

CONSTITUTIONAL LAW IN CONTEXT

4th Edition

Michael Kent Curtis, J. Wilson Parker,
William G. Ross, Davison M. Douglas, and Paul Finkelman

2018-2019 ANNUAL SUPPLEMENT

by

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Chapter 3. Limits on Federal Power: The Federal Structure, the 10th Amendment, and State Sovereign Immunity. Part II, National Power and State Power: The 10th Amendment

[Insert on page 221 following note on Printz.]

Note: *Murphy v. NCAA* (2018)

Sports gambling is a multi-billion dollar industry, much of which occurs illegally. The federal Professional and Amateur Sports Protection Act of 1992 (PASPA) makes it unlawful for a State “to sponsor, operate, advertise, promote, license, or authorize by law or compact...a lottery, sweepstakes, or other betting, gambling, or wagering scheme based...on” competitive sporting events, 28 U.S.C. §3702(1), and for “a person to sponsor, operate, advertise, or promote” those same gambling schemes if done “pursuant to the law or compact of a governmental entity,” §3702(2). But PASPA does not make sports gambling itself a federal crime. Instead, it allows the Attorney General, as well as professional and amateur sports organizations, to bring civil actions to enjoin violations. §3703. “Grandfather” provisions allow existing forms of sports gambling to continue in four States, §3704(a)(1)-(2), and another provision would have permitted New Jersey to set up a sports gambling scheme in Atlantic City within a year of PASPA's enactment, §3704(a)(3).

New Jersey did not take advantage of that option but subsequently changed its mind. After voters approved an amendment to the State Constitution giving the legislature the authority to legalize sports gambling schemes in Atlantic City and at horseracing tracks, the legislature enacted a 2012 law doing just that. The NCAA and three major professional sports leagues brought an action in federal court against New Jersey's Governor and other state officials, seeking to enjoin the law on the ground that it violates PASPA. New Jersey countered that PASPA violates the Constitution's “anticommandeering” principle by preventing the State from modifying or repealing its laws prohibiting sports gambling. The District Court found no anticommandeering violation, the Third Circuit affirmed, and the Supreme Court denied review.

In 2014, the New Jersey Legislature enacted a new law. Instead of affirmatively authorizing sports gambling schemes, this law repealed state-law provisions that prohibited such schemes, insofar as they concerned wagering on sporting events by persons 21 years of age or older; at a horseracing track or a casino or gambling house in Atlantic City; and only as to wagers on sporting events not involving a New Jersey college team or a collegiate event taking place in the State. The plaintiffs in the earlier suit then filed a new action in federal court. They won in the District Court, and the Third Circuit affirmed, holding that the 2014 law, no less than the 2012 one, violates PASPA. The court further held that the prohibition does not “commandeer” the States in violation of the Constitution.

In *Murphy v. NCAA* (2018), the Supreme Court reversed. Justice Alito delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, Kagan, and Gorsuch, JJ., joined. Justice Breyer joined as to all but Part VI–B. Justice Ginsburg dissented, joined by Justice

Sotomayor (in whole) and Justice Breyer (in part). The Court held that, consistent with the holdings of *New York v. United States* (1992) and *Printz v. United States* (1997), PASPA in fact “commandeered” state legislatures. [It must be noted that this opinion in no way limits Congress’s power to make sports betting illegal in all fifty states pursuant to its powers under the Commerce Clause—recall *Champion v. Ames* (1903). Obviously, the political influence of Las Vegas makes such an action problematic.] The Court’s treatment of the anticommandeering issue follows.

[**Justice Alito.**] III-A. The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States. When the original States declared their independence, they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority “to do all...Acts and Things which Independent States may of right do.” ¶32. The Constitution limited but did not abolish the sovereign powers of the States, which retained “a residuary and inviolable sovereignty.” The Federalist No. 39. Thus, both the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of “dual sovereignty.” *Gregory v. Ashcroft* (1991).

The Constitution limits state sovereignty in several ways. It directly prohibits the States from exercising some attributes of sovereignty. See, *e.g.*, Art. I, § 10. Some grants of power to the Federal Government have been held to impose implicit restrictions on the States. See, *e.g.*, *Department of Revenue of Ky. v. Davis*, (2008); *American Ins. Assn. v. Garamendi* (2003). And the Constitution indirectly restricts the States by granting certain legislative powers to Congress, see Art. I, § 8, while providing in the Supremacy Clause that federal law is the “supreme Law of the Land...any Thing in the Constitution or Laws of any State to the Contrary notwithstanding,” Art. VI, cl. 2. This means that when federal and state law conflict, federal law prevails and state law is preempted.

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.

Although the anticommandeering principle is simple and basic, it did not emerge in our cases until relatively recently, when Congress attempted in a few isolated instances to extend its authority in unprecedented ways. The pioneering case was *New York v. United States* (1992), which concerned a federal law that required a State, under certain circumstances, either to “take title” to low-level radioactive waste or to “regulat[e] according to the instructions of Congress.” *Id.* In enacting this provision, Congress issued orders to either the legislative or executive branch of state government (depending on the branch authorized by state law to take the actions

demanded). Either way, the Court held, the provision was unconstitutional because “the Constitution does not empower Congress to subject state governments to this type of instruction.” *Id.*

Justice O'Connor's opinion for the Court traced this rule to the basic structure of government established under the Constitution. The Constitution, she noted, “confers upon Congress the power to regulate individuals, not States.” *Id.* In this respect, the Constitution represented a sharp break from the Articles of Confederation. “Under the Articles of Confederation, Congress lacked the authority in most respects to govern the people directly.” *Id.* Instead, Congress was limited to acting “ ‘only upon the States.’ ” *Id.* Alexander Hamilton, among others, saw this as “ ‘[t]he great and radical vice in...the existing Confederation.’ ” The Constitutional Convention considered plans that would have preserved this basic structure, but it rejected them in favor of a plan under which “Congress would exercise its legislative authority directly over individuals rather than over States.” *Id.*

As to what this structure means with regard to Congress's authority to control state legislatures, *New York* was clear and emphatic. The opinion recalled that “no Member of the Court ha[d] ever suggested” that even “a particularly strong federal interest” “would enable Congress to command a state government to enact *state* regulation.” *Id.* “We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.” *Id.* “Congress may not simply ‘commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’ ” *Id.* “Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.” *Id.*

Five years after *New York*, the Court applied the same principles to a federal statute requiring state and local law enforcement officers to perform background checks and related tasks in connection with applications for handgun licenses. *Printz v. United States* (1997). Holding this provision unconstitutional, the Court put the point succinctly: “The Federal Government” may not “command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.” *Id.* This rule applies, *Printz* held, not only to state officers with policymaking responsibility but also to those assigned more mundane tasks. *Id.*

III-B. Our opinions in *New York* and *Printz* explained why adherence to the anticommandeering principle is important. Without attempting a complete survey, we mention several reasons that are significant here.

First, the rule serves as “one of the Constitution's structural protections of liberty.” *Printz, supra.* “The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities.” *New York, supra.* “To the contrary, the Constitution divides authority between federal and state governments for the protection of

individuals.” *Ibid.* “ ‘[A] healthy balance of power between the States and the Federal Government [reduces] the risk of tyranny and abuse from either front.’ ” *Id.*

Second, the anticommandeering rule promotes political accountability. When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame. By contrast, if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred. *See New York, supra; Printz, supra.*

Third, the anticommandeering principle prevents Congress from shifting the costs of regulation to the States. If Congress enacts a law and requires enforcement by the Executive Branch, it must appropriate the funds needed to administer the program. It is pressured to weigh the expected benefits of the program against its costs. But if Congress can compel the States to enact and enforce its program, Congress need not engage in any such analysis.

IV-A. The PASPA provision at issue here—prohibiting state authorization of sports gambling—violates the anticommandeering rule. That provision unequivocally dictates what a state legislature may and may not do. And this is true under either our interpretation or that advocated by respondents and the United States. In either event, state legislatures are put under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.

Neither respondents nor the United States contends that Congress can compel a State to enact legislation, but they say that prohibiting a State from enacting new laws is another matter. Noting that the laws challenged in *New York* and *Printz* “told states what they must do instead of what they must not do,” respondents contend that commandeering occurs “only when Congress goes beyond precluding state action and affirmatively commands it.” Brief for Respondents 19.

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

Here is an illustration. PASPA includes an exemption for States that permitted sports betting at the time of enactment, §3704, but suppose Congress did not adopt such an exemption. Suppose Congress ordered States with legalized sports betting to take the affirmative step of criminalizing that activity and ordered the remaining States to retain their laws prohibiting sports betting. There is no good reason why the former would intrude more deeply on state sovereignty than the latter.

IV-B. Respondents and the United States claim that prior decisions of this Court show that PASPA's anti-authorization provision is constitutional, but they misread those cases. In none of

them did we uphold the constitutionality of a federal statute that commanded state legislatures to enact or refrain from enacting state law.

In *South Carolina v. Baker* (1988), the federal law simply altered the federal tax treatment of private investments. Specifically, it removed the federal tax exemption for interest earned on state and local bonds unless they were issued in registered rather than bearer form. This law did not order the States to enact or maintain any existing laws. Rather, it simply had the indirect effect of pressuring States to increase the rate paid on their bearer bonds in order to make them competitive with other bonds paying taxable interest.

In any event, even if we assume that removal of the tax exemption was tantamount to an outright prohibition of the issuance of bearer bonds, see *Id.*, the law would simply treat state bonds the same as private bonds. The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage.

That principle formed the basis for the Court's decision in *Reno v. Condon* (2000), which concerned a federal law restricting the disclosure and dissemination of personal information provided in applications for driver's licenses. The law applied equally to state and private actors. It did not regulate the States' sovereign authority to “regulate their own citizens.” *Id.*

In *Hodel V. Virginia Surface Mining and Reclamation Association, Inc.* (1981), the federal law, which involved what has been called “cooperative federalism,” by no means commandeered the state legislative process. Congress enacted a statute that comprehensively regulated surface coal mining and offered States the choice of “either implement[ing]” the federal program “or else yield[ing] to a federally administered regulatory program.” *Ibid.* Thus, the federal law *allowed* but did not *require* the States to implement a federal program. “States [were] not compelled to enforce the [federal] standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever.” *Id.* If a State did not “wish” to bear the burden of regulation, the “full regulatory burden [would] be borne by the Federal Government.” *Ibid.*

Finally, in *FERC v. Mississippi* (1982), the federal law in question issued no command to a state legislature. Enacted to restrain the consumption of oil and natural gas, the federal law directed state utility regulatory commissions to consider, but not necessarily to adopt, federal “‘rate design’ and regulatory standards.” *Id.* The Court held that this modest requirement did not infringe the States' sovereign powers, but the Court warned that it had “never ... sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations.” *Id.* *FERC* was decided well before our decisions in *New York* and *Printz*, and PASPA, unlike the law in *FERC*, does far more than require States to *consider* Congress's preference that the legalization of sports gambling be halted. See *Printz* (distinguishing *FERC*).

