carefully and narrowly tailor its programs and to demonstrate that race-

neutral means are not available.

**[B] Fundamental Rights**

**[1] The Right to Vote**

**[b] Voting Apportionment: “One Person, One Vote”**

*[At page 842, add the following as new Note (6) after Davis:]*

(6) *Redistricting with “Total Population:”* *Evenwood v. Abbott*, 136 S.Ct. 1120 (2016). This is the Court’s latest ruling on “the one-person, one-vote principle” of the Equal Protection doctrine. Texas, like all other states, establishes its legislative districts on the basis of “total population.” “Total population” means the full population (including non-voters) and not the narrower set of persons which would be the “voter-eligible population.” When Texas used the total population concept for the senate districts, it was sued by Texas voters who contended that the total population concept devalued their votes compared to other Texas senate districts. The challengers argued for the use of the voter-eligible population concept.

The Supreme Court, per Justice Ginsburg, ruled in favor of Texas and confirmed that the use of the total population concept. The Court relied on: (1) historical analysis (both from the drafting of Article I in 1787 and from the Fourteenth Amendment); (2) precedential analysis; and (3) policy (factual) analysis. The Court reasoned that elected representatives must represent the total population of a district and not just the registered voters and voter-eligible persons. Justices Thomas and Alito filed opinions concurring in the judgment.

Although it was not an issue in *Evenwood*, the Court addressed the “permitted variance” issue that was addressed in several redistricting cases, *supra*. Justice Ginsburg stated that some variation—approximately 10%—is permitted.

**§ 10.04 THE “MIDDLE TIER”: SHIFTING AREAS OF GREATER-THAN-NORMAL (BUT NOT FUNDAMENTAL) PROTECTION**

**[C] Sexual Orientation: The Arguments of Gays, Lesbians and Others**

*[At page 894, add the following as a Major Decision with Notes and Questions:]*

**OBERGEFELL V. HODGES**  
135 S.Ct. 584 (2015)

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. . . .

The petitioners sought certiorari. This Court granted review, limited to two questions. The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio, Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

## 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. . . .

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. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. 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.” App. in No. 14–556 etc., p. 38. He brought suit to be shown as the surviving spouse on Arthur’s death certificate. . . .

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. . . .

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. See Brief for Organization of American Historians as *Amicus Curiae* 5–28.

For much of the 20th century, moreover, homosexuality was treated as an illness. . . .

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers v. Hardwick* (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer v. Evans* (1996), the Court invalidated an amendment to Colorado’s Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers*, holding that laws making same-sex intimacy a crime “demea[n] the lives of homosexual persons.” *Lawrence v. Texas*.

Against this background, the legal question of same-sex marriage arose. 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. 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), 110 Stat. 2419, defining marriage for all federal-law purposes as “only a legal union between one man and one woman as husband and wife.” 1 U.S.C. § 7. . . .

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. See Office of the Atty. Gen. of Maryland, *The State of Marriage Equality in America, State-by-State Supp.* (2015).

### 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. See *Duncan v. Louisiana*, 391 U.S. 145 (1968). 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*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (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 (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. See *ibid.* 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, supra*, 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 (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 (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 (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. See *Lawrence, supra*, at 574. 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." *Zablocki, supra*, at 386.

Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." *Goodridge*, 440 Mass., at 322, 798 N.E.2d, at 955.

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. See *Windsor*. 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. Cf. *Loving, supra*.

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. . . .

And in *Turner*, the Court again acknowledged the intimate association protected by this right, holding prisoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. See 482 U.S., at 95–

96. The right to marry thus dignifies couples who “wish to define themselves by their commitment to each other.” *Windsor, supra*. Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

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.” 539 U.S., at 567. 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. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); . . . The Court has recognized these connections by describing the varied rights as a unified whole: “[T]he right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.” *Zablocki*, 434 U.S., at 384. 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, supra*. Marriage also affords the permanency and stability important to children’s best interests. See Brief for Scholars of the Constitutional Rights of Children as *Amici Curiae* 22–27.

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. See Brief for Gary J. Gates as *Amicus Curiae* 4. 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, see *id.*, at 5. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families. . . .

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. See Brief for United States as *Amicus Curiae* 6–9; Brief for American Bar

Association as *Amicus Curiae* 8–29. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. See *Windsor*. 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 (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.” Brief for Respondent in No. 14–556, p. 8. *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. See also *Glucksberg* (Souter, J., concurring in judgment); *id.* (BREYER, J., concurring in judgments).

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. [The Court here rejects original intentionism.] 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. . . . The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions. . . .

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. . . . 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.

In *Lawrence* the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. See *ibid.* *Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State "cannot demean their existence or control their destiny by making their private sexual conduct a crime."

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. See *DeBoer*, 772 F.3d, at 409.

Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. See Appendix A, *infra*. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 *amici* make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic principle in *Schuette v. BAMN*, 572 U.S. — (2014) noting the “right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times.” *Id.* Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as *Schuette* also said, “[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power.” *Id.* Thus, when the rights of persons are violated, “the Constitution requires redress by the courts,” notwithstanding the more general value of democratic decisionmaking. *Id.* This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

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.” *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943). This is why “fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.” *Ibid.* 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. . . . 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. The petitioners’ stories make clear the urgency of the issue they present to the Court. . . .

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. . . .

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. . . .

## V

...

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. See Tr. of Oral Arg. on Question 2, p. 44. 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.

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.

*It is so ordered.*

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?

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution “is made for



people of fundamentally differing views.” *Lochner v. New York*, 198 U.S. 45 (1905) (Holmes, J., dissenting). Accordingly, “courts are not concerned with the wisdom or policy of legislation.” *Id.*, at 69 (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own “understanding of what freedom is and must become.” I have no choice but to dissent.

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”? . . .

## A

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbians. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. See G. Quale, *A History of Marriage Systems* 2 (1988); cf. M. Cicero, *De Officiis* 57 (W. Miller transl. 1913). . . .

The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child’s prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond. . . .

The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with “[t]he whole subject of the domestic relations of husband and wife.” *Windsor*, 570 U.S., at —, 133 S.Ct., at 2691. . . .

As the majority notes, some aspects of marriage have changed over time. Arranged marriages have largely given way to pairings based on romantic love. States have replaced coverture, the doctrine by which a married man and woman became a single legal entity, with laws

that respect each participant’s separate status. Racial restrictions on marriage, which “arose as an incident to slavery” to promote “White Supremacy,” were repealed by many States and ultimately struck down by this Court. *Loving*, 388 U.S., at 6–7.

The majority observes that these developments “were not mere superficial changes” in marriage, but rather “worked deep transformations in its structure.” They did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. . .

## B

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. See Tr. of Oral Arg. on Question 1, at 38–39. 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.

## A

Petitioners’ “fundamental right” claim falls into the most sensitive category of constitutional adjudication. Petitioners do not contend that their States’ marriage laws violate an *enumerated* constitutional right, such as the freedom of speech protected by the First Amendment. There is, after all, no “Companionship and Understanding” or “Nobility and Dignity” Clause in the Constitution. They argue instead that the laws violate a right *implied* by the Fourteenth Amendment’s requirement that “liberty” may not be deprived without “due process of law.”

This Court has interpreted the Due Process Clause to include a “substantive” component that protects certain liberty interests against state deprivation “no matter what process is provided.” *Reno v. Flores*, 507 U.S. 292 (1993). The theory is that some liberties are “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” and therefore cannot be deprived without compelling justification. *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

Allowing unelected federal judges to select which unenumerated rights rank as “fundamental”—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges “exercise the utmost care” in identifying implied fundamental rights, “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.” *Washington v. Glucksberg*, 521 U.S. 702 (1997) (internal quotation marks omitted); see Kennedy, *Unenumerated Rights and the Dictates of Judicial Restraint* 13 (1986) (Address at Stanford) (“One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system.”). . . .

*Dred Scott*’s holding was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox, but its approach to the Due Process Clause reappeared. In a series of early 20th-century cases, most prominently *Lochner v. New York*, this Court invalidated state statutes that presented “meddlesome interferences with the rights of the individual,” and “undue interference with liberty of person and freedom of contract.” . . .

Proper reliance on history and tradition of course requires looking beyond the individual law being challenged, so that every restriction on liberty does not supply its own constitutional justification. The Court is right about that. But given the few “guideposts for responsible decisionmaking in this uncharted area,” *Collins*, 503 U.S., at 125, 112 S.Ct. 1061, “an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula,” *Moore*, 431 U.S., at 504, n. 12 (plurality opinion). . . .

## B

The majority acknowledges none of this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*.

### 1

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. . . .

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. . . .

2

. . .

Neither *Lawrence* nor any other precedent in the privacy line of cases supports the right that petitioners assert here. Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is “condemned to live in loneliness” by the laws challenged in these cases—no one. At the same time, the laws in no way interfere with the “right to be let alone.” . . .

In sum, the privacy cases provide no support for the majority’s position, because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State. See *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 (1989); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973). Thus, although the right to privacy recognized by our precedents certainly plays a role in protecting the intimate conduct of same-sex couples, it provides no affirmative right to redefine marriage and no basis for striking down the laws at issue here.

3

Perhaps recognizing how little support it can derive from precedent, the majority goes out of its way to jettison the “careful” approach to implied fundamental rights taken by this Court in *Glucksberg*. It is revealing that the majority’s position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process. At least this part of the majority opinion has the virtue of candor. Nobody could rightly accuse the majority of taking a careful approach. . . .