In sum, none of the prior decisions on which respondents and the United States rely involved federal laws that commandeered the state legislative process. None concerned laws that directed the States either to enact or to refrain from enacting a regulation of the conduct of activities

occurring within their borders. Therefore, none of these precedents supports the constitutionality of the PASPA provision at issue here.

Chapter 5. The Role of the President. Section I, The Scope of Executive Power

*[Insert on page 341 after Youngstown Sheet & Tube Co. v. Sawyer and before the ***.]*

Note: *Trump v. Hawaii* (2018)

The Court in this case sustained the validity of President Trump's restrictions on the entry into the United States of persons that the Trump Administration regarded as potential terrorists. The Court, in an opinion delivered by Chief Justice Roberts (joined by Kennedy, Thomas, Alito, and Gorsuch, JJ.), concluded that Trump had acted in accordance with the powers delegated to the president pursuant to the Immigration and Nationality Act (INA) and that the order did not violate the Establishment Clause even though most of the persons affected by the order were Muslims.

Trump's order, as the Court explained, "sought to improve vetting procedures by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present 'public safety threats.'... To further that purpose, the Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate."

The proclamation explained that the eight countries were selected only after an extensive investigative process by the Department of Homeland Security, which identified countries whose governments were deficient in ensuring the integrity of travel documents and disclosure of information about the criminal histories and possible terrorist links of persons seeking to enter the United States. The Department also considered the extent to which these foreign states were known or potential havens for terrorists. It initially identified sixteen countries as having deficient information-sharing practices and another 31 as "at risk" for deficiencies in such practices. The State Department afterwards spent fifty days in diplomatic efforts to encourage these foreign governments to improve their practices. Many of these countries responded by improving their documentation process and agreeing to share information about known or suspected terrorists. At the end of this fifty day period, the Department of Homeland Security recommended restrictions on entry of various persons from Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen. The president embodied these recommendations in his proclamation after consulting with Cabinet members and other officials. As the Court explained, the proclamation "imposed a range of restrictions that vary based on the 'distinct circumstances' in each of the eight countries."

The constitutionality of the statute was challenged by the State of Hawaii, whose university recruits students and faculty from the designated countries; three U.S. citizens whose relatives were applying for visas from some of those countries; and an organization that operates a mosque in Hawaii. A federal district court issued a nationwide injunction on the ground that the President failed to make sufficient findings that the entry of the designated foreign nationals would be detrimental to the national interest and because it discriminated on the basis of nationality. The Court of Appeals for the Ninth Circuit affirmed. Neither lower federal court considered the plaintiffs' claims that the proclamation violated the Establishment Clause by discriminating against Muslims.

In reversing this decision, the Court declared that the President acted in accordance with the “plain language” of section 1182(f) of the INA, which provides that “[w]henver the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.” The Court concluded that this statute, which “exudes deference to the President in every clause,” confers “broad discretion” permitting the President “to suspend the entry of aliens into the United States. The President lawfully exercised that discretion based on his findings – following a worldwide, multi-agency review – that entry of the covered aliens would be detrimental to the national interest. And plaintiffs’ attempts to identify a conflict with other provisions in the INA, and their appeal to the statute’s purposes and history, fail to overcome the clear statutory language.” The Court remarked that “[t]he 12-page Proclamation – which thoroughly describes the process, agency evaluations, and recommendations underlying the President’s chosen restrictions – is more detailed than any prior order a President has issued under [section] 1182(f).” The Court also pointed out that at least three previous presidents, Obama, Clinton, and Reagan, have expansively interpreted the statute by suspending entry “not because the covered nationals themselves engaged in harmful acts but instead to retaliate for conduct by their governments that conflicted with U.S. foreign policy interests.”

The Court also rejected the argument that the proclamation violated a provision of the INA, section 1152(a)(1)(A), which prohibits discrimination based on “nationality, place of birth, or place of residence.” The Court explained that this provision applies only after a person has been deemed admissible pursuant to section 1182(f). The Court explained that “[t]he distinction between admissibility – to which [section] 1152(a)(1)(A) does not apply – and visa issuance – to which it does – is apparent from the text of the provision, which specifies only that its protections apply to the ‘issuance’ of ‘immigrant visa[s],’ without mentioning admissibility or entry.”

Finally, the Court concluded that the proclamation did not discriminate on the grounds of religion even though most of the countries covered by it have Muslim-majority populations and even though Trump during his presidential campaign had expressed concerns about possible security risks caused by Muslim immigration into the United States. Although the Court expressed reluctance to inquire into the motives behind a proclamation that was “neutral on its face” and addressed “a matter within the core of executive responsibility,” the Court expressed its willingness to “look behind the face of the Proclamation to the extent of applying rational basis review.” The Court explained that this “standard of review considers whether the entry policy is plausibly related to the Government’s stated objective to protect the country and improve vetting processes.” In applying this standard the Court considered, among various factors, that the proclamation was religiously neutral; that it was “limited to countries that were previously designated by Congress or prior administrations as posing national security risks;” that it reflected “the results of a worldwide review process undertaken by multiple Cabinet officials and their

agencies;” that the proclamation includes “significant exceptions for various categories of foreign nationals,” and that it contains a waiver program open to individuals who could demonstrate hardship and the absence of any threat to American security. The Court concluded that “the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility.”

In deciding this case, the Court adhered to its traditional reluctance to interfere with presidential or congressional decisions concerning national security. As the Court explained, “‘[a]ny rule of constitutional law that would inhibit the flexibility’ of the President ‘to respond to changing world conditions should be adopted only with the greatest caution,’ and our inquiry into matters of entry and national security is highly constrained,” quoting *Mathews v. Diaz* (1976).

In a concurring opinion, Justice Thomas expressed skepticism “that district courts have the authority to enter universal injunctions.” Such injunctions, he explained, did not emerge until the 1960s and remained rare until recently, when “they have exploded in popularity.” Thomas pointed out that England’s “system of equity did not contemplate universal injunctions” and that American courts historically “did not provide relief beyond parties to the case. If those injunctions advantaged nonparties, that benefit was merely incidental.” Although Thomas acknowledged that “[d]efenders of these injunctions contend that they ensure that individuals who did not challenge a law are treated the same as plaintiffs who did,” he contended that history and traditional limitations on equity and judicial power provided no justification for them.

Dissents by Justices Breyer (joined by Kagan, J.) and Justice Sotomayor (joined by Ginsburg, J.) argued that the proclamation was invalid under the Establishment Clause because it appeared to be motivated by anti-Muslim bias. Expressing concern that there was evidence suggesting that the proclamation’s waiver and exemption provisions were not being applied in a religiously neutral manner, Breyer contended that the case should be remanded for additional consideration. He stated, however, that, “[i]f this Court must decide this question without this further litigation,” he would conclude that Trump’s public statements about the dangers of Muslim immigration would be sufficient to invalidate the proclamation.

In her dissent, Sotomayor cited numerous statements of Trump concerning Muslim immigration, during and after his presidential campaign, as evidence of “a harrowing picture” of anti-Muslim bias that they believed to have found expression in his proclamation. In particular, she pointed out that he had pledged that, if elected, he would ban Muslims from entering the United States until the nation could assess the extent to which their entry posed a security threat. Sotomayor also quoted Trump as having declared during his campaign that “Islam hates us.” She contended that the Court in its recent decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* “found less persuasive official expressions of hostility and the failure to disavow them to be constitutionally significant.” Although Sotomayor declared that those statements would permit invalidation of the proclamation even pursuant to a rational basis standard of review, she described the Court’s use of this low level scrutiny as “perplexing” since the Court in other cases

involving religious discrimination “has applied a more stringent standard of review.” The majority responded to this aspect of the dissent by stating that the dissent failed to provide authority for its argument that a higher level review than rational basis scrutiny should apply “in the national security and foreign affairs context.” Sotomayor found additional evidence of anti-Muslim bias insofar as she contended that “Congress has already erected a statutory scheme that fulfills the putative national security interests the Government now puts forth to justify the Proclamation.” She also averred that “there is reason to suspect that the Proclamation’s waiver program is nothing more than a sham” since so few waivers had been granted.

Sotomayor found “stark parallels” between this case and *Korematsu v. United States* (1944) insofar as both were based upon injurious racial classifications and “rooted in dangerous stereotypes about...a particular groups’s supposed inability to assimilate and desire to harm the United States.” In responding to these allegations, the majority opinion formally overruled *Korematsu*, which it described as “gravely wrong the day it was decided,” but contended that “*Korematsu* has nothing to do with this case. The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority.”

Chapter 7. Limits on State Power. Part II, The Dormant Commerce Clause, Section G

[After the last sentence on page 522 insert a new heading: G. The Dormant Commerce Clause and State Taxation of Commerce.]

G. The Dormant Commerce Clause and State Taxation of Commerce.

Note: *South Dakota v. Wayfair* (2018)

South Dakota, taxes in-state retail sales of goods and services. North Carolina and many other states do the same. In South Dakota, many but not all, Sellers are required to collect and remit the tax to the State. Under Supreme Court precedent, sellers who lacked a physical presence in the state, could not be required to collect the state's sales and services taxes. See, *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U. S. 753, and *Quill Corp. v. North Dakota*, 504 U. S. 298. For such sales, in-state consumers were responsible for paying a use tax at the same rate, but compliance had been "notoriously low."

With the rise of internet sales, many sellers lacked a physical presence in the state. The estimate that the Court cited was that "*Bellas Hess* and *Quill* cause[d] South Dakota to lose between \$48 and \$58 million annually in sales tax revenue.

Concerned about the erosion of its sales tax base and corresponding loss of critical funding for state and local services, the South Dakota Legislature enacted a law requiring out-of-state sellers to collect and remit sales tax "as if the seller had a physical presence in the State." The Act covers only sellers that, on an annual basis, deliver more than \$100,000 of goods or services into the State or engage in 200 or more separate transactions for the delivery of goods or services into the State.

Wayfair and other top retailers (respondents) had no employees or real estate or qualifying physical presence in South Dakota, but each met the Act's minimum sales or transactions requirement. Nonetheless, they did not collect the State's sales tax. South Dakota filed suit in state court, seeking a declaration that the Act's requirements are valid and applicable to respondents and also sought an injunction requiring Wayfair and the other respondents to register for licenses to collect and remit the sales tax. The state courts held the act unconstitutionally violated the Dormant Commerce Clause.

The Supreme Court reversed. Kennedy delivered the opinion of the Court in which Thomas, Ginsberg, Alito, and Gorsuch, JJ., joined. Thomas, J., and Gorsuch, J., filed concurring opinions. Roberts, C.J., dissented in an opinion joined by Breyer, Kagan, and Sotomayor, JJ.

The Court explained that the Dormant Commerce Clause limits state regulation of interstate commerce. States "1. may not discriminate against interstate commerce and" 2. they may not unduly burden interstate commerce." These principles also "animate" the Court's precedents on taxation of interstate commerce. As applied to state taxation of interstate commerce, the Court has set out four guiding principles. Taxes "will be sustained so long as they (1) apply to

an activity with a substantial nexus with the taxing State, (2) are fairly apportioned, (3) do not discriminate against interstate commerce, and (4) are fairly related to the services the State provides.”

The Court rejected the physical presence rule and overruled cases requiring it. It said each year the rule became more and more divorced from economic reality. It imposed significant revenue losses on the states. It favored many out of state sellers over sellers located within the states. It created market distortions and creates an tax shelter for businesses that sell to state consumers but that limit their physical presence in the state. It held that

“Modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*.”

“Between targeted advertising and instant access to most consumers via any internet-enabled device, ‘a business may be present in a State in a meaningful way without’ that presence ‘being physical in the traditional sense of the term.’ ... A virtual showroom can show far more inventory, in far more detail, and with greater opportunities for consumer and seller interaction than might be possible for local stores. Yet the continuous and pervasive virtual presence of retailers today is, under *Quill*, simply irrelevant.”

In addition as applied the physical presence rule undermined the role of the states in the federal system. “The physical presence rule as defined and enforced in *Bellas Hess* and *Quill* is not just a technical legal problem—it is an extraordinary imposition by the Judiciary on States’ authority to collect taxes and perform critical public functions.” For example, the Court noted, citing South Dakota’s brief:

“Wayfair offers to sell a vast selection of furnishings. Its advertising seeks to create an image of beautiful, peaceful homes, but it also says that “[o]ne of the best things about buying through Wayfair is that we do not have to charge sales tax.” What Wayfair ignores in its subtle offer to assist in tax evasion is that creating a dream home assumes solvent state and local governments. State taxes fund the police and fire departments that protect the homes containing their customers’ furniture and ensure goods are safely delivered; maintain the public roads and municipal services that allow communication with and access to customers; support the “sound local banking institutions to support credit transactions [and] courts to ensure collection of the purchase price,”

In addition, it was unfair and unjust to in-state and out-of-state competitors who must pay the tax.

The four dissenters argued for stare decisis but also pointed out policy arguments for leaving the matter to Congress. Chief Justice Roberts, joined by Justice Breyer, Sotomayor, and Kagan dissented. They agreed that *Quill* had been wrongly decided, but held the matter of fixing the problems should be left up to Congress. The physical presence rule had become intertwined

with commercial decisions, and provided a bonus to small retailers. Adjusting the competing interest should be left to the Congress, which of course, has the constitutional power to change the Court's dormant commerce decisions:

“E-commerce has grown into a significant and vibrant part of our national economy against the backdrop of established rules, including the physical-presence rule. Any alteration to those rules with the potential to disrupt the development of such a critical segment of the economy should be undertaken by Congress. The Court should not act on this important question of current economic policy, solely to expiate a mistake made over 50 years ago. ...

Chief Justice Roberts noted the myriad state and local taxes which which small retailers must now comply:

“The burden will fall disproportionately on small businesses. One vitalizing effect of the Internet has been connecting small, even ‘micro’ businesses to potential buyers across the Nation. People starting a business selling their embroidered pillowcases or carved decoys can offer their wares throughout the country—but probably not if they have to figure out the tax due on every sale. See Sales Taxes Report 22 (indicating that “costs will likely increase the most for businesses that do not have established legal teams, software systems, or outside counsel to assist with compliance related questions”). And the software said to facilitate compliance is still in its infancy, and its capabilities and expense are subject to debate. ... The Court’s decision today will surely have the effect of dampening opportunities for commerce in a broad range of new markets.’

Congress, the dissenters argued is far better suited to adjusting the complex policy choices:

“Here, after investigation, Congress could reasonably decide that current trends might sufficiently expand tax revenues, obviating the need for an abrupt policy shift with potentially adverse consequences for e-commerce. Or Congress might decide that the benefits of allowing States to secure additional tax revenue outweigh any foreseeable harm to e-commerce. Or Congress might elect to accommodate these competing interests, by, for example, allowing States to tax Internet sales by remote retailers only if revenue from such sales exceeds some set amount per year. See Goodlatte Brief 12–14 (providing varied examples of how Congress could address sales tax collection). In any event, Congress can focus directly on current policy concerns rather than past legal mistakes. Congress can also provide a nuanced answer to the troubling question whether any change will have retroactive effect.”

Chapter 9. Equal Protection. Section XI, Equal Protection and Fundamental Rights, Part A, The Right to Vote.

[Insert *Cooper v. Harris*, the note on *Covington v. North Carolina*, and the note on *Gill v. Whitford* on p. 819 after the note on the Voting Rights Act of 1965 and before *Harper*.

***Cooper v. Harris* (2017): Background and Case**

After the 2010 election, North Carolina Republicans controlled the governor's office, and both branches of the state legislature. 2011 was a year in which redistricting was required, as it is in North Carolina every ten years. Since Republicans controlled the legislature, they were in charge of redistricting. They redistricted congressional districts and state legislative districts and in both cases, they maximized Republican control and severely minimized Democratic representation in Congress and in the state legislature. Voters challenged twenty-eight state legislative districts and two congressional districts (District 1 and District 12) as racial gerrymanders that violated the Equal Protection Clause of the 14th Amendment. In a somewhat complex series of judicial decisions, the federal decisions ended up stating the controlling law.

Ultimately, in three-judge court decisions that were affirmed by the Supreme Court, the federal courts had found racial considerations had predominated in drawing the districts and the justifications (under the Voting Rights Act) withered under strict scrutiny. Here we excerpt only the majority opinion in the case of District 1. As to District 12 the Court was divided with a majority finding no clear error in the three-judge court's finding of impermissible racial districting and dissenters claiming that instead the legislature that engaged in a presumably permissible political districting.

In Congressional District 1 and in the purported Voting Rights state legislative districting, the legislature's method was to use explicit racial quotas (euphemistically called targets) to require the districts have a black voting age population of at least 50%. Since typically black candidates preferred by black voters had been winning the prior districts—which were reconstituted-- packing more black voters into the “new” districts paid political dividends for Republicans—by wasting black and overwhelmingly Democratic votes. In less than majority black districts, often these votes had helped to elect white Democrats—just as votes of whites and other ethnic groups had help elect black candidates in districts that were less than 50%+ black voting age population. For those who sought to create the impression of a “white” Republican Party and a “black” Democratic Party, draining black Democratic votes from these districts, the quota paid additional dividends.

Cooper v. Harris was the federal court suit brought by registered voters in Congressional Districts 1 and 12. Excerpts are set out below.

Cooper v. Harris
581 U. S. __ (2017)

[Majority: Kagan, Thomas, Ginsburg, Breyer, and Sotomayor, JJ. Concurring: Thomas, J. Concurring in the judgment in part and dissenting in part, Alito, J., joined by Roberts (C.J.) and Kennedy, J. Gorsuch, J., took no part in the consideration or decision of the case.]

Justice Kagan delivered the opinion of the Court.

The Constitution entrusts States with the job of designing congressional districts. But it also imposes an important constraint: A State may not use race as the predominant factor in drawing district lines unless it has a compelling reason. In this case, a three-judge District Court ruled that North Carolina officials violated that bar when they created two districts whose voting-age populations were majority black. Applying a deferential standard of review to the factual findings underlying that decision, we affirm. ...

I-A. The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans. It prevents a State, in the absence of “sufficient justification,” from “separating its citizens into different voting districts on the basis of race.” *Bethune–Hill v. Virginia State Bd. of Elections* (2017). When a voter sues state officials for drawing such race-based lines, our decisions call for a two-step analysis.

First, the plaintiff must prove that “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.” *Miller v. Johnson* (1995). That entails demonstrating that the legislature “subordinated” other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to “racial considerations.” The plaintiff may make the required showing through “direct evidence” of legislative intent, “circumstantial evidence of a district’s shape and demographics,” or a mix of both.

Second, if racial considerations predominated over others, the design of the district must withstand strict scrutiny. ... The burden thus shifts to the State to prove that its race-based sorting of voters serves a “compelling interest” and is “narrowly tailored” to that end. This Court has long assumed that one compelling interest is complying with operative provisions of the Voting Rights Act of 1965 (VRA or Act). ...

Two provisions of the VRA—§ 2 and § 5—are involved in this case. Section 2 prohibits any “standard, practice, or procedure” that “results in a denial or abridgement of the right ... to vote on account of race.” We have construed that ban to extend to “vote dilution”—brought about, most relevantly here, by the “dispersal of [a group’s members] into districts in which they constitute an ineffective minority of voters.” *Thornburg v. Gingles* (1986). Section 5, at the time of the districting in dispute, worked through a different mechanism. Before this Court invalidated its coverage formula, see *Shelby County v. Holder* (2013), that section required certain jurisdictions (including various North Carolina counties) to pre-clear voting changes with the

Department of Justice, so as to forestall “retrogression” in the ability of racial minorities to elect their preferred candidates, *Beer v. United States* (1976).

When a State invokes the VRA to justify race-based districting, [as North Carolina did in the case of Congressional District 1 and in another case challenging state legislative districts] it must show (to meet the “narrow tailoring” requirement) that it had “a strong basis in evidence” for concluding that the statute required its action. *Alabama Legislative Black Caucus v. Alabama* (2015). Or said otherwise, the State must establish that it had “good reasons” to think that it would transgress the Act if it did *not* draw race-based district lines. That “strong basis” (or “good reasons”) standard gives States “breathing room” to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed. *Bethune–Hill*.

A district court’s assessment of a districting plan, in accordance with the two-step inquiry just described, warrants significant deference on appeal to this Court. We of course retain full power to correct a court’s errors of law, at either stage of the analysis. But the court’s findings of fact—most notably, as to whether racial considerations predominated in drawing district lines—are subject to review only for clear error. ...

I-B. This case concerns North Carolina’s most recent redrawing of two congressional districts, both of which have long included substantial populations of black voters. ...

Another census, in 2010, necessitated yet another congressional map—(finally) the one at issue in this case. State Senator Robert Rucho and State Representative David Lewis, both Republicans, chaired the two committees jointly responsible for preparing the revamped plan. They hired Dr. Thomas Hofeller, a veteran political mapmaker, to assist them in re-drawing district lines. Several hearings, drafts, and revisions later, both chambers of the State’s General Assembly adopted the scheme the three men proposed.

The new map (among other things) significantly altered both District 1 and District 12. The 2010 census had revealed District 1 to be substantially underpopulated: To comply with the Constitution’s one-person-one-vote principle, the State needed to place almost 100,000 new people within the district’s boundaries. ...