It is striking how much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If “[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,” why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would otherwise “suffer the stigma of knowing their families are somehow lesser,” why wouldn’t the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry “serves to disrespect and subordinate” gay and lesbian couples, why wouldn’t the same “imposition of this disability,” serve to disrespect and subordinate people who find fulfillment in polyamorous relationships? See Otter, Three May Not

Be a Crowd: The Case for a Constitutional Right to Plural Marriage, 64 Emory L.J. 1977 (2015).

I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But if there are, petitioners have not pointed to any. When asked about a plural marital union at oral argument, petitioners asserted that a State “doesn’t have such an institution.” Tr. of Oral Arg. on Question 2, p. 6. But that is exactly the point: the States at issue here do not have an institution of same-sex marriage, either. . . .

#### 4

The majority’s understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country’s entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now. I agree with the majority that the “nature of injustice is that we may not always see it in our own times.” As petitioners put it, “times can blind.” Tr. of Oral Arg. on Question 1, at 9, 10. But to blind yourself to history is both prideful and unwise. “The past is never dead. It’s not even past.” W. Faulkner, *Requiem for a Nun* 92 (1951).’

### 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. . . .

### IV

. . .

Those who founded our country would not recognize the majority’s conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. And they certainly would not have been satisfied by a system empowering judges to override policy judgments so long as they do so after “a quite extensive discussion.” In our democracy, debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will. “Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unresolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution.” Rehnquist, *The Notion of a Living Constitution*, 54 Texas L. Rev. 693, 700 (1976). As a plurality

of this Court explained just last year, “It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.” *Schuette v. BAMN*, . . .

But today the Court puts a stop to all that. By deciding this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. As a thoughtful commentator observed about another issue, “The political process was moving . . ., not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.” Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 385–386 (1985) (footnote omitted). Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs. . . .

In the face of all this, a much different view of the Court’s role is possible. That view is more modest and restrained. It is more skeptical that the legal abilities of judges also reflect insight into moral and philosophical issues. It is more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment. It is more attuned to the lessons of history, and what it has meant for the country and Court when Justices have exceeded their proper bounds. And it is less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition. . . .

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

. . .

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

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 nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality.” (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, *is* a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.) Rights, we are told, can “rise ... from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.” (Huh? How can a better informed understanding of how constitutional imperatives [whatever

that means] define [whatever that means] an urgent liberty [never mind], give birth to a right?) And we are told that, “[i]n any particular case,” either the Equal Protection or Due Process Clause “may be thought to capture the essence of [a] right in a more accurate and comprehensive way,” than the other, “even as the two Clauses may converge in the identification and definition of the right.” (What say? What possible “essence” does substantive due process “capture” in an “accurate and comprehensive way”? It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court *really* dislikes. Hardly a distillation of essence. If the opinion is correct that the two clauses “converge in the identification and definition of [a] right,” that is only because the majority’s likes and dislikes are predictably compatible.) I could go on. 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. . . .

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. The Framers created our Constitution to preserve that understanding of liberty. Yet the majority invokes our Constitution in the name of a “liberty” that the Framers would not have recognized, to the detriment of the liberty they sought to protect. Along the way, it rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic. I cannot agree with it. . . .

## II

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. . . .

## 2

Even assuming that the “liberty” in those Clauses encompasses something more than freedom from physical restraint, it would not include the types of rights claimed by the majority. In the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement. . . .

## B

Whether we define “liberty” as locomotion or freedom from governmental action more



broadly, petitioners have in no way been deprived of it. . . .

### III

The majority’s inversion of the original meaning of liberty will likely cause collateral damage to other aspects of our constitutional order that protect liberty.

#### A

The majority apparently disregards the political process as a protection for liberty. Although men, in forming a civil society, “give up all the power necessary to the ends for which they unite into society, to the majority of the community,” Locke § 99, at 49, they reserve the authority to exercise natural liberty within the bounds of laws established by that society, *id.*, § 22, at 13; see also Hey §§ 52, 54, at 30–32. . . .

#### B

Aside from undermining the political processes that protect our liberty, the majority’s decision threatens the religious liberty our Nation has long sought to protect. . . .

### IV

Perhaps recognizing that these cases do not actually involve liberty as it has been understood, the majority goes to great lengths to assert that its decision will advance the “dignity” of same-sex couples. The flaw in that reasoning, of course, is that the Constitution contains no “dignity” Clause, and even if it did, the government would be incapable of bestowing dignity. . . . 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.<sup>1</sup> 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.

### I

The Constitution says nothing about a right to same-sex marriage, but the Court holds that the term “liberty” in the Due Process Clause of the Fourteenth Amendment encompasses this right. Our Nation was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings. For classical liberals, it may include economic rights now limited by government regulation. For social democrats, it may include the right to a variety of government benefits. For today’s majority, it has a distinctively postmodern meaning.

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*, 521 U.S. 702 (1997). And it is beyond dispute that the right to same-sex marriage is not among those rights. . . .

For today's majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.

## II

Attempting to circumvent the problem presented by the newness of the right found in these cases, the majority claims that the issue is the right to equal treatment. Noting that marriage is a fundamental right, the majority argues that a State has no valid reason for denying that right to same-sex couples. This reasoning is dependent upon a particular understanding of the purpose of civil marriage. Although the Court expresses the point in loftier terms, its argument is that the fundamental purpose of marriage is to promote the well-being of those who choose to marry. Marriage provides emotional fulfillment and the promise of support in times of need. And by benefiting persons who choose to wed, marriage indirectly benefits society because persons who live in stable, fulfilling, and supportive relationships make better citizens. It is for these reasons, the argument goes, that States encourage and formalize marriage, confer special benefits on married persons, and also impose some special obligations. This understanding of the States' reasons for recognizing marriage enables the majority to argue that same-sex marriage serves the States' objectives in the same way as opposite-sex marriage.

This understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate. . . .

If this traditional understanding of the purpose of marriage does not ring true to all ears today, that is probably because the tie between marriage and procreation has frayed. Today, for instance, more than 40% of all children in this country are born to unmarried women. This development undoubtedly is both a cause and a result of changes in our society's understanding of marriage. . . .

## III

Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage. The decision will also have other important consequences.

It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent. . . .

Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed. A lesson that some will take from today's decision is that preaching about

the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means. I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation. . . .

## NOTES AND QUESTIONS

(1) *The Same-Sex Marriage Decision: Obergefell v. Hodges, 135 S.Ct. 2584 (2015)*. This decision involved four consolidated lower court decisions. In each case, same-sex couples had challenged state laws (often voter-approved) that prohibited same-sex marriage. At the time of the decision, 38 States had legalized same-sex marriage. In most of them, the decision had been made by the judicial process. The “political process” had legalized same-sex marriage in 12 of the States (*e.g.*, Minnesota) and the District of Columbia.

The States argued that they were the traditional and “superior” decision-makers (rather than the federal courts) and that the decision should be made by the political process (*i.e.*, politically accountable decision-makers) rather than lifetime tenured federal Judges. The Supreme Court rejected these State arguments in a controversial 5-4 decision. Justice Kennedy, writing his fourth “gay rights” decision, wrote for the Court, and he was joined by the Court’s so-called “liberals” (Ginsburg, Breyer, Sotomayor, and Kagan). Justice Roberts, Scalia, Thomas, and Alito dissented, and each filed a dissent.

The Court held that the right to marry was a fundamental “liberty” right protected under both the Due Process and Equal Protection Clauses. The Court then held that same-sex couples were holders of this fundamental right, and that the States could not justify depriving them of same-sex marriage. Finally, the Court held that States must recognize lawful same-sex marriages established in other States. (This was important to various government licenses and programs.)

(2) *The Fundamental Rights Analysis of the Court’s Decision*. For many years, the doctrinal debate about same-sex marriage focused on whether the Court would use the “suspect clause” theory from Equal Protection (Chapter 10) or the “fundamental rights” approach of Substantive Due Process (Chapter 9). Although his opinion drew on both, Justice Kennedy relied primarily on fundamental rights analysis under Substantive Due Process. The rest of this Note will outline the Court’s analysis. [At this point, you may want to review various materials in Chapter 9.]

The Court rejected both dimensions of the States’ argument. The Court held that the Due Process Clause protected fundamental “liberties” and that these liberties extended to “certain personal choices central” to individual “dignity” and “autonomy,” that define personal identity and beliefs. Using this standard, the Court held that marriage was a fundamental right and that individuals desiring a same-sex marriage were holders of that fundamental right.

The Court’s reasoning also relied on what it considered to be the constitutional rights of the children of same-sex couples. The need to protect the children contributed to the Court’s decision to consider the same-sex couple to have a fundamental right.

In response to the States' argument that the resolution of the same-sex marriage controversy should be left to the political process, the Court relied on the famous explanation by Justice Robert Jackson in the iconic *Barnette* decision: "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." The Court concluded that the same-sex marriage issue, as a fundamental right, would be addressed by the Court – and not solely by the political process. The Jackson opinion is commonly understood to represent a theory of fundamental rights that focuses on the inadequacies of the majoritarian political process. Justice Jackson's general standard is the theory that the majoritarian political process is not constitutionally competent to make certain decisions – such as a person's religious belief (in *Barnette*).

(3) *The Obergefell Dissents*. Chief Justice Roberts dissent would have tracked the position of the States: there is no fundamental right to same-sex marriage and the State political process are the only proper place to change such a traditional and historical matter such as marriage. The Chief Justice announced that "The majority's decision is an act of will, not legal judgment." He also labeled the five Justices in the majority as "five lawyers who happen to hold commissions. . . ." [Remember: Marbury sued for his "commission."] The Chief Justice asserted that the majority was *Lochnerizing*. His opinion also raised the issue of "plural marriage". The Chief Justice, a well-regarded appellate lawyer, even cited to an article by Justice Ginsburg and a speech by Justice Kennedy.

Justice Scalia did not write as long an opinion as the Chief Justice. Justice Scalia had dissented in all three prior gay rights decisions. He had repeatedly "warned" in those cases that "gay marriage is coming". Justice Scalia contended that the majority opinion was a "threat to American democracy" because five Justices had substituted their views for the views of the majorities in various States. Justice Scalia presented the biographical data about the current 9 Justices – clearly suggesting all were part of a social elite that was not representative of the American public.

Justice Thomas dissented based on original intentionalism. He criticized the majority's reasoning for relying on a non-existent "Dignity" Clause.

Justice Alito's dissent focused on the threat to democratic decision-making from the majority's invention of a "new right". Justice Alito relied on sociological data that demonstrates that marriage in America has generally declined from its traditional status: fewer people get married and marriage is not the context for procreation. Justice Alito argued that this general decline contributed to the same-sex marriage movement. Should the Justices rely on such data? *See Brown v. Bd. of Education, supra*. He did not doubt the sincerity of the majority, but Justice Alito argued that the majority represented "a deep and perhaps irremedial corruption" of constitutional interpretation.

## CHAPTER 11

### SPEECH, PRESS, AND ASSOCIATION

#### § 11.03 SOME GENERAL PRINCIPLES: THE TWO-TRACK SYSTEM

##### [A] “Track One” and “Track Two” Analysis: Content-Based Regulation Versus Content-Neutral Regulation

[At page 948, add the following as new Note (4):]

(4) *Reaffirming the Two Track System: Reed v. Town of Gilbert, AZ, 135 S.Ct. 2218 (2015)*. The Town of Gilbert, like many municipalities, had an ordinance regulating the placement and display of signage. The Town distinguished between three subject matters of signs: (1) “ideological”; (2) “political”; and “temporary directional”. The restrictions on directional signs were greater (more burdensome) than the restrictions on political or ideological signs. A minister and his Church seeking to place directional signs for their religious services challenged the Town’s ordinance contending that the ordinance was content-based. The Town defended basically arguing that the signage ordinance was a content-neutral time, place and manner regulation. While the lower courts agreed with the Town, the Supreme Court, per Justice Thomas, ruled for the challengers.

The Court held that the ordinance was content-based and that, as a content-based regulation, the applicable standard was strict scrutiny. The Court further held that the Town could not satisfy strict scrutiny. The Court held that the ordinance was underinclusive and thereby failed the means prong of strict scrutiny. The Court reaffirmed the Two Track analysis. There were several concurrences.

On the critical issue of content-neutrality, the Town argued that the ordinance was content-neutral because it was a “subject matter” regulation (rather than a “viewpoint” regulation). The Court held, following *Mosley, supra*, that subject matter regulations are content-based (Track One) regulations. The Town also argued for content-neutrality on the ground that the ordinance was “speaker-based”. The Court held that a regulation based on the identity of the “speaker” was a content-based (Track One) restriction (subject to strict scrutiny). The Court also held that Track One regulations are not limited only to regulations that are *facially* content-based.

[At page 948, add the following as new Note (5):]

(5) *“The Slants” Rock the World of Offensive Speech: Matal v. Tam, 137 S.Ct. \_\_\_\_\_ (2017)*. The Roberts Court delivered a major decision regarding “offensive speech” and, probably, “hate speech.” Simon Tam was the lead singer of a rock group and a person of Asian heritage. Tam’s rock group was called “The Slants.” Although the term “Slants” is a term that is offensive to many people, Tam chose the term as an effort to “reclaim” it and to drain it of denigrating force.

Tam sought to register the term as a federal trademark. The Government rejected the

trademark under the Disparagement Clause, 15 U.S.C. § 1052(a), because it was offensive. Tam contested the denial. The Federal Circuit found that the Disparagement Clause was facially unconstitutional, and the U.S. Supreme Court, per Justice Alito, unanimously affirmed. Justice Kennedy (for Ginsberg, Sotomayor, and Kagan) concurred in part and in the judgment. Justice Thomas also concurred. Justice Gorsuch did not participate.

The Court recognized that the Disparagement Clause permitted the Trademark Office to reject trademarks based on the “offensive” nature of the speech. This, the Court concluded, constituted viewpoint discrimination under the Two Track system. As Justice Alito said: “Giving offense is a viewpoint.” The Court applied Track One strict scrutiny and concluded that the Disparagement Clause failed at least the narrow tailoring prong. “It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.”

The *Tam* Court rejected the Government’s arguments that the trademark process converted the private speech into government speech. The Government also argued that trademarks should be tested under the less rigorous test of the Commercial Speech doctrine; the *Tam* Court rejected this position since the Disparagement Clause was viewpoint discrimination.

The Court’s analysis of offensive speech is applicable to “hate” speech. Watch for the application of *Tam* to various campus speech codes that usually rely on a combination of offensive speech or hate speech rationales. The Court also applied traditional analysis to the regulation of speech on internet websites in *Packingham v. North Carolina*, 137 S.Ct. \_\_\_\_ (2017).

[At page 953, delete Note (6) and add the following as new Note (6):]

6. Revisiting *Burson* and *State Regulation of Polling Places: Minnesota Voters Alliance v. Mansky*, 138 S.Ct. 1876 (2018). The *Burson* decision involved state regulation of free speech interests *outside* a polling place. The *Mansky* decision involved regulation of “political apparel” *inside* a polling place, and the *Mansky* Court, per Chief Justice Roberts, thereby distinguished *Burson*. More importantly, *Burson* was decided as a content-based regulation where the state could satisfy strict scrutiny (especially the means prong). In *Mansky*, Chief Justice Roberts addressed the “political apparel ban” with a different doctrinal analysis.

The *Mansky* majority used the modern public forum doctrine. The Court held the polling place is a “nonpublic forum”. The Court then applied a reasonableness standard. But, in contrast to *Burson*’s use of strict scrutiny, the Minnesota political apparel ban was unreasonably broad, at least as applied to political badges, political buttons or “other political insignia.” [For “insignia”, see *Tinker v. Des Moines School District*, *supra*.] Chief Justice Roberts concluded that Minnesota’s failure to define the term “political” made the statute “not capable of reasoned application” by “election judges”. Justice Sotomayor (for Breyer) dissented.

The *Mansky* decision represents an important development: the Court uses the public forum doctrine to achieve a lower level of scrutiny than the strict scrutiny of Track One. See § 11.06[B] *supra*. The irony of Chief Justice Roberts’ opinion is that, even though he used the nonpublic forum prong to achieve lower-than-strict scrutiny, he had the challengers win with a broad means test. This should be compared to Chief Justice Rehnquist (for whom Chief Justice Roberts clerked) in

*South Dakota v. Dole*. The importance of the government interest in anonymous, independent voting justifies the state in regulating free speech about political campaigns.

## § 11.04 UNPROTECTED SPEECH

### [F] “True Threats” as Unprotected Speech

[At page 1113, add the following as new Note (4):]

(4) *An Intent Requirement for a “True Threat”*: *Elonis v. United States*, 135 S.Ct. 2001 (2015). The *Elonis* decision, by Chief Justice Roberts, will remind readers of the famous *Brandenburg* decision by Justice Fortas. See § 11.02 *supra*. *Elonis* is a fact-intensive analysis with extensive, verbatim quotations from trial transcripts. The case is the true threat doctrine meets Facebook. The Free Speech issue presented was whether the government could criminalize speech as an unprotected “true threat” without showing the speaker’s intent to do, or threaten, harm. The Court, however, decided the case on narrower criminal law grounds. The Court reversed and remanded.

After his wife left him, defendant *Elonis* posted on Facebook some self-styled rap lyrics and graphically violent language about his wife, his co-workers, a kindergarten class and various state and federal law enforcement officials. His postings often contained disclaimers that his statements were “fictitious” and the exercise of his “First Amendment rights”. Many people viewed these as threatening, including his boss – who fired him. Moreover, *Elonis* was indicted under a federal statute making it a federal felony to transmit “a communication containing any threat. . . .” At the trial, the jury was instructed that a true threat could be established by effects alone: no showing of intent was necessary. The Supreme Court, albeit speaking in criminal law terms, disagreed.

In its analysis, the Court stated that it did not have to answer the “unprotected speech” issue. Prompted by this assertion, Justice Alito concurred in part and dissented in part. Justice Thomas dissented and, relying on an historical analysis, concluded that a true threat could be established by the effects of the defendant’s speech alone. Note the similarity to Justice Thomas’ dissent in *Black*, above at Note (3).

## § 11.06 TRACK TWO REGULATION

### [A] Time, Place, or Manner Regulations

#### [2] The Modern Time, Place, or Manner Doctrine

[At page 1091, add the following as new Note (1):]

(1) “Fixed Buffer Zones” and Anti-Abortion Protest: *McCullen v. Coakley*, 134 S.Ct. 2518 (2014). The Court revisited the modern time, place or manner (TPM) doctrine in *McCullen v. Coakley*. The Massachusetts statute created a “fixed” 35-foot buffer zone around all abortion

clinics in the State. This was based on “problems” reported to police regarding protests around one clinic in Boston and, then, “the problems” occurred only on Saturdays. The Court, per Chief Justice Roberts, held that that level of “problems” did not satisfy, under the circumstances, the means prong of the TPM intermediate scrutiny standard.