Rucho, Lewis, and Hofeller chose to take most of those people from heavily black areas of Durham, requiring a finger-like extension of the district’s western line. ... With that addition, District 1’s BVAP rose from 48.6% to 52.7%. District 12, for its part, had no need for significant total-population changes: It was overpopulated by fewer than 3,000 people out of over 730,000. ... Still, Rucho, Lewis, and Hofeller decided to reconfigure the district, further narrowing its already snakelike body while adding areas at either end—most relevantly here, in Guilford County. Those changes appreciably shifted the racial composition of District 12: As the district gained some 35,000 African–Americans of voting age and lost some 50,000 whites of that age, its BVAP increased from 43.8% to 50.7%. ...

Registered voters in the two districts (David Harris and Christine Bowser, here called “the plaintiffs”) brought this suit against North Carolina officials (collectively, “the State” or “North

Carolina’’), complaining of impermissible racial gerrymanders. After a bench trial, a three-judge District Court held both districts unconstitutional. All the judges agreed that racial considerations predominated in the design of District 1. See *Harris v. McCrory* (2016). And in then applying strict scrutiny, all rejected the State’s argument that it had a “strong basis” for thinking that the VRA compelled such a race-based drawing of District 1’s lines. As for District 12, a majority of the panel held that “race predominated” over all other factors, including partisanship. And the court explained that the State had failed to put forward any reason, compelling or otherwise, for its attention to race in designing that district. Judge Osteen dissented from the conclusion that race, rather than politics, drove District 12’s lines—yet still characterized the majority’s view as “[e]minently reasonable.” ...

[T]he court below found that race furnished the predominant rationale for that district’s redesign. And it held that the State’s interest in complying with the VRA could not justify that consideration of race. We uphold both conclusions. ...

III-A. Uncontested evidence in the record shows that the State’s mapmakers, in considering District 1, purposefully established a racial target: African–Americans should make up no less than a majority of the voting-age population. Senator Rucho and Representative Lewis were not coy in expressing that goal. They repeatedly told their colleagues that District 1 had to be majority-minority, so as to comply with the VRA. During a Senate debate, for example, Rucho explained that District 1 “must include a sufficient number of African–Americans” to make it “a majority black district.” Similarly, Lewis informed the House and Senate redistricting committees that the district must have “a majority black voting age population.” And that objective was communicated in no uncertain terms to the legislators’ consultant. Dr. Hofeller testified multiple times at trial that Rucho and Lewis instructed him “to draw [District 1] with a [BVAP] in excess of 50 percent. [As a result, Dr. Hofeller explained that he sometimes could not follow county or precinct lines because the most important thing was to reach the 50%+ target.] ...

[The Court noted that in light of evidence showing other criteria were subordinated to race, the district court could hardly avoid finding race predominated in drawing District 1.] Indeed, as all three judges recognized, the court could hardly have concluded anything but. ... (calling District 1 a “textbook example” of racial districting.) [The Court noted that the question was whether District 1 could survive the strict scrutiny applied to race based districting. The Court has assumed that complying with the Voting Rights Act is a compelling interest. The second part of the test was whether the districting remedy applied was narrowly tailored to comply with that interest. On whether the remedy of a majority-minority district was required, the Court looked to the *Gingles* test, set out below.]

III-B. This Court identified, in *Thornburg v. Gingles*, three threshold conditions for proving vote dilution under § 2 of the VRA. First, a “minority group” must be “sufficiently large and geographically compact to constitute a majority” in some reasonably configured legislative district. Second, the minority group must be “politically cohesive.” And third, a district’s white majority must “vote[] sufficiently as a bloc” to usually “defeat the minority’s preferred

candidate.” Those three showings, we have explained, are needed to establish that “the minority [group] has the potential to elect a representative of its own choice” in a possible district, but that racially polarized voting prevents it from doing so in the district as actually drawn because it is “submerg[ed] in a larger white voting population.” *Growe v. Emison* (1993). If a State has good reason to think that all the “*Gingles* preconditions” are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. ... But if not, then not. ...

Here, electoral history provided no evidence that a § 2 plaintiff could demonstrate the third *Gingles* prerequisite—effective white bloc-voting. For most of the twenty years prior to the new plan’s adoption, African-Americans had made up less than a majority of District 1’s voters; the district’s BVAP usually hovered between 46% and 48%. ... Yet throughout those two decades, as the District Court noted, District 1 was “an extraordinarily safe district for African-American preferred candidates.” In the *closest* election during that period, African-Americans’ candidate of choice received 59% of the total vote; in other years, the share of the vote garnered by those candidates rose to as much as 70%. Those victories (indeed, landslides) occurred because the district’s white population did *not* “vote[] sufficiently as a bloc” to thwart black voters’ preference, *Gingles*; rather, a meaningful number of white voters joined a politically cohesive black community to elect that group’s favored candidate. In the lingo of voting law, District 1 functioned, election year in and election year out, as a “crossover” district, in which members of the majority help a “large enough” minority to elect its candidate of choice. *Bartlett v. Strickland* (2009) (plurality opinion). When voters act in that way, “[i]t is difficult to see how the majority-bloc-voting requirement could be met”—and hence how § 2 liability could be established. So experience gave the State no reason to think that the VRA required it to ramp up District 1’s BVAP.

The State counters that, in this context, past performance is no guarantee of future results. Recall here that the State had to redraw its whole congressional map following the 2010 census. And in particular, the State had to add nearly 100,000 new people to District 1 to meet the one-person-one-vote standard. That meant about 13% of the voters in the new district would never have voted there before. So, North Carolina contends, the question facing the state mapmakers was not whether the *then-existing* District 1 violated § 2. Rather, the question was whether the *future* District 1 would do so if drawn without regard to race. And that issue, the State claims, could not be resolved by “focusing myopically on past elections.”

But that reasoning, taken alone, cannot justify North Carolina’s race-based redesign of District 1. True enough, a legislature undertaking a redistricting must assess whether the new districts it contemplates (not the old ones it sheds) conform to the VRA’s requirements. And true too, an inescapable influx of additional voters into a district may suggest the possibility that its former track record of compliance can continue only if the legislature intentionally adjusts its racial composition. Still, North Carolina too far downplays the significance of a longtime pattern of white crossover voting in the area that would form the core of the redrawn District 1. See *Gingles* (noting that longtime voting patterns are highly probative of racial polarization). And even more important, North Carolina can point to no meaningful legislative inquiry into what it now rightly identifies as

the key issue: whether a new, enlarged District 1, created without a focus on race but however else the State would choose, could lead to § 2 liability. The prospect of a significant population increase in a district only raises—it does not answer—the question whether § 2 requires deliberate measures to augment the district’s BVAP. (Indeed, such population growth could cut in either direction, depending on who comes into the district.) To have a strong basis in evidence to conclude that § 2 demands such race-based steps, the State must carefully evaluate whether a plaintiff could establish the *Gingles* preconditions—including effective white bloc-voting—in a new district created without those measures. We see nothing in the legislative record that fits that description.

And that absence is no accident: Rucho and Lewis proceeded under a wholly different theory—arising not from *Gingles* but from *Bartlett v. Strickland*—of what § 2 demanded in drawing District 1. *Strickland* involved a geographic area in which African-Americans could not form a majority of a reasonably compact district. The African-American community, however, was sizable enough to enable the formation of a crossover district, in which a substantial bloc of black voters, if receiving help from some white ones, could elect the candidates of their choice. A plurality of this Court, invoking the first *Gingles* precondition, held that § 2 did not require creating that district: When a minority group is not sufficiently large to make up a majority in a reasonably shaped district, § 2 simply does not apply. Over and over in the legislative record, Rucho and Lewis cited *Strickland* as mandating a 50%-plus BVAP in District 1. They apparently reasoned that if, as *Strickland* held, § 2 does not *require* crossover districts (for groups insufficiently large under *Gingles*), then § 2 also cannot be *satisfied* by crossover districts (for groups in fact meeting *Gingles*’s size condition). In effect, they concluded, whenever a legislature *can* draw a majority-minority district, it *must* do so—even if a crossover district would also allow the minority group to elect its favored candidates.

That idea, though, is at war with our § 2 jurisprudence—*Strickland* included. Under the State’s view, the third *Gingles* condition is no condition at all, because even in the absence of effective white bloc-voting, a § 2 claim could succeed in a district (like the old District 1) with an under-50% BVAP. But this Court has made clear that unless *each* of the three *Gingles* prerequisites is established, “there neither has been a wrong nor can be a remedy.” And *Strickland*, far from supporting North Carolina’s view, underscored the necessity of demonstrating effective white bloc-voting to prevail in a § 2 vote-dilution suit. The plurality explained that “[i]n areas with substantial crossover voting,” § 2 plaintiffs would not “be able to establish the third *Gingles* precondition” and so “majority-minority districts would not be required.” Thus, North Carolina’s belief that it was compelled to redraw District 1 (a successful crossover district) as a majority-minority district rested not on a “strong basis in evidence,” but instead on a pure error of law. *Alabama*.

In sum: Although States enjoy leeway to take race-based actions reasonably judged necessary under a proper interpretation of the VRA, that latitude can-not rescue District 1. We by no means “insist that a state legislature, when redistricting, determine *precisely* what percent

minority population [§ 2 of the VRA] demands.’’ But neither will we approve a racial gerrymander whose necessity is supported by no evidence and whose *raison d’être* is a legal mistake. Accordingly, we uphold the District Court’s conclusion that North Carolina’s use of race as the predominant factor in designing District 1 does not withstand strict scrutiny.

IV. [The Court proceeded to consider District 12. There the state argued that far from a racial gerrymander it had engaged in a political gerrymander. The trial court had found that race predominated and that the racial districting failed to survive the somewhat relaxed strict scrutiny used in this category of cases.]

We now look west to District 12, making its fifth(!) appearance before this Court. This time, the district’s legality turns, and turns solely, on which of two possible reasons predominantly explains its most recent reconfiguration. [The trial court found that] that the General Assembly chose voters for District 12, as for District 1, because of their race; more particularly, they urged that the Assembly intentionally increased District 12’s BVAP in the name of ensuring preclearance under the VRA’s § 5. But North Carolina declined to mount any defense (similar to the one we have just considered for District 1) that § 5’s requirements in fact justified race-based changes to District 12—perhaps because § 5 could not reasonably be understood to have done so. Instead, the State altogether denied that racial considerations accounted for (or, indeed, played the slightest role in) District 12’s redesign. According to the State’s version of events, Senator Rucho, Representative Lewis, and Dr. Hofeller moved voters in and out of the district as part of a “strictly” political gerrymander, without regard to race. The mapmakers drew their lines, in other words, to “pack” District 12 with Democrats, not African–Americans. After hearing evidence supporting both parties’ accounts, the District Court accepted the plaintiffs’.