The Court generally relied on the TPM standard from *Rock Against Racism, supra*. The burden of persuasion was placed on the government. The State failed the “narrow tailoring” prong when it failed to show that it “seriously undertook to address these various problems with the less intrusive tools readily available to it.” For example, the Court said that obstructive protestors could be individually prosecuted.

The Chief Justice was joined by the Court’s four liberals. The Chief Justice left open the possibility of the State regulating more precisely – with a less burdensome place regulation than a fixed, 35-foot zone. There were four concurring Justices. The concurrences would have ruled more broadly the fixed buffer zone regulations were actually Track One content-based regulations and should be scrutinized with strict scrutiny.

## **§ 11.08 WHEN GOVERNMENT FUNCTIONS ARE INTERTWINED WITH SPEECH**

### **[B] Election Campaigns**

*[At page 1143, add the following as new Note (6):]*

(6) *The FECA’s Aggregate Limits on a Campaign Donor are Unconstitutional: McCutcheon v. Federal Election Commission, 134 S.Ct. 1434 (2014).* The Federal Elections Campaign Act (FECA) was a product of the 1970’s campaign finance reform era. (You looked at one provision of the FECA in *Citizens United, supra*.) In *McCutcheon*, a prospective campaign contributor and a political party’s national committee challenged the constitutionality of another FECA regulation of federal election campaigns: the “aggregate” limit on candidate contributions and other contributions to party committees. FECA, § 315 *et seq.* The Court, per Chief Justice Roberts, held that the FECA aggregate limit (“ceiling”) on how much money a donor may contribute to all political candidates or political committees violated the First Amendment.

For present purposes, several features of the Chief Justice’s opinion can be highlighted. The Court confirmed *Buckley*: campaign contributions are “protected speech.” The Court also held that regulations of such “speech” must satisfy “rigorous” judicial review (which seemed close, if not identical to, strict scrutiny). The Court held that the only compelling interest the federal government could use in these circumstances was “quid pro quo” corruption or the appearance of quid pro quo corruption. (Following *Citizens United*, the Court held that other government interests such as “access” or “ingratiation” would not be sufficient.) Even to the extent that the FECA aggregate limits might be considered targeted at quid pro quo corruption, the Court held that the FECA provisions failed to satisfy the “narrow tailoring prong” of strict scrutiny. The Court emphasized that the Government had “disclosure” provisions available and that these provisions would identify attempts to “flood” a particular campaign.



Justice Thomas concurred only in the judgment. Justice Thomas would overrule *Buckley* and any distinction between contributions and expenditures.

The dissenters, per Justice Breyer, disagreed with almost every part of the Roberts “plurality.” The dissenters contend that Congress can regulate campaign finance to prevent political corruption. The dissenters contended that Congress had permissibly addressed “influence bought by money alone.” The dissent attached several long Appendices.

[At page 1143, add the following as new Note (7):]

(7) *Campaign Speech of State Judicial Candidates: Williams-Yulee v. Florida Bar Ass’n*, 135 S.Ct. 1656 (2015). Forty years after *Buckley*, the consequences of the decision (that campaign contributions were “speech”) reached the area of state judicial campaigns.

The Florida Bar had various regulations for state judicial campaigns. (In most states, unlike the federal system, state judges are subject to various forms of democratic accountability; often these are “retention” elections.) The Florida regulations (Canon 7(c)(i)) prohibited judicial candidates from *personally* soliciting campaign contributions. The campaign of the judicial candidate, however, could solicit contributions. In addition, the judicial candidate could personally sign and send a thank you letter for any contributions. The judicial candidates challenged the narrow ban on “personal solicitation”. The Florida courts upheld Canon 7(c)(i). The Supreme Court, per Chief Justice Roberts, affirmed and upheld the narrow regulation.

The Court first held that judicial campaign speech was not unprotected speech. The Court then held that the Florida rule was a content-based (speaker-based) regulation and that applicable standard, under the Two Track system, was strict scrutiny.

Chief Justice Roberts then applied strict scrutiny. The Court held that the state had two compelling interests: (1) in preserving public confidence in the integrity of its judiciary; and (2) in maintaining public confidence in an impartial judiciary. Regarding the means testing, the Court conceded that the Florida rule was “underinclusive”, but the Court held that the rule was, under the circumstances, “narrowly tailored”. In a general statement, the Chief Justice observed that “narrow tailoring” did not have to be “perfect tailoring”.

The Court’s four “liberal” Justices joined the Chief Justice. Justices Breyer and Ginsburg filed concurring opinions. The Court’s four “conservatives” all dissented; Justices Scalia (for Thomas), Kennedy and Alito filed dissents. While the Chief Justice’s opinion reaffirmed the Two Track’s protection for Free Speech values, the decision, it should be noted, ruled against the Free Speech challenger. The decision may be the “rare” case where strict scrutiny is satisfied, or it may foreshadow an “easier” form of heightened scrutiny (*i.e.*, more pro-government).

## **[C] Government Speech: The Government as Speaker or the Government's Message**

### **[1] Government Subsidy and Speech**

*[At page 1154, add the following as new Note (9):]*

(9) *License Plates as Government Speech: Walker v. Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239 (2015). The Court's latest government speech decision involved automobile license plates. The State of Texas, like many states, had a vanity specialty plate program as part of its state auto licensing program. In this lucrative specialty program, Texas allowed over 450 different messages. But, Texas refused to allow the Texas Chapter of the Sons of Confederate Veterans ("Sons") to have a specialty plate with "Confederate battle flag logo". Texas considered this to be a racially charged expression. Viewing this refusal to accept the plate as "content discrimination," the Sons sued the State of Texas.

The Supreme Court, per Justice Breyer, ruled for Texas. The 5-Justice majority (including the four "liberals" plus Justice Thomas) held that the license plate message program was "government speech" and, thereby, the two-track content discrimination standards did not apply. Consistent with the government speech doctrine, the only relief for the Sons would be through the political process.

The dissenters, in an opinion by Justice Alito, disagreed and argued that the license plate decision encroached on protected private speech. This had been the theme of the dissenters to who criticized Justice Alito's opinion in *Sumnum*, above. It is, of course, one of the main concerns about any expansion of the modern government speech doctrine. *See generally*, David S. Day, *Government Speech: An Introduction to a Constitutional Dialogue*, 57 S.D. L. REV. 389 (2012).

### **[2] Speech by Government Employees**

*[At page 1160, add the following as new Note (7):]*

(4) *Testimony in a Federal Criminal Trial is Speech on a "Matter of Public Concern"*: *Lane v. Franks*, 134 S.Ct. 2369 (2014). Lane, a public employee, conducted an audit of expenses at a federally-funded program at an Alabama public community college. Lane discovered that Schmitz, an Alabama State Representative, was receiving payments from the program even though she never did any work. Lane terminated Schmitz. The federal government then indicted Schmitz. At Schmitz's trial, Lane testified, under a subpoena, about Schmitz's conduct. Schmitz was convicted of, *inter alia*, mail fraud and sentenced to 30 months.

After the trial, the community college was allegedly experiencing financial difficulties. Franks, the college President, terminated 29 employees, including Lane. A few days later, the terminations of all employees – except Lane and one other employee – were rescinded. Lane sued Franks and the college, claiming that Franks had retaliated against Lane because Lane's testimony embarrassed the college.

While the lower courts ruled in favor of defendant Franks, the Supreme Court, per Justice Sotomayor, reversed and ruled in favor of Lane. The college argued that Lane’s speech was not entitled to heightened scrutiny because it was with the scope of his employment speech and not involving a matter of “public” concern. In contrast, the Court held that Lane’s testimony was as a “citizen” and not in the scope of his employment. The Court analyzed the substance (public corruption) and form of the speech (trial testimony) and held that the testimony was Lane’s speech on a matter of “public concern.” Thus, Lane’s speech satisfied the first prong of the public employee speech standard. Justice Thomas (for Scalia and Alito) concurred.

[At page 1160, add the following as new Note (8):]

(8) *Public Employee Speech: Heffernan v. City of Patterson*, 136 S.Ct. 1412 (2016). The theme of this decision may be: No “good deed” goes unpunished. During the City’s election for mayor, policeman Heffernan was a friend of the challenger to the incumbent mayor, but Heffernan did not personally participate in the any campaign. Heffernan’s mother, however, supported the challenger to the mayor. Heffernan picked up a campaign sign for his bedridden mother to be displayed at the mother’s property. When this was reported to Heffernan’s supervisors, they demoted him to a patrol officer. Heffernan sued under 42 U.S.C. §1983, arguing the demotion violated his freedom of speech.

The City argued that, since Heffernan was not actually engaged in his own speech, he could not maintain an action under §1983. Although the lower courts agreed with the City, the Supreme Court, per Justice Breyer, held that the fact that the supervisors were *mistaken* about Heffernan’s participation in the mayoral campaign did not bar his suit under §1983.

The majority relied on textual, historical and policy analysis. The Court reasoned that what was at stake was *the government’s action*—and not its mistaken impression about Heffernan’s political activity and speech. The Court remanded for determination of the City’s motive and for a decision whether the City’s anti-political involvement policy satisfied constitutional standards.

Justice Thomas (for Justice Alito) dissented. The dissenters objected to what they considered to be a broad interpretation of public employee speech doctrine. In response, the majority stressed that the issue in the case was quite narrow. As a doctrinal matter, the decision does not alter the current two-step doctrine.

### [3] Government Employees’ or Licensees’ Freedom of Belief or Association

[At page 1164, add the following as the last sentence to Note (3):]

The *Abood* decision was not extended to part-time, home-care personal assistants. The Court struck down “mandatory fair share fees” paid to the union in *Harris v. Quinn*, 134 S.Ct. 2618 (2014).

[At page 1164, add the following to Notes and Questions as new Note (6):]

(6) *Overruling Abood – the Roberts Court Follows the Rehnquist Position: Janus v. American Federation, 138 S. Ct. \_\_\_\_\_ (2018)*. Under *Abood*, government workers who had not joined the applicable union could be required to pay a share of the union dues attributable to collective bargaining expenses – but not the political lobbying or ideological activities of the union. This seemed to be a “compromise” that worked for 40 years. In *Janus*, however, the Court, per Justice Alito, ruled (5-4) that their agency fees were “compelled speech” and then overruled *Abood*. Justice Kagan (for the Court’s four “liberals”) dissented.

The Alito opinion rejected the “labor peace” rationale underlying *Abood*. Justice Alito and Justice Kagan dueled with empirical and statistical data – mainly about the *effect* of eliminating the agency fee framework. The new majority sounded much like the *Abood* dissenters. Otherwise, the Court’s compelled speech analysis was similar to the analysis in the “beef-check-off” decision in the expanding line of compelled speech decisions. [Professor Day was part of the federal court trial in *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550 (2005).] See Chapter 11.08[C] *supra*.

## § 11.10 THE RIGHT NOT TO SPEAK

### [A] Freedom Not to Speak and Loyalty Oaths

[At page 1180, add the following as Note (4):]

(4) *Compelled Speech and Religiously Oriented Pregnancy Centers: National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. \_\_\_\_\_ (2018)*. A California statute required that 200 “pregnancy centers” operated by opponents of abortion to provide women with information about the availability of legal abortion services. See, *Rust v. Sullivan*. Although the lower courts had upheld the statute (and reasoned that it satisfied strict scrutiny), the Supreme Court, per Justice Thomas, held that statute constituted government compelled speech. The Majority (5-4) also held that California could not satisfy a searching scrutiny. It was important to the majority that California had alternatives for providing women with information. In this regard, Justice Thomas’ opinion seemed to incorporate elements of time, place or manner analysis, including the open ample alternatives prong. Justice Kennedy concurred.

Justice Breyer wrote the dissent for the Court’s liberals. Justice Breyer focused on the factual finding of the California Legislature that the licensed pregnancy centers used “intentionally deceptive advertising and counseling practices.” The dissent argued that the statute was a reasonable remedy for this problem. Justice Breyer also argued that, if the majority would be correct, then the laws in many states (like South Dakota) that require abortion clinics to provide women with anti-abortion information would be compelled speech by the abortion providers. Justice Thomas said anti-abortion laws were distinguishable. Justice Breyer, the former Harvard law professor, disagreed.

## CHAPTER 12

### FREEDOM OF RELIGION

#### § 12.02 THE ESTABLISHMENT CLAUSE

##### [A] Aid to Religion or Religious Institutions

##### [2] Non-Financial Aid: “Accommodation” or Official Recognition

[At page 1242, add the following as new Note (3):]

(3) *Competing Lines of Decisions Regarding “Public Prayers” in Public Institutions.* The “School Prayer” decisions generally struck down attempts to conduct public prayers in public institutions – namely public schools (including “graduation”) or on public school grounds (e.g., public school football stadium). In contrast, *Marsh v. Chamber, supra*, upheld a public prayer – in the context of the Nebraska State Legislature. As a general matter, the different result in *Marsh* was attributed to the age and status of the audience (adult legislators v. school children), the voluntariness of the audience (school children are compelled to attend) and the use of different standards of judicial review (“historical review” in *Marsh* v. “heightened scrutiny” in the school prayer cases).

These cases seemed to form two competing lines of authority. These competing precedents intersected in the *Town of Greece v. Galloway* decision below.

[At page 1242, add the following decision and Notes and Questions:]

**TOWN OF GREECE, NEW YORK v. GALLOWAY**  
134 S.Ct. 1811 (2014)

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part II–B.

The Court must decide whether the town of Greece, New York, imposes an impermissible establishment of religion by opening its monthly board meetings with a prayer. It must be concluded, consistent with the Court’s opinion in *Marsh v. Chambers*, 463 U.S. 783 (1983), that no violation of the Constitution has been shown.

#### I

Greece, a town with a population of 94,000, is in upstate New York. For some years, it began its monthly town board meetings with a moment of silence. In 1999, the newly elected town supervisor, John Auberger, decided to replicate the prayer practice he had found meaningful while serving in the county legislature. . . . The prayer was intended to place town board members in a

solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures.

The town followed an informal method for selecting prayer givers, all of whom were unpaid volunteers. A town employee would call the congregations listed in a local directory until she found a minister available for that month's meeting. The town eventually compiled a list of willing "board chaplains" who had accepted invitations and agreed to return in the future. The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation. But nearly all of the congregations in town were Christian; and from 1999 to 2007, all of the participating ministers were too.

Greece neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content, in the belief that exercising any degree of control over the prayers would infringe both the free exercise and speech rights of the ministers. The town instead left the guest clergy free to compose their own devotions. The resulting prayers often sounded both civic and religious themes. . . .

Respondents Susan Galloway and Linda Stephens attended town board meetings to speak about issues of local concern, and they objected that the prayers violated their religious or philosophical views. . . .

Galloway and Stephens brought suit in the United States District Court for the Western District of New York. They alleged that the town violated the First Amendment's Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayers, such as those given "in Jesus' name." They did not seek an end to the prayer practice, but rather requested an injunction that would limit the town to "inclusive and ecumenical" prayers that referred only to a "generic God" and would not associate the government with any one faith or belief.

The District Court on summary judgment upheld the prayer practice as consistent with the First Amendment. It found no impermissible preference for Christianity, noting that the town had opened the prayer program to all creeds and excluded none. Although most of the prayer givers were Christian, this fact reflected only the predominantly Christian identity of the town's congregations, rather than an official policy or practice of discriminating against minority faiths. The District Court found no authority for the proposition that the First Amendment required Greece to invite clergy from congregations beyond its borders in order to achieve a minimum level of religious diversity. . . .

The Court of Appeals for the Second Circuit reversed. 681 F.3d 20, 34 (2012). It held that some aspects of the prayer program, viewed in their totality by a reasonable observer, conveyed the message that Greece was endorsing Christianity. [The Court of Appeals applied the endorsement standard.] . . .

## II

In *Marsh v. Chambers*, 463 U.S. 783, the Court found no First Amendment violation in the

Nebraska Legislature’s practice of opening its sessions with a prayer delivered by a chaplain paid from state funds. The decision concluded that legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. . . .

*Marsh* is sometimes described as “carving out an exception” to the Court’s Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to “any of the formal ‘tests’ that have traditionally structured” this inquiry. *Id.*, at 796, 813 (Brennan, J., dissenting). The Court in *Marsh* found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause. . . .

Yet *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted “by reference to historical practices and understandings.” *County of Allegheny*, 492 U.S., at 670 (KENNEDY, J., concurring in judgment in part and dissenting in part). That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion’s role in society. D. Currie, *The Constitution in Congress: The Federalist Period 1789–1801*, pp. 12–13 (1997). . . .

The Court’s inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures. . . .

## A

Respondents maintain that prayer must be nonsectarian, or not identifiable with any one religion; and they fault the town for permitting guest chaplains to deliver prayers that “use overtly Christian terms” or “invoke specifics of Christian theology.” Brief for Respondents 20. . . .

An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court’s cases. The Court found the prayers in *Marsh* consistent with the First Amendment not because they espoused only a generic theism but because our history and tradition have shown that prayer in this limited context could “coexist[t] with the principles of disestablishment and religious freedom.” 463 U.S., at 786.

. . .

The contention that legislative prayer must be generic or nonsectarian derives from dictum in *County of Allegheny*, 492 U.S. 573, that was disputed when written and has been repudiated by later cases. . . .

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. Our Government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of

moral behavior. *Engel v. Vitale*, 370 U.S. 421 (1962). . . .

Respondents argue, in effect, that legislative prayer may be addressed only to a generic God. The law and the Court could not draw this line for each specific prayer or seek to require ministers to set aside their nuanced and deeply personal beliefs for vague and artificial ones. There is doubt, in any event, that consensus might be reached as to what qualifies as generic or nonsectarian. . . .

From the earliest days of the Nation, these invocations have been addressed to assemblies comprising many different creeds. These ceremonial prayers strive for the idea that people of many faiths may be united in a community of tolerance and devotion. Even those who disagree as to religious doctrine may find common ground in the desire to show respect for the divine in all aspects of their lives and being. Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith

The prayers delivered in the town of Greece do not fall outside the tradition this Court has recognized. . . .

Finally, the Court disagrees with the view taken by the Court of Appeals that the town of Greece contravened the Establishment Clause by inviting a predominantly Christian set of ministers to lead the prayer. The town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one. That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. . . .