[In assessing a racial gerrymander claim a court] can make real headway by exploring the challenged district’s conformity to traditional districting principles, such as compactness and respect for county lines. In *Shaw II*, for example, this Court emphasized the “highly irregular” shape of then-District 12 in concluding that race predominated in its design. But such evidence loses much of its value when the State asserts partisanship as a defense, because a bizarre shape—as of the new District 12—can arise from a “political motivation” as well as a racial one. *Cromartie I*. And crucially, political and racial reasons are capable of yielding similar oddities in a district’s boundaries. That is because, of course, “racial identification is highly correlated with political affiliation.” *Cromartie II*. As a result of those redistricting realities, a trial court has a formidable task: It must make “a sensitive inquiry” into all “circumstantial and direct evidence of intent” to assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district’s lines. *Cromartie I*.

Our job is different—and generally easier. As described earlier, we review a district court’s finding as to racial predominance only for clear error, except when the court made a legal mistake. Under that standard of review, we affirm the court’s finding so long as it is “plausible”; we reverse only when “left with the definite and firm conviction that a mistake has been committed.” *Anderson v. Bessemer City* (1985). And in deciding which side of that line to come down on, we

give singular deference to a trial court’s judgments about the credibility of witnesses. See Fed. Rule Civ. Proc. 52(a)(6). That is proper, we have explained, because the various cues that “bear so heavily on the listener’s understanding of and belief in what is said” are lost on an appellate court later sifting through a paper record. *Anderson*.

In light of those principles, we uphold the District Court’s finding of racial pre-dominance respecting District 12. The evidence offered at trial, including live witness testimony subject to credibility determinations, adequately supports the conclusion that race, not politics, accounted for the district’s reconfiguration. And no error of law infected that judgment: Contrary to North Carolina’s view, the District Court had no call to dismiss this challenge just because the plaintiffs did not proffer an alternative design for District 12 as circumstantial evidence of the legislature’s intent.

IV-A. Begin with some facts and figures, showing how the redistricting of District 12 affected its racial composition. As explained above, District 12 (unlike District 1) was approximately the right size as it was: North Carolina did not—indeed, could not—much change its total population. See But by further slimming the district and adding a couple of knobs to its snakelike body (including in Guilford County), the General Assembly incorporated tens of thousands of new voters and pushed out tens of thousands of old ones. And those changes followed racial lines: To be specific, the new District 12 had 35,000 more African–Americans of voting age and 50,000 fewer whites of that age. (The difference was made up of voters from other racial categories.) [The majority proceeded to summarize evidence supporting the district court’s decision.]

[In footnote 7 the Court explained that where race predominates the use of race for political purposes still triggers strict scrutiny. If the motive is political but the means are racial that still triggers heightened scrutiny. The footnote continues:] As earlier noted, that inquiry is satisfied when legislators have “place[d] a significant number of voters within or without” a district predominantly because of their race, regardless of their ultimate objective in taking that step. So, for example, if legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests— perhaps thinking that a proposed district is more “sellable” as a race-based VRA compliance measure than as a political gerrymander and will accomplish much the same thing— their action still triggers strict scrutiny. ... In other words, the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics. See *Miller*.

The *Cooper* dissent by Justices Alito, Kennedy, and Chief Justice Roberts

[The dissenters argued that politics predominated and that the case was controlled by a prior decision about District 12, which had held that politics predominated. The following summary, including quotes from the Court, is largely from an Article by Michael Curtis, *North Carolina’s Sick Democracy* © Michael Curtis].

The dissenters noted that finding a racial motive was to accuse the legislature of something

really bad. By contrast a political gerrymander was “distasteful.” “When a federal court says that race was a legislature’s predominant purpose in drawing a district, it accuses the legislature of ‘offensive and demeaning’ conduct. Indeed, we have said that racial gerrymanders ‘bea[r] an uncomfortable resemblance to political apartheid.’” That is a grave accusation to level against a state legislature.

In addition, the dissent continued “[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions” because “[i]t is well settled that reapportionment is primarily the duty and responsibility of the State.” The dissenters continued:

When a federal court finds that race predominated in the redistricting process, it inserts itself into that process. That is appropriate—indeed, constitutionally required—if the legislature truly did draw district boundaries on the basis of race. But if a court mistakes a political gerrymander for a racial one, it illegitimately invades a traditional domain of state authority, usurping the role of a State’s elected representatives. This does violence to both the proper role of the Judiciary and the powers reserved to the States under the Constitution. There is a final, often-unstated danger where race and politics correlate: that the federal courts will be transformed into weapons of political warfare. Unless courts “exercise extraordinary caution” in distinguishing race-based redistricting from politics-based redistricting, they will invite the losers in the redistricting process to seek to obtain in court what they could not achieve in the political arena. If the majority party draws districts to favor itself, the minority party can deny the majority its political victory by prevailing on a racial gerrymandering claim. Even if the minority party loses in court, it can exact a heavy price by using the judicial process to engage in political trench warfare for years on end.

The two dissenters cited *Cromartie II*, one of five challenges to District 12. The dissenters warned that unjustified success in a racial gerrymandering case, might rob the legislature of its *legitimate* political gains. “[C]aution ‘is especially appropriate . . . where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated.’”

Cromartie II, like *Cooper*, involved the race versus politics conundrum. In *Cromartie II*, the Court reversed the district court’s fact-finding of a racial motive—just the approach the dissenters thought the Court should follow in *Cooper v. Harris*. *Cromartie I* was reversed on the grounds that the challengers had failed to show “that the legislature could have achieved its legitimate political objectives in an alternative way” that was “consistent with traditional districting principles” and that the “alternatives would have brought about significantly greater racial balance.” The argument about District 12 highlights the problem of separating the Siamese twin of racial and political gerrymanders as well as the dissenters less negative view of political gerrymanders.

Note: *Covington v. North Carolina*, 316 F.R.D. 117 (MDNC 2016)

In 2011, after their smashing win in the 2010 election, Republicans in control of the North Carolina General Assembly redistricted both houses of the state legislature. Among their objectives, two were not to be deviated from when possible. First, wherever a district could be constructed with 50%+ black voting age population, it should be created. Second, there should be blacks in the legislature in proportion to the black voting age population of the state. The Republican co-chairs of the redistricting committee justified these “targets” or quotas, as mandated by Sections 2 & 5 of the Voting Rights Act or at least as justified by the need to create a safe harbor against a successful Voting Rights Act suit.

The racial districting paid political dividends. In the prior districts which were redrawn, black candidates with support from whites and other ethnic groups often had been winning elections by landslide-like majorities—with less than 50% black voting age population in the districts. Packing more blacks into majority black districts wasted black votes, and the votes were most often Democratic. It also drained black voters out of other districts that had been won by white Democrats—undermining white incumbents—and making the parties in the legislature look more like a black and white party. The legislature also drew white state senator Linda Garrou out of her district which had a large but not majority black population, most of whom had supported Senator Garrou. The object expressed by Senator Rucho, the senate redistricting chair, was to increase the chances that a black candidate would win the seat instead of the white state senator. Other white Democrats were also drawn out of their districts or potential districts.

North Carolina voters challenged twenty-eight of the new State Senate and House of Representative districts as unconstitutional racial gerrymanders created “through the predominant and unjustified use of race” in violation of the Equal Protection Clause of the 14th Amendment. Defendants—the redistricting co-chairs—argued in response that race was not the primary consideration in the 2011 redistricting, and that, even if it was, the North Carolina General Assembly’s use of race was justified as to comply with its obligations under sections 2 and 5 of the Voting Rights Act or to protect against potential Voting Rights Acts suits.

The three-judge federal court found that race predominated in drawing the districts and that the legislature had failed to show a strong reason to believe the districts were narrowly tailored to achieve a compelling Voting Rights Act objective. That supposed objective would be to prevent white bloc voting from usually defeating candidates preferred by black voters in the newly created districts. Eventually, districts were redrawn, some by agreement of the parties to the suit and, where they failed to agree, some by court order. As to the purported voting rights districts, the decision in *Covington v. North Carolina* was summarily affirmed without opinion by the United States Supreme Court [*North Carolina v. Covington* (2017)], presumably on grounds similar to those in *Cooper v. Harris*, the congressional case—failure of the defendants to show that there were strong reasons to believe that the racial “targets” were reasonably necessary to serve the purported Voting Rights interest.

Note: *Gill v. Whitford* (2018)

In *Gill*, the Court invoked the doctrine of standing to bypass consideration of the extent to which political gerrymandering of state legislative districts might violate the First Amendment's right to association and the Fourteenth Amendment's right to equal protection. Roberts, C. J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Breyer, Alito, Sotomayor, and Kagan, JJ., joined, and in which Thomas and Gorsuch, JJ., joined except as to Part III.

The Court remanded the case to provide the plaintiffs with an opportunity to prove that they had suffered concrete and particularized injuries that burdened their individual votes. Although the Court's decision on standing was unanimous, Justice Kagan, joined by Ginsburg, Breyer, and Sotomayor, JJ., vigorously argued that "extreme partisan gerrymanders" are unconstitutional.

The plaintiffs alleged that the Wisconsin legislature, in which Republicans had majorities in both houses, had violated the constitutional rights of Democratic voters by "cracking" and "packing" such voters. The plaintiffs explained that "[c]racking means dividing a party's supporters among multiple districts so that they fall short of a majority in each one. Packing means concentrating one party's backers in a few districts that they win by overwhelming margins." Such practices are used in apportioning seats in most of the states of the Union. The plaintiffs contended that "the degree to which packing and cracking has favored one party over another can be measured by a single calculation: an 'efficiency gap' that compares each party's respective 'wasted' votes across all legislative districts. 'Wasted' votes are those cast for a losing candidate or for a winning candidate in excess of what that candidate needs to win." The plaintiffs contended that the legislature's apportionment of seats "resulted in an unusually large efficiency gap that favored Republicans."

A federal district court in Wisconsin held that the plaintiffs demonstrated a violation of the rights to association and equal protection. The court held that redistricting of legislative seats is unconstitutional if it "(1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds." Although the court found that Wisconsin Republicans enjoyed a modest natural advantage because Democratic votes tended to be concentrated in Milwaukee and Madison, it determined that "this inherent geographical disparity did not account for the magnitude of the Republican advantage." The court held that the plaintiffs had standing because the legislation prevented "Wisconsin Democrats from being able to translate their votes into seats as effectively as Wisconsin Republicans" and the "dilution of their votes is both personal and acute." A dissenting judge argued that the precedents of the U.S. Supreme Court demonstrated that "partisan intent" to benefit a particular party "is not illegal, but is simply the consequence of assigning the task of redistricting to the political branches."

On appeal, the Court acknowledged that its previous gerrymandering decisions had "few clear landmarks" and had "generated conflicting views both of how to conceive of the injury

arising from partisan gerrymandering and of the appropriate role for the Federal Judiciary in remedying that injury.” In the Court’s most recent decision, *Vieth v. Jubelirer* (2004), a four-Justice plurality held that the political question doctrine barred adjudication because of the absence of any “judicially discernable and manageable standard” for a decision.

In determining that the plaintiffs lacked standing, the Court explained that their complaint of vote dilution needed to be specific to the district in which they resided rather than state-wide, in contrast with the plaintiffs in *Baker v. Carr* and *Reynolds v. Sims*, who had standing because they were able to assert that districts throughout the state had been malapportioned. The Court explained that “[h]ere, the plaintiffs’ partisan gerrymandering claims turn on allegations that their votes have been diluted. That harm arises from the particular composition of the voter’s own district, which causes his vote – having been packed or cracked – to carry less weight than it would carry in another, hypothetical district. Remedying the individual voter’s harm, therefore, does not necessarily require restructuring all of the State’s legislative districts. It requires revising only such districts as are necessary to reshape the voter’s district – so that the voter may be unpacked or uncracked, as the case may be.” The Court explained that a “citizen’s interest in the overall composition of the legislature is embodied in his right to vote for his representative. And the citizen’s abstract interest in policies adopted by the legislature on the facts here is a nonjusticiable ‘general interest common to all members of the public,’” citing *Ex parte Levitt* (1937).

The Court likewise explained that the plaintiffs lacked standing because they based their complaint on a theory of statewide injury to the Democratic party rather than attempting to provide that they lived in packed or cracked districts.

Accordingly, the Court remanded the case to the district court to provide plaintiffs with “an opportunity to prove concrete and particularized injuries using evidence – unlike the bulk of the evidence presented thus far – that would tend to demonstrate a burden on their individual votes.”

In a concurring opinion, Justice Kagan, joined by Ginsburg, Breyer, and Sotomayor, JJ., argued that the Court could declare partisan gerrymandering to be unconstitutional if the plaintiffs satisfied the Court’s standing requirements. Kagan contended that the plaintiffs could also assert an associational claim under the First Amendment if they could demonstrate harm to their political party insofar as [m]embers of the ‘disfavored party’...deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office.”

Anticipating the merits of a political gerrymandering claim, Kagan declared that partisan gerrymandering “jeopardizes ‘[t]he ordered working of our Republic, and of the democratic process,” quoting *Veith, supra* (concurring opinion of Justice Kennedy). Kagan contended that this “practice enables politicians to entrench themselves in power against the people’s will. And only the courts can do anything to remedy the problem, because gerrymanders benefit those who control the political branches.” Kagan also argued that “the evils of gerrymandering seep into the

legislative process itself,” through ways including “indifference to swing voters and their views; extreme political positioning designed to placate the party’s base and fend off primary challenges; the devaluing of negotiation and compromise; and the impossibility of reaching pragmatic, bipartisan solutions to the nation’s problems.” Although Kagan acknowledged that “partisan gerrymandering goes back to the Republic’s earliest days,” she asserted that “technology makes today’s gerrymandering altogether different from the crude linedrawing of the past. New redistricting software enables pinpoint precision in designing districts. With such tools, mapmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements (compactness, contiguity, and the like)...Gerrymanders have thus become ever more extreme and durable, insulating officeholders against all but the most titanic shifts in the political tides. The 2010 redistricting cycle produced some of the worst partisan gerrymanders on record...The technology will only get better, so the 2020 cycle will only get worse.”

Chapter 11. Freedom of Speech and Press

Part II, Section XVII, Commercial Speech

[Insert on page 1328 after *Sorrell v. IMS Health, Inc.*]

National Institute of Family and Life Advocates v. Becerra

585 U.S. __ (2018)

[Majority: Thomas, J., Roberts (C.J.), Kennedy, Alito, and Gorsuch, JJ. Concurring: Kennedy, J., joined by Roberts (C.J.), Alito, and Gorsuch, JJ. Dissent: Breyer, joined by Ginsburg, Sotomayor, and Kagan, JJ.]

Justice Thomas delivered the opinion of the Court.

The California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) requires clinics that primarily serve pregnant women to provide certain notices.... Licensed clinics must notify women that California provides free or low-cost services, including abortions, and give them a phone number to call. Unlicensed clinics must notify women that California has not licensed the clinics to provide medical services. The question in this case is whether these notice requirements violate the First Amendment.

I-A. The California State Legislature enacted the FACT Act to regulate crisis pregnancy centers. Crisis pregnancy centers ... are “pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center.” ... The author of the FACT Act observed that crisis pregnancy centers “are commonly affiliated with, or run by organizations whose stated goal” is to oppose abortion....

I-A-1. The first notice requirement applies to “licensed covered facilit[ies].” ... To fall under the definition of “licensed covered facility,” a clinic must be a licensed primary care or specialty clinic or qualify as an intermittent clinic under California law.... A licensed covered facility also must have the “primary purpose” of “providing family planning or pregnancy-related services.” And it must satisfy at least two of the following six requirements: “(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women; (2) The facility provides, or offers counseling about, contraception or contraceptive methods; (3) The facility offers pregnancy testing or pregnancy diagnosis; (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling; (5) The facility offers abortion services; (6) The facility has staff or volunteers who collect health information from clients.”

If a clinic is a licensed covered facility, the FACT Act requires it to disseminate a government-drafted notice on site ... stat[ing] that “California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine

whether you qualify, contact the county social services office at [insert the telephone number].”...

I-A-2. The second notice requirement in the FACT Act applies to “unlicensed covered facilit[ies].” To fall under the definition of “unlicensed covered facility,” a facility must not be licensed by the State, not have a licensed medical provider on staff or under contract, and have the “primary purpose” of “providing pregnancy-related services.” An unlicensed covered facility also must satisfy at least two of the following four requirements: “(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women; (2) The facility offers pregnancy testing or pregnancy diagnosis; (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling; (4) The facility has staff or volunteers who collect health information from clients.”

Clinics operated by the United States and licensed primary care clinics enrolled in Medi-Cal and Family PACT are excluded [from both notice requirements].... Unlicensed covered facilities must provide a government-drafted notice stating that “[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.” ...

I-B. Petitioners alleged that the licensed and unlicensed notices abridge the freedom of speech protected by the First Amendment. The District Court denied their motion for a preliminary injunction. The Court of Appeals for the Ninth Circuit affirmed....

We reverse with respect to both notice requirements.

II. We first address the licensed notice.

II-A. The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech. When enforcing this prohibition, our precedents distinguish between content-based and content-neutral regulations of speech. Content-based regulations “target speech based on its communicative content.” *Reed v. Town of Gilbert* (2015). As a general matter, such laws “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” ...

The licensed notice is a content-based regulation of speech. By compelling individuals to speak a particular message, such notices “alte[r] the content of [their] speech.” *Riley v. National Federation of Blind of N. C., Inc.* (1988). Here, for example, licensed clinics must provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them. One of those services is abortion—the very practice that petitioners are devoted to opposing....

II-B. Although the licensed notice is content based, the Ninth Circuit did not apply strict scrutiny because it concluded that the notice regulates “professional speech.” Some Courts of

Appeals have recognized “professional speech” as a separate category of speech that is subject to different rules.... But this Court has not recognized “professional speech” as a separate category of speech.... This Court’s precedents do not permit governments to impose content-based restrictions on speech without “persuasive evidence ... of a long (if heretofore unrecognized) tradition” to that effect....

This Court’s precedents do not recognize such a tradition for a category called “professional speech.” This Court has afforded less protection for professional speech in two circumstances—neither of which turned on the fact that professionals were speaking. First, our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their “commercial speech.” See, e.g., *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* (1985). Second, under our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech. See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey* (1992) (opinion of O’Connor, Kennedy, and Souter, JJ.). But neither line of precedents is implicated here.

II-B-1. This Court’s precedents have applied a lower level of scrutiny to laws that compel disclosures in certain contexts. In *Zauderer*, for example, this Court upheld a rule requiring lawyers who advertised their services on a contingency-fee basis to disclose that clients might be required to pay some fees and costs. Noting that the disclosure requirement governed only “commercial advertising” and required the disclosure of “purely factual and uncontroversial information about the terms under which ... services will be available,” the Court explained that such requirements should be upheld unless they are “unjustified or unduly burdensome.”

The *Zauderer* standard does not apply here. Most obviously, the licensed notice is not limited to “purely factual and uncontroversial information about the terms under which ... services will be available.” The notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about *state*-sponsored services—including abortion, anything but an “uncontroversial” topic. Accordingly, *Zauderer* has no application here.

II-B-2. In addition to disclosure requirements under *Zauderer*, this Court has upheld regulations of professional conduct that incidentally burden speech... In *Planned Parenthood of Southeastern Pa. v. Casey*, for example, this Court upheld a law requiring physicians to obtain informed consent before they could perform an abortion.... The joint opinion in *Casey* ... described the Pennsylvania law as “a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion,” which “for constitutional purposes, [was] no different from a requirement that a doctor give certain specific information about any medical procedure.” ...

The licensed notice at issue here is not an informed-consent requirement or any other regulation of professional conduct. The notice does not facilitate informed consent to a medical procedure. In fact, it is not tied to a procedure at all.... Tellingly, many facilities that provide the exact same services as covered facilities ... are not required to provide the licensed notice. The

licensed notice regulates speech as speech.

II-B-3. Outside of the two contexts discussed above ... this Court's precedents have long protected the First Amendment rights of professionals....

As with other kinds of speech, regulating the content of professionals' speech "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Turner Broadcasting Sys. v. FCC* (1994).... Further, when the government polices the content of professional speech, it can fail to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen v. Coakley* (2014)....

"Professional speech" is also a difficult category to define with precision.... As defined by the courts of appeals, the professional-speech doctrine would cover a wide array of individuals—doctors, lawyers, nurses, physical therapists, truck drivers, bartenders, barbers, and many others.... But that gives the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement....

II-C. In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles....

California asserts a single interest to justify the licensed notice: providing low-income women with information about state-sponsored services. Assuming that this is a substantial state interest, the licensed notice is not sufficiently drawn to achieve it.

If California's goal is to educate low-income women about the services it provides, then the licensed notice is "wildly underinclusive." *Brown v. Entertainment Merchants Assn.* (2011). The notice applies only to clinics that have a "primary purpose" of "providing family planning or pregnancy-related services" and that provide two of six categories of specific services. Other clinics that have another primary purpose, or that provide only one category of those services, also serve low-income women and could educate them about the State's services.... But most of those clinics are excluded from the licensed notice requirement without explanation....

Further, California could inform low-income women about its services "without burdening a speaker with unwanted speech." *Riley v. National Federation of Blind of N. C., Inc.* (1988). Most obviously, it could inform the women itself with a public-information campaign....

In short, petitioners are likely to succeed on the merits of their challenge to the licensed notice. Contrary to the suggestion in the dissent, *post* (opinion of BREYER, J.), we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.