## **B**

Respondents further seek to distinguish the town’s prayer practice from the tradition upheld in *Marsh* on the ground that it coerces participation by nonadherents. . . . Respondents argue that the public may feel subtle pressure to participate in prayers that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling. In their view the fact that board members in small towns know many of their constituents by name only increases the pressure to conform.

It is an elemental First Amendment principle that government may not coerce its citizens “to support or participate in any religion or its exercise.” *County of Allegheny*, 492 U.S., at 659 (KENNEDY, J., concurring in judgment in part and dissenting in part); see also *Van Orden*, 545 U.S., at 683 (plurality opinion) (recognizing that our “institutions must not press religious observances upon their citizens”). On the record in this case the Court is not persuaded that the town of Greece, through the act of offering a brief, solemn, and respectful prayer to open its monthly meetings, compelled its citizens to engage in a religious observance. The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed. . . .



The principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing. . . .

The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. No such thing occurred in the town of Greece. . . . A practice that classified citizens based on their religious views would violate the Constitution, but that is not the case before this Court.

In their declarations in the trial court, respondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions. If circumstances arise in which the pattern and practice of ceremonial, legislative prayer is alleged to be a means to coerce or intimidate others, the objection can be addressed in the regular course. . . .

In the town of Greece, the prayer is delivered during the ceremonial portion of the town's meeting. Board members are not engaged in policymaking at this time, but in more general functions, such as swearing in new police officers, inducting high school athletes into the town hall of fame, and presenting proclamations to volunteers, civic groups, and senior citizens. . . . The inclusion of a brief, ceremonial prayer as part of a larger exercise in civic recognition suggests that its purpose and effect are to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers. . . .

\* \* \*

*It is so ordered.*

JUSTICE ALITO, with whom JUSTICE SCALIA joins, concurring.

I write separately to respond to the principal dissent, which really consists of two very different but intertwined opinions. One is quite narrow; the other is sweeping. I will address both.

## I

First, however, since the principal dissent accuses the Court of being blind to the facts of this case, *post*, at 1851 – 1852 (opinion of KAGAN, J.), I recount facts that I find particularly salient. . . .

As a result of this procedure, for some time all the prayers at the beginning of town board meetings were offered by Christian clergy, and many of these prayers were distinctively Christian. But respondents do not claim that the list was attributable to religious bias or favoritism, and the Court of Appeals acknowledged that the town had “no religious animus.” . . .

## II

I turn now to the narrow aspect of the principal dissent, and what we find here is that the principal dissent’s objection, in the end, is really quite niggling. According to the principal dissent, the town could have avoided any constitutional problem in either of two ways.

### A

. . .

Not only is there no historical support for the proposition that only generic prayer is allowed, but as our country has become more diverse, composing a prayer that is acceptable to all members of the community who hold religious beliefs has become harder and harder. It was one thing to compose a prayer that is acceptable to both Christians and Jews; it is much harder to compose a prayer that is also acceptable to followers of Eastern religions that are now well represented in this country. Many local clergy may find the project daunting, if not impossible, and some may feel that they cannot in good faith deliver such a vague prayer.

In addition, if a town attempts to go beyond simply *recommending* that a guest chaplain deliver a prayer that is broadly acceptable to all members of a particular community (and the groups represented in different communities will vary), the town will inevitably encounter sensitive problems. . . .

### B

If a town wants to avoid the problems associated with this first option, the principal dissent argues, it has another choice: It may “invit[e] clergy of many faiths.” *Post*, at 1851. “When one month a clergy member refers to Jesus, and the next to Allah or Jehovah,” the principal dissent explains, “the government does not identify itself with one religion or align itself with that faith’s citizens, and the effect of even sectarian prayer is transformed.” *Ibid.* . . .

If the task of putting together the list had been handled in a more sophisticated way, the employee in charge would have realized that the town’s Jewish residents attended synagogues on the Rochester side of the border and would have added one or more synagogues to the list. But the mistake was at worst careless, and it was not done with a discriminatory intent. (I would view this case very differently if the omission of these synagogues were intentional.)

The informal, imprecise way in which the town lined up guest chaplains is typical of the way in which many things are done in small and medium-sized units of local government. In such places, the members of the governing body almost always have day jobs that occupy much of their time. The town almost never has a legal office and instead relies for legal advice on a local attorney whose practice is likely to center on such things as land-use regulation, contracts, and torts. When

a municipality like the town of Greece seeks in good faith to emulate the congressional practice on which our holding in *Marsh v. Chambers*, 463 U.S. 783 (1983), was largely based, that municipality should not be held to have violated the Constitution simply because its method of recruiting guest chaplains lacks the demographic exactitude that might be regarded as optimal. . .

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

Except for Part II–B, I join the opinion of the Court, which faithfully applies *Marsh v. Chambers*. I write separately to reiterate my view that the Establishment Clause is “best understood as a federalism provision,” *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004) (THOMAS, J., concurring in judgment), and to state my understanding of the proper “coercion” analysis.

## I

The Establishment Clause provides that “Congress shall make no law respecting an establishment of religion.” U.S. Const., Amdt. 1. As I have explained before, the text and history of the Clause “resis[t] incorporation” against the States. *Newdow, supra*, at 45–46; see also *Van Orden v. Perry*, 545 U.S. 677 (2005) (THOMAS, J., concurring); *Zelman v. Simmons–Harris*, 536 U.S. 639 (2002) (same). If the Establishment Clause is not incorporated, then it has no application here, where only municipal action is at issue. . . .

## II

Thus, to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not the “subtle coercive pressures” allegedly felt by respondents in this case, *ante*, at 1819 – 1820. . . .

JUSTICE BREYER, dissenting.

As we all recognize, this is a “fact-sensitive” case. The Court of Appeals did not believe that the Constitution forbids legislative prayers that incorporate content associated with a particular denomination. *Id.*, at 28. Rather, the court’s holding took that content into account simply because it indicated that the town had not followed a sufficiently inclusive “prayer-giver selection process.” *Id.*, at 30. It also took into account related “actions (and inactions) of prayer-givers and town officials.” *Ibid.* Those actions and inactions included (1) a selection process that led to the selection of “clergy almost exclusively from places of worship located within the town’s borders,” despite the likelihood that significant numbers of town residents were members of congregations that gather just outside those borders; (2) a failure to “infor[m] members of the general public that volunteers” would be acceptable prayer givers; and (3) a failure to “infor[m] prayer-givers that invocations were not to be exploited as an effort to convert others to the particular faith of the invocational speaker, nor to disparage any faith or belief different than that of the invocational speaker.” . . .

The plaintiffs do not argue that the town intentionally discriminated against non-Christians when choosing whom to invite, 681 F.3d, at 26, and the town claims, plausibly, that it would have

allowed anyone who asked to give an invocation to do so. Rather, the evident reasons why the town consistently chose Christian prayer givers are that the Buddhist and Jewish temples mentioned above were not listed in the Community Guide or the Greece Post and that the town limited its list of clergy almost exclusively to representatives of houses of worship situated within Greece's town limits (again, the Buddhist temple on the map was within those limits, but the synagogues were just outside them).

Third, in this context, the fact that nearly all of the prayers given reflected a single denomination takes on significance. That significance would have been the same had all the prayers been Jewish, or Hindu, or Buddhist, or of any other denomination. The significance is that, in a context where religious minorities exist and where more could easily have been done to include their participation, the town chose to do nothing. . . . Given that the town could easily have made these or similar efforts but chose not to, the fact that all of the prayers (aside from the 2008 outliers) were given by adherents of a single religion reflects a lack of effort to include others. And that is what I take to be a major point of Justice KAGAN's related discussion. . . .

In seeking an answer to that fact-sensitive question, "I see no test-related substitute for the exercise of legal judgment." *Van Orden v. Perry* (BREYER, J., concurring in judgment). Having applied my legal judgment to the relevant facts, I conclude, like Justice KAGAN, that the town of Greece failed to make reasonable efforts to include prayer givers of minority faiths, with the result that, although it is a community of several faiths, its prayer givers were almost exclusively persons of a single faith. Under these circumstances, I would affirm the judgment of the Court of Appeals that Greece's prayer practice violated the Establishment Clause. . . .

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

For centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom. Our Constitution promises that they may worship in their own way, without fear of penalty or danger, and that in itself is a momentous offering. Yet our Constitution makes a commitment still more remarkable—that however those individuals worship, they will count as full and equal American citizens. A Christian, a Jew, a Muslim (and so forth)—each stands in the same relationship with her country, with her state and local communities, and with every level and body of government. So that when each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American.

I respectfully dissent from the Court's opinion because I think the Town of Greece's prayer practices 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 contend that principle translates here into a bright separationist line. To the contrary, I agree with the Court's decision in *Marsh v. Chambers*, 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 invocations given—directly to those citizens—

were predominantly 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 government benefits. In my view, that practice does not square with the First Amendment’s promise that every citizen, irrespective of her religion, owns an equal share in her government. . . .

## II

In both Greece’s and the majority’s view, everything I have discussed is irrelevant here because this case involves “the tradition of legislative prayer outlined” in *Marsh v. Chambers*. And before I dispute the Town and Court, I want to give them their due: They are right that, under *Marsh*, legislative prayer has a distinctive constitutional warrant by virtue of tradition. . . .