III. We next address the unlicensed notice. The parties dispute whether the unlicensed

notice is subject to deferential review under *Zauderer*. We need not decide whether the *Zauderer* standard applies to the unlicensed notice. Even under *Zauderer*, a disclosure requirement cannot be “unjustified or unduly burdensome.” Our precedents require disclosures to remedy a harm that is “potentially real not purely hypothetical,” *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy* (1994)....

The only justification that the California Legislature put forward was ensuring that “pregnant women in California know when they are getting medical care from licensed professionals.” [However,] California points to nothing suggesting that pregnant women do not already know that the covered facilities are staffed by unlicensed medical professionals....

Even if California had presented a nonhypothetical justification for the unlicensed notice, the FACT Act unduly burdens protected speech. The unlicensed notice imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California’s informational interest.... The unlicensed notice applies only to facilities that primarily provide “pregnancy-related” services. Thus, a facility that advertises and provides pregnancy tests is covered by the unlicensed notice, but a facility across the street that advertises and provides nonprescription contraceptives is excluded—even though the latter is no less likely to make women think it is licensed....

The application of the unlicensed notice to advertisements demonstrates just how burdensome it is. The notice applies to all “print and digital advertising materials” by an unlicensed covered facility.... As California conceded at oral argument, a billboard for an unlicensed facility that says “Choose Life” would have to surround that two-word statement with a 29-word statement from the government, in as many as 13 different languages. In this way, the unlicensed notice drowns out the facility’s own message....

For all these reasons, the unlicensed notice does not satisfy *Zauderer*, assuming that standard applies....

IV. We hold that petitioners are likely to succeed on the merits of their claim that the FACT Act violates the First Amendment. We reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice Kennedy, with whom the Chief Justice, Justice Alito, and Justice Gorsuch join, concurring.

[Justice Kennedy commented that, although the Court did not reach the issue, in his view there was strong evidence of viewpoint discrimination.]

Justice Breyer, with whom Justice Ginsburg, Justice Sotomayor, and Justice Kagan

join, dissenting.

The petitioners ask us to consider whether two sections of a California statute violate the First Amendment.... In my view both statutory sections are likely constitutional, and I dissent from the Court’s contrary conclusions.

I-A. Before turning to the specific law before us, I focus upon the general interpretation of the First Amendment that the majority says it applies. It applies heightened scrutiny to the Act because the Act, in its view, is “content based.” ...

The majority recognizes exceptions to this general rule: It excepts laws that “require professionals to disclose factual, noncontroversial information in their ‘commercial speech,’” *provided that* the disclosure “relates to the services that [the regulated entities] provide.” It also excepts laws that “regulate professional conduct” *and* only “incidentally burden speech.”

This constitutional approach threatens to create serious problems. Because much, perhaps most, human behavior takes place through speech and because much, perhaps most, law regulates that speech in terms of its content, the majority’s approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation. Virtually every disclosure law could be considered “content based,” for virtually every disclosure law requires individuals “to speak a particular message.” ... Thus, the majority’s view, if taken literally, could radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk, depending on how broadly its exceptions are interpreted.

Many ordinary disclosure laws would fall outside the majority’s exceptions for disclosures related to the professional’s own services or conduct. These include numerous commonly found disclosure requirements relating to the medical profession. [Examples include: requiring hospitals to tell parents about child seat belts, to ask incoming patients if they would like the facility to give their family information about parents’ rights and responsibilities, and to tell parents of newborns about pertussis disease and the available vaccine.] These also include numerous disclosure requirements found in other areas [such as requiring signs by elevators showing stair locations, or requiring property owners to inform tenants about garbage disposal procedures.]

The majority ... perhaps recognizing this problem, adds a general disclaimer. It says that it does not “question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.” But this generally phrased disclaimer would seem more likely to invite litigation than to provide needed limitation and clarification....

[I]n saying the Act is not a longstanding health and safety law, the Court substitutes its own approach—without a defining standard—for an approach that was reasonably clear. Historically, the Court has been wary of claims that regulation of business activity, particularly

health-related activity, violates the Constitution. Ever since this Court departed from the approach it set forth in *Lochner v. New York* (1905), ordinary economic and social legislation has been thought to raise little constitutional concern.... The Court has taken this same respectful approach to economic and social legislation when a First Amendment claim like the claim present here is at issue....

Even during the *Lochner* era, when this Court struck down numerous economic regulations concerning industry, this Court was careful to defer to state legislative judgments concerning the medical profession.... Medical professionals do not, generally speaking, have a right to use the Constitution as a weapon allowing them rigorously to control the content of those reasonable conditions. See, e.g., *Dent v. West Virginia* (1889) (upholding medical licensing requirements). In the name of the First Amendment, the majority today treads into territory where the pre-New Deal, as well as the post-New Deal, Court refused to go.

The Court, in justification, refers to widely accepted First Amendment goals, such as the need to protect the Nation from laws that “suppress unpopular ideas or information” or inhibit the “marketplace of ideas in which truth will ultimately prevail.” ... And, in suggesting that heightened scrutiny applies to much economic and social legislation, the majority pays those First Amendment goals a serious disservice through dilution. Using the First Amendment to strike down economic and social laws that legislatures long would have thought themselves free to enact will, for the American public, obscure, not clarify, the true value of protecting freedom of speech.

I-B. Still, what about this specific case? The disclosure at issue here concerns speech related to abortion. It involves health, differing moral values, and differing points of view. Thus, rather than set forth broad, new, First Amendment principles, I believe that we should focus more directly upon precedent more closely related to the case at hand....

I begin with *Akron v. Akron Center for Reproductive Health, Inc.* (1983). In that case the Court considered a city ordinance requiring a doctor to tell a woman contemplating an abortion about the “status of her pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the availability of agencies to provide her with assistance and information with respect to birth control, adoption, and childbirth[, and] ... ‘the particular risks associated with her own pregnancy and the abortion technique to be employed.’” ... The ordinance further required a doctor to tell such a woman that “‘the unborn child is a human life from the moment of conception.’”

The plaintiffs claimed that this ordinance violated a woman’s constitutional right to obtain an abortion. And this Court agreed.... [T]he Court held that the law at issue went “beyond permissible limits” because “much of the information required [was] designed not to inform the woman’s consent but rather to persuade her to withhold it altogether.” ... Several years later, in *Thornburgh v. American College of Obstetricians and Gynecologists* (1986), the Court considered a Pennsylvania statute that “prescribe[d] in detail the method for securing ‘informed consent’” to

an abortion [that required doctors to provide the opportunity to contact various agencies that provided medical and financial assistance before performing an abortion].... The Court, as in *Akron*, held that the statute's information requirements violated the Constitution....

These cases, however, whatever support they may have given to the majority's view, are no longer good law. In *Planned Parenthood of Southeastern Pa. v. Casey* (1992), the Court again considered a state law that required doctors to provide information to a woman deciding whether to proceed with an abortion. That law required the doctor to tell the woman about the nature of the abortion procedure, the health risks of abortion and of childbirth, the “probable gestational age of the unborn child,” and the availability of printed materials describing the fetus, medical assistance for childbirth, potential child support, and the agencies that would provide adoption services (or other alternatives to abortion).

This time a joint opinion of the Court, in judging whether the State could impose these informational requirements, asked whether doing so imposed an “undue burden” upon women seeking an abortion. It held that it did not. Hence the statute was constitutional.... And, it “overruled” portions of the two cases, *Akron* and *Thornburgh*, that might indicate the contrary.

The joint opinion ... concluded that the statute did not violate the First Amendment. It wrote: ... “to be sure, the physician's First Amendment rights not to speak are implicated ... but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.” ...

I-C. Taking *Casey* as controlling, the law's demand for even-handedness requires a different answer than that perhaps suggested by *Akron* and *Thornburgh*. If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services? As the question suggests, there is no convincing reason to distinguish between information about adoption and information about abortion in this context....

I-C-1. The majority tries to distinguish *Casey* as ... appl[ying] only when obtaining “informed consent” to a medical procedure is directly at issue. This distinction, however, lacks moral, practical, and legal force. The individuals at issue here are all medical personnel engaging in activities that directly affect a woman's health—not significantly different from the doctors at issue in *Casey*....

The majority contends that the disclosure here is unrelated to a “medical procedure,” unlike that in *Casey*, and so the State has no reason to inform a woman about alternatives to childbirth (or, presumably, the health risks of childbirth). Really? No one doubts that choosing an abortion is a medical procedure that involves certain health risks.... But the same is true of carrying a child to term and giving birth.... Indeed, nationwide “childbirth is 14 times more likely than abortion to

result in” the woman’s death....

In any case, informed consent principles apply more broadly than only to discrete “medical procedures.” [For example,] [p]rescription drug labels warn patients of risks even though taking prescription drugs may not be considered a “medical procedure.” ... If even these disclosures fall outside the majority’s cramped view of *Casey* and informed consent, it undoubtedly would invalidate the many other disclosures that are routine in the medical context as well.

The majority also finds it “[t]ellin[g]” that general practice clinics—*i.e.*, paid clinics—are not required to provide the licensed notice. But the lack-of-information problem that the statute seeks to ameliorate is a problem that the State explains is commonly found among low-income women. That those with low income might lack the time to become fully informed ... is not intuitively surprising....

I-C-2. ... The majority concludes that *Zauderer* does not apply because the disclosure “in no way relates to the services that licensed clinics provide.” But information about state resources for family planning, prenatal care, and abortion *is* related to the services that licensed clinics provide...

I-D. It is particularly unfortunate that the majority, through application of so broad and obscure a standard, declines to reach remaining arguments that the Act discriminates on the basis of viewpoint.... Given the absence of evidence in the record before the lower courts, the “viewpoint discrimination” claim could not justify the issuance of a preliminary injunction.

II. [As to the statutory provision covering unlicensed facilities], the majority concludes that the State’s interest is “purely hypothetical” because unlicensed clinics provide innocuous services that do not require a medical license. To do so, it applies a searching standard of review based on our precedents that deal with speech *restrictions*, not *disclosures*.... There is no basis for finding the State’s interest “hypothetical.” ...

The majority also suggests that the Act applies too broadly, namely, to all unlicensed facilities “no matter what the facilities say on site or in their advertisements.” But the Court has long held that a law is not unreasonable merely because it is overinclusive. [This sentence should be read in the context discussed, regulations dealing with business or health and safety.] For instance, in *Semler* the Court upheld as reasonable a state law that prohibited licensed dentists from advertising that their skills were superior to those of other dentists. [T]he Court held that ... “[t]he legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule, even though in particular instances there might be no actual deception or misstatement.”

Relatedly, the majority suggests that the Act is suspect because it covers some speakers but

not others. I agree that a law's exemptions can reveal viewpoint discrimination ... [but] [t]here is no cause for such concern here...