Still more, the prayers betray no understanding that the American community is today, as it long has been, a rich mosaic of religious faiths. See *Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion) (recognizing even half a century ago that “we are a cosmopolitan nation made up of people of almost every conceivable religious preference”). . . .

## C

Those three differences, taken together, remove this case from the protective ambit of *Marsh* and the history on which it relied. . . . And so, contra the majority, Greece’s prayers cannot simply ride on the constitutional coattails of the legislative tradition *Marsh* described. The Board’s practice must, in its own particulars, meet constitutional requirements.

And the guideposts for addressing that inquiry include the principles of religious neutrality I discussed earlier. . . .

Everything about that situation, I think, infringes the First Amendment. (And of course, as I noted earlier, it would do so no less if the Town’s clergy always used the liturgy of some other religion.) . . .

## NOTES AND QUESTIONS

(1) *Town of Greece, N.Y. v. Galloway*, 134 S.Ct. 1811 (2014). The Town of Greece, N.Y., is (with a population of 94,000) close to a larger city, Rochester. The Town has a legislative Town Council that meets once per month. Starting in 1999 the Council opened its public sessions with a prayer. The prayer, which was aimed at the members of the Council, was delivered by an outside clergy person. To provide prayer-givers, the Town compiled and used a list of clergy in the Town, but it did not invite any clergy from out of Town. Except for four times in the 15 years of the opening prayer practice, the prayer givers were clergy from Christian churches. (The four exceptions were two Jewish prayer givers, one prayer giver from a local Baha’i temple, and one

“Wiccan priestess”, who was involved only because she had read about the prayer controversy in the press.)

The challengers sued under the Establishment Clause. The challengers did not ask to end the prayer practice altogether. The challengers had more limited claims: (1) that the Town was required to use a “nonsectarian” prayer; (2) that the Town was constitutionally required to develop a more diverse group of prayer givers by adding non-Christians to its list. The Court, per Justice Kennedy, rejected both these theories and upheld (5-4) the “ceremonial prayer” practice. Justice Kennedy wrote a narrow analysis and rejected some of the broader arguments of the Town with the conclusion that the First Amendment is not a “majority rule”.

(2) *Town of Greece – The Plurality Analysis.* The plurality analyzed the facts under two of the competing Establishment Clause theories: (1) historical and (2) coercion. The Court reviewed the history of “legislative prayer.” The Court found that the fact the House of Representatives in 1789 established an opening prayer *before* James Madison introduced the Bill of Rights (and the Establishment Clause) must mean that Madison and Congress did not think that an opening prayer for a legislature was a violation of the Establishment Clause. The *Town of Greece* Court concluded that the Town’s “ceremonial” prayer practice was protected by the historical tradition in Congress and the state legislatures (*Marsh*). Under the historical theory, the Court followed *Marsh* and distinguished the *School Prayer* cases. The Court asserted that ceremonial practices that predated the Bill of Rights would be viewed under the “historical only” theory. [Cf., *United States v. Stevens* in Chapter 11.]

Justice Kennedy’s plurality, in the alternative, also reviewed the Town’s prayer practice under the “coercion” theory. [(Justice Kennedy was the originator of the coercion theory in *County of Allegheny, supra*.] The Court concluded that the use of a ceremonial prayer was basically a recognition of the traditional role of religion and not a coercion of nonbelievers. The Court explicitly rejected the theory that the “offensiveness” of the practice to the challengers was enough to constitute coercion. The Court stated: “Offense, however, does not equate to coercion.”

(3) *An Array of Opinions.* The Court divided 5-4 in terms of result with Justice Kennedy, the frequent “swing” vote, siding with the conservatives. In terms of rationale or opinions, there was a wide array of opinions reflecting a highly fractured Court.

(4) *The Coercion Standard for the Establishment Clause: Town of Greece, N.Y. v. Galloway, 134 S.Ct. 1811 (2014).* There have not been many decisions relying on the “coercion” standard for the Establishment Clause. This may derive from the fact that, as compared to countries like Iraq, government officials in America rarely “coerce” the religious interests of citizens or other people – at least in the “common” sense of the word “coerce.”

The “coercion” standard for the Establishment Clause arose in Justice Kennedy’s dissent in the *County of Allegheny* decision, *supra*. *County of Allegheny* was the second “crèche” case, and the majority struck down the government display of the crèche using Justice O’Connor’s “endorsement” standard. The Kennedy dissent was a rejection of the endorsement standard (as well as the *Lemon* standard) because endorsement was too high of a standard of judicial review.

Although coercion has always been a “lower” standard than *Lemon* or endorsement, it has been somewhat ambiguous: what actually constitutes government coercion? In *Lee v. Weisman*, *supra*, Justice Kennedy’s majority opinion provided some guidance. A school district’s practice of having a prayer presented by an adult clergyman from a local church and directing the content of the clergyman’s prayer at a middle school graduation ceremony held on school district property was considered “coercive” of non-Christian parents who had objected to the prayer. Otherwise, there were not many “coercion” decisions.

In that regard, *Town of Greece*’s rejection of a coercion theory may be doctrinally significant. The “legislative” prayer in *Town of Greece* was held to be not coercive. Although the prayer givers were outside persons and nearly all Christian, Justice Kennedy relied on the fact the prayer was given for an adult audience and was aimed at the Council (not the audience – and certainly not at children in the audience). Also, unlike the *Lemon* standard, the coercion test does not appear to rely on the “effects” of a government policy at least on members of minority religious groups. The Kennedy plurality, and Justice Alito, have concluded that any coercion must be “purposeful”.

(5) *The Alito Concurring Opinion: The Kagan Dissent was “Niggling.”* Justice Alito’s opinion closely tracked the Kennedy plurality. Justice Alito directed the bulk of his remarks at refuting Justice Kagan’s opinion: both on the facts and on the governing doctrine. Justice Alito rejected, on historical and pragmatic grounds, the theory that only a “generic prayer” could be used by the Town.

He also rejected the Kagan dissent’s theory that the Town’s employees prepared the list of clergy improperly (*i.e.*, not including synagogues from neighboring Rochester). Justice Alito rejected the theory that the Establishment Clause imposed any affirmative duty. He concluded: “But the mistake was at worst careless, and it was not done with a discriminatory intent.” Justice Alito thus applied a version of the equal protection doctrine’s purposefulness doctrine.

(6) *The Thomas Concurring Opinion.* Justice Thomas concurred in part and concurred in the judgment. Justice Thomas concurred in the judgment based on his view that the Establishment Clause was not incorporated against the States.

(7) *The Kagan Dissent: “Headspinningly.”* Justice Kagan’s dissent was the principle dissent since all four dissenters joined it; it was also the target of Justice Alito’s concurrence. Justice Kagan was essentially deductive. She contended, as the major premise, that the Establishment Clause established a “norm of religious equality.” She contended that this “norm” created an affirmative duty.

Justice Kagan reviewed the facts, and she concluded that “no one can fairly read the prayers from Greece’s Town meetings as anything other than explicitly Christian – constantly and exclusively so.” This practice, according to the Kagan dissent, was “religious favoritism.” Justice Kagan concluded that such religious favoritism violated the norm of religious equality and, therefore, the First Amendment.

There is much more to this lengthy dissent, including the use of “hypotheticals” that provoked considerable disagreement from Justice Alito. Justice Kagan had an extensive critique of the plurality opinion. She criticized the Court – “as the Court (headspinningly) suggests. . . .” More generally, the Kagan dissent departed from the majority because it considered the “subjective” feelings of rejection and exclusion that the persons of minority religious persuasion allegedly felt from the predominantly Christian prayer practice. Remember that the majority Justices asserted that “offensiveness” to religious minorities is not enough, by itself, to violate the Establishment Clause.

(8) *The Breyer Dissent*. Justice Breyer’s dissent was based on inductive reasoning. Justice Breyer broke down the “facts” and summarized the significance of certain facts. At one point he summarized: “The significance is that, in a context where religious minorities exist and where more could easily have been done to include their participation, the town chose to do nothing.” Justice Breyer apparently envisioned a “duty” created by the Establishment Clause. He saw as the flaw in the Town’s policy: “doing too little to reflect the religious diversity of its citizens. . . .” Justice Breyer concluded that the Town violated the Establishment Clause because it “failed to make reasonable efforts to include prayer givers of minority faiths, with the result that, although it is a community of several faiths, its prayers givers were almost exclusively persons of a single faith.”

## § 12.03 THE FREE EXERCISE CLAUSE

### [C] Conflict with Nondiscriminatory Secular Regulation: The Modern Doctrine

[At page 1276, add the following as new Note (5):]

(5) *Locke Distinguished: Trinity Lutheran Church v. Comer, 137 S.Ct. 2012 (2017)*. In the *Locke* decision, former Chief Justice Rehnquist distinguished *Hialeah* because the regulation in *Locke* was not a purposeful burden on Free Exercise. In *Trinity Lutheran*, the new Chief Justice (the former clerk for Rehnquist) distinguished *Locke* because Chief Justice Roberts concluded that Missouri’s program was a purposeful burden on the Church’s Free Exercise rights. Thus, the law of Free Exercise evolves in classic fashion.

Trinity Lutheran Church had a preschool and daycare. The daycare had a playground. The playground was “coarse pea gravel.” [Note the Chief Justice’s careful selection of the adjective “coarse” to heighten the burden on the challengers.] The State of Missouri had a “Scrap Tire Program” to use recycled tires to provide for a safer playground surface. Trinity Lutheran’s preschool was rejected solely because Trinity Lutheran was a religious organization. Because of the Missouri state constitution, the Missouri playground surface program purposefully (or intentionally) discriminated against (*i.e.*, excluded) religious playgrounds.