Finally, the majority concludes that the Act is overly burdensome. I agree that “unduly burden- some disclosure requirements might offend the First Amendment.” ... But these and similar claims are claims that the statute could be applied unconstitutionally, not that it is unconstitutional on its face....

For these reasons I would not hold the California statute unconstitutional on its face, I would not require the District Court to issue a preliminary injunction forbidding its enforcement, and I respectfully dissent from the majority's contrary conclusions.

Part II, Section XV. Symbols and Silence: Compelled Affirmation.

[Insert on page 1305 after note on *Rumsfeld*.]

Note: *Janus v. AFSCME, Council 31* (2018)

Illinois law permits public employees to unionize. If a majority of employees in a bargaining unit vote in favor of union representation, that union is designated as the exclusive bargaining representative of all employees, including those who choose not to join the union. Employees may not designate any other agent as their representative or bargain with the government employer directly. Public-sector unions were permitted to charge non-member employees an agency fee, *i.e.* a lesser percentage of the full union dues. Under *Abood v. Detroit Board of Education*, the agency fee was only permitted to cover expenditures germane to the union's collective-bargaining and representation of employees with the employer, for example, in bargaining, grievance procedures and arbitration of grievances. Political activities were not chargeable agency fees.

Mark Janus, a child support specialist employed by the Illinois Department of Healthcare and Family Services, was represented by the American Federation of State, County, and Municipal Employees, Council 31 (“AFSCME”). Janus refused to join AFSCME because he opposed many of the Union's positions and believed that the Union's conduct in bargaining contributed to the State's fiscal troubles. Janus challenged his required payment of agency fees on the grounds that the charge the fee to him violated his free speech rights under the First Amendment by requiring him to subsidize the Union's speech. The district court dismissed the lawsuit on the grounds that *Abood* foreclosed Janus's claim, and the Seventh Circuit affirmed.

In a 5-4 decision, the Supreme Court overruled *Abood* and held agency fees charged to non-consenting public employees were unconstitutional. Justice Alito, writing for the majority, was joined by Roberts, C. J., and Kennedy, Thomas, and Gorsuch, JJ. Justice Sotomayor filed a dissenting opinion. Justice Kagan also filed a dissenting opinion, in which Ginsburg, Breyer, and Sotomayor, JJ., joined. The Court found that agency fees violate the free speech rights of public employees who refuse union membership by forcing them to subsidize the speech of the union.

The Court suggested that such a requirement may trigger strict scrutiny, but did not decide that issue as the agency-fee scheme did not survive the lesser “exacting” scrutiny applied to “the compulsory subsidization of commercial speech.” To survive that scrutiny, a compelled subsidy must “serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.”

The Court rejected the primary defense of *Abood*: that the State’s interest in maintaining “labor peace” justified agency fees. The Court observed that while unions were prohibited from collecting agency fees from federal employees, unions continued to effectively represent those employees as their exclusive bargaining representative. Therefore, the Court concluded that labor peace could be achieved by means less restrictive of employees’ associational freedoms than the assessment of agency fees.

Since unions are obligated by law to fairly represent all employees, including nonmembers, *Abood* also reasoned that agency fees are necessary to prevent “free riders” from enjoying the benefits of union representation without contributing to the expenses of collective bargaining and representation of employees. To the majority, this was not a compelling state interest:

“[P]rivate speech often furthers the interests of nonspeakers,” but “that does not alone empower the state to compel the speech to be paid for.” *Lehnert v. Ferris Faculty Assn.* (1991) (Scalia, J., concurring in judgment in part and dissenting in part). In simple terms, the First Amendment does not permit the government to compel a person to pay for another party’s speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.

The majority said that even representing individual nonmember employees in grievance proceedings served the union’s interests because “when a union controls the grievance process, it may, as a practical matter, effectively subordinate the interests of an individual employee to the collective interests of all employees in the bargaining unit.” Further, the issue of union representation of individual employees in grievance proceedings could be addressed by less restrictive means, such as requiring employees who desire that service to then pay a fee.

Turning to the next defense of *Abood*, the Court rejected the Union’s reliance on *Pickering v. Board of Education of Township High School District 205* and the line of cases that followed holding that “employee speech is largely unprotected if it is part of what the employee is paid to do... or if it involved a matter of only private concern” and that an employee’s speech on a matter of public concern “is protected unless ‘the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees outweighs the interests of the employee, as a citizen, in commenting on matters of public concern.’”

The Court held that the *Pickering* framework did not apply to the challenge to the agency-fee scheme, observing that *Abood* did not rely on *Pickering* and that the framework did not fit the issues presented in *Abood*. First, the *Pickering* framework was developed only to analyze cases

involving a single employee's speech and the impact on that employee's duties, not "a blanket requirement that all employees subsidize speech with which they do not agree." Second, the framework fit less well where the government compelled speech or required employees to subsidize a third party's speech. Finally, *Pickering* and *Abood* required different categorizations of speech that were incompatible.

Even if *Pickering* did apply, the agency-fee scheme still would not survive.

When an employee engages in speech that is part of the employee's job duties, the employee's words are really the words of the employer. The employee is effectively the employer's spokesperson. But when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the *employees*, not the employer. Otherwise, the employer would be negotiating with itself and disputing its own actions. That is not what anybody understands to be happening.

The Court found the wages, hours, and terms of employment of public employees to be matters of significant public importance. Therefore, requiring an employee to subsidize even the Union's contract negotiations violated the free speech rights of employees who opposed the Union's bargaining positions. The Court continued:

In addition to affecting how public money is spent, union speech in collective bargaining addresses many other important matters. As the examples offered by respondent's own *amici* show, unions express views on a wide range of subjects—education, child welfare, healthcare, and minority rights, to name a few.... What unions have to say on these matters in the context of collective bargaining is of great public importance.

The supposed state interest in bargaining with an adequately funded exclusive bargaining representative did not justify this intrusion into employees' free speech rights regarding matters of public concern.

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

views. Nothing in the *Pickering* line of cases requires us to uphold every speech restriction the government imposes as an employer.

Finally, the Court concluded that *stare decisis* did not counsel against overruling *Abood* on the grounds that *Abood* was poorly reasoned, unworkable, and no longer suited to the legal and economic environment that had arisen since it was decided.

Dissenting, Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, argued that the Court overruled *Abood* with “little regard for the usual principles of *stare decisis*, and predicted:

[The Court’s] decision will have large-scale consequences. Public employee unions will lose a secure source of financial support. State and local governments that thought fair-share provisions furthered their interests will need to find new ways of managing their workforces. Across the country, the relationships of public employees and employers will alter in both predictable and wholly unexpected ways.

Justice Kagan argued that *Abood* struck an appropriate balance between the government employer’s interests in maintaining labor peace and preventing free riders, and public employees’ free speech interests by prohibiting the assessment of fees to nonmembers that accounted for the union’s overtly political activities. Without agency fees from nonmembers, Kagan wrote:

Everyone—not just those who opposed the union, but also those who back it—has an economic incentive to withhold dues; only altruism or loyalty—as *against* financial self-interest—can explain why an employee would pay the union for its services. And so emerged *Abood*’s rule allowing fair-share agreements: That rule ensured that a union would receive sufficient funds, ... to effectively carry out its duties as exclusive representative of the government’s employees.

For the dissenters, the Court’s decision represented an expansion of First Amendment protections that intruded upon the general rule that government employers enjoyed “substantial latitude... in recognition of its significant interests in managing its workforce so as to best serve the public.” Justice Kagan continued:

Indeed, [the Court’s] reversal today creates a significant anomaly—an exception, applying to union fees alone, from the usual rules governing public employee’s speech. “Time and again our cases have recognized that the Government has a much freer hand” in dealing with its employees than with “citizens at large.” *NASA v. Nelson* (2011). The government, we have stated, needs to run “as effectively and efficiently as possible.” *Engquist v. Oregon Dept. of Agriculture* (2008). That means it must be able, much as a private employer is, to manage its workforce as it thinks fit. That means it must be able, much as a private employer is, to manage its

workforce as it thinks fit. A public employee thus must submit to “certain limitations on his or her freedom.” *Garcetti v. Ceballos* (2006). Government workers, of course, do not wholly “lose their constitutional rights when they accept their positions.” *Engquist*. But under our precedent, their rights often yield when weighed “against the realities of the employment context.” If it were otherwise—if every employment decision were to “bec[o]me a constitutional matter”—“the Government could not function.” *NASA*.

Justice Kagan concluded that with its decision, the majority:

[P]revents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.

Comment: The effect of the decision, by reducing revenue unions have to fund their collective bargaining and legally required representation duties, can reduce other funds available to unions to support progressive causes. For one article suggesting this effect, see, Noam Scheiber, *Curbs on Unions Likely to Starve Activist Groups*, N.Y. TIMES, July 2, 2018, at A1. As the *Times* article noted:

The Supreme Court decision striking down mandatory union fees for government workers was not only a blow to unions. It will also hit hard at a vast network of groups dedicated to advancing liberal policies and candidates. Some of these groups work for immigrants and civil rights; others produce economic research; still others turn out voters or run ads in Democratic campaigns. Together, they have benefited from tens of millions of dollars a year from public-sector unions -- funding now in jeopardy because of the prospective decline in union revenue.

Liberal activists argue that closing that pipeline was a crucial goal of the conservative groups that helped bring the case, known as *Janus v. American Federation of State, County and Municipal Employees*. ...

Conservatives have acknowledged as much. In a fund-raising solicitation in December, John Tillman, the chief executive of the free-market group that found the plaintiff in the case, cited the objective of depriving unions of revenue by helping workers abandon them. “The union bosses would use that money to advance their big-government agenda,” Mr. Tillman wrote.

Even President Trump took notice of the justices' ruling, declaring on Twitter that it was a “big loss for the coffers of the Democrats!”

In contrast, corporate executives may direct corporate treasury funds to assist Republican and “conservative” groups. Stock holders have no practical remedy. They could sell stock or sell

index funds, but that is a costly alternative. Decisions that seem facially neutral, including campaign finance decisions, often have hugely disproportional effects on groups access to the system of freedom of expression. While not overt viewpoint discrimination, such decisions may have in fact a viewpoint discriminatory effect.

Part III, Section II, Regulating Streets, Parks, and Sidewalks

[Insert on page 1344 after Note on *Christian Legal Society v. Martinez*.]

Note: *Packingham v. North Carolina* (2017)

In *Packingham v. North Carolina* (2017), the Court struck down as overbroad a North Carolina statute that prohibited registered sex offenders from using extensive portions of the Internet. The statute made it a felony for a registered sex offender “to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages.” N. C. Gen. Stat. Ann. §§14–202.5(a), (e) (2015). The Court noted that while this prohibition would apply to social networking sites like Facebook, LinkedIn, and Twitter, it could also apply to such sites