Under these facts, the Roberts’ opinion held that the applicable standard was the “most rigorous” standard from *Hialeah*. This is, *supra*, strict scrutiny. The Court held that Missouri did not have a “compelling state interest” and, thereby, failed strict scrutiny.



The *Trinity Lutheran* decision confirms the *Smith/Hialeah* doctrine: A facially neutral, generally applicable program will be tested against the strict scrutiny standard only when the government program is shown to be a purposeful burden (“prohibition”) on the challengers’ Free Exercise rights. Second, note that the Missouri program applied to all religions. The program was not preferentialist; the Court was not using a nonpreferentialist theory.

[At page 1278, add the following squib:]

**MASTERPIECE CAKESHOP, LTD. v. COLORADO CIVIL RIGHTS COMM’N, 138 S.Ct. 1719 (2018).** In the Court’s most recent Free Exercise case, the Court, per Justice Kennedy, held that the State of Colorado, in this case, violated the Free Exercise rights of a Colorado baker. The facts seem like a dispute that could walk into your office. [They will remind you of a junior high school student (Mary Beth Tinker) who wanted to attend her public school wearing a black (anti-war) armband.]

In 2012, Colorado did not recognize gay marriage, but Colorado public accommodations law prohibited covered businesses from discriminating on the grounds of sexual orientation. The Masterpiece Cakeshop sold bakery products to the public, and it was subject to the Colorado public accommodations law. The Cakeshop was owned by Jack Phillips, an expert baker and “a devout Christian”. A gay couple who intended to be married in a non-Colorado jurisdiction came to the Cakeshop to purchase a custom “wedding cake” for their Colorado wedding reception. Phillips told the couple that, because of his religious beliefs against gay marriage, he would not bake a “custom” cake. He told the couple that he would sell other, non-custom cakes and bakery products. [That Phillips was willing to sell these other products turns out to indicate, for the Kennedy majority, that the gay couple had alternatives available.]

The gay couple filed a charge under the Colorado Anti-Discrimination Act. The Act is treated as a facially neutral, generally applicable governmental regulation. As part of the post-charge process, the Commission held a formal hearing before an Administrative Law Judge (ALJ). The ALJ rejected the free speech and free exercise defenses asserted by the baker. During the hearing before the Commission, certain Commissioners made statements that Justice Kennedy’s opinion considered “hostile” to Phillips’ free exercise defense. [See the similar situation in the *Hialeah* decision, *supra*, also written by Justice Kennedy.] The Commission rejected the free speech and free exercise defenses raised by the baker.

Although the lower courts upheld the Commission, the Supreme Court, per Justice Kennedy, held that the Commission acted with “a clear and impermissible hostility toward the sincere religious beliefs” held by Phillips. The Commission, therefore, purposefully burdened Phillips’ free exercise rights regarding his baking expertise.

The *Masterpiece Cakeshop* Court confirmed the *Smith/Hialeah* rule: the state must purposefully burden free exercise rights to violate the Free Exercise Clause. The Court stated that the issue was “whether a law intentionally discriminates on the basis of religion” [Citing *Hialeah* and Justice Scalia’s concurring opinion in *Hialeah*.]

Justice Kennedy found two categories of intentional discrimination in the record: (1) comments made by Commissioners at public hearings; (2) comparisons between the Commission’s decision against Phillips and three other decisions involving bakers who refused to put certain statements on cakes.

#### *The Commissioners’ Comments*

The “hostile comments” were made by two different Commissioners at two different meetings. The first set of statements were summarized by Justice Kennedy as “inappropriate and dismissive comments”. The second set were more hostile because the Commissioner (unnamed by Justice Kennedy) called Phillips’ position “one of the most despicable pieces of rhetoric”. This Commissioner also likened Phillips to the defenders of slavery or of the Holocaust. Finally, Justice Kennedy held against the state the fact that “no objection” was made by other Commissioners. [Apparently, this indicates adoption by silence by the others. This is a broader notion than *Hialeah*.]

#### *The Other Baker Cases*

The second category of evidence of intentional discrimination against Phillips was three Commission decisions where the bakers, as a matter of conscience, refused to put “discriminatory” statements on cakes. These cases demonstrated, according to Justice Kennedy, that the Commission applied the Statute to discriminate purposefully against Phillips on the basis of his religion.

The dissent and some of the concurring Justices disagreed with the use of this evidence to show purposefulness. More on that below.

#### *The Concurrences*

Justice Kagan (for Breyer) concurred. She disagreed with Justice Kennedy’s reliance on the other three decisions to demonstrate purposeful discrimination.

Justice Gorsuch concurred on broader grounds. His opinion contested the position argued by Kagan (and the Ginsburg dissent).

Justice Thomas concurred in the judgment. The Thomas opinion relied on a free speech analysis. *See* Chapter 11 *supra*.

#### *The Dissent*

Justice Ginsburg (for Sotomayor) dissented. She agreed with the majority’s basic free exercise analysis, but she would have upheld the Commission. She noted that Justice Kennedy relied “only” on *City of Hialeah* for his analysis of purposefulness.

NOTE: The *Masterpiece Cakeshop* decision is a confirmation of the purposefulness *Smith v. Hialeah* doctrine’s control of the Free Exercise doctrine. Like *Hialeah/Trinity Lutheran*, the Free Exercise challenger in *Masterpiece* was able to satisfy the purposefulness standard.

In *Smith*, and *Locke*, the challengers were unsuccessful, and the government won because only the rational basis standard was applied. Free Exercise doctrine, today, is the same doctrinal model as equal protection and procedural due process.

## CHAPTER 14

### CONGRESSIONAL ENFORCEMENT OF THE CIVIL RIGHTS AMENDMENTS

#### § 14.02 ENFORCING THE FOURTEENTH AND FIFTEENTH AMENDMENTS AGAINST STATE AND FEDERAL ACTION

[At page 1328: move the *O'Centro Note* from page 1273 to Note 9 and add the following new Notes (10), (11), and (12) to Notes and Questions:]

(10) *Closely-Held Corporations with Religious Objections to Contraception Can Bring Claims Under RFRA: Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014).* Under the Affordable Care Act (the Act), employers are required to provide female employees with contraception as part of the required health care coverage. The ACA required employers to provide 20 types of contraception. Under the ACA, there were exceptions for “religious employers” and by administrative order also for religious non-profit institutions, including churches and church-owned schools and hospitals.

Hobby Lobby was a corporation owned by the Green family. The religious values of the ownership family oppose certain forms of contraception. Hobby Lobby objected to 4 of the 20 types of contraception because the family believes that life begins at conception. Hobby Lobby was not a religious employer, and it was not a non-profit.

Hobby Lobby brought a claim under the Religious Freedom Restoration Act (RFRA). There were several issues, including whether a corporation like Hobby Lobby would be considered a “person” covered by RFRA. In this 5-4 decision, the Supreme Court, per Justice Alito, held that a closely-held corporation like Hobby Lobby would be considered a person for RFRA purposes. The Court also held that the family’s religious beliefs were “substantially burdened” by the ACA requirement to have the employer subsidize the contraceptive requirement. The Court further held that, even if the government’s interests were considered “compelling,” the government failed the means test of RFRA because such corporations could have been given the “exception” like non-profit religious institutions.

Justice Kennedy concurred. He also relied on the failure of the federal government to use narrowly tailored means.

The Court’s four “liberals” dissented in an opinion by Justice Ginsburg. She disputed most issues, especially the holding that the corporation was a proper “person” for purposes of RFRA. She argued that the majority’s analysis was hostile to women, at least in effect. As a matter of policy, Justice Ginsburg argued that there would now be a “flood” of RFRA claims by corporations, including publicly-held corporations. The majority opinion dismissed this as a “parade of horrors” argument.

(11) *The Future of RFRA after Hobby Lobby: Wheaton College v. Burwell, 134 S.Ct. 2806 (2014)*. The *Hobby Lobby* decision involved a closely held corporation; it was allowed to bring a religious liberty claim under RFRA. *Wheaton College* is one case involving religious-oriented nonprofit groups that operate charities, colleges and hospitals. While the Obama Administration decided to waive the ACA's contraception requirement for such employers, some of the employers object to signing a waiver agreement (to have the contraceptive coverage provided by the insurers or the government). These employers consider the request to sign the waiver to be a "sin" equal to paying for the coverage. After *Hobby Lobby*, it is easy to anticipate that employers will have other religious objections to other regulatory programs – such as an employer's objection to hiring persons who are gay or lesbian. Because of an Executive Order, employers who hold federal government contracts are now prohibited from discriminating in the employment of homosexuals or transgender persons. See Nedra Pickler, AP, *Gay, Transgender Workers Gain US Bias Protection*, SIOUX CITY JOURNAL, July 22, 2014, at A12. A RFRA challenge is foreseeable.

(12) *The Continued Role of RFRA after Flores*. Between the *O'Centro* decision, *supra*, and *Hobby Lobby*, it is apparent that RFRA still regulates the Congressional action (federal law), even if RFRA would be unconstitutional versus a State's regulation of religious liberty. In *Flores*, the Court's separation of powers rationale seemed to be directed at the scope of Congressional power and the Congressional intrusion into the Article III power to decide constitutional questions (as in *Smith*, *supra* Chapter 12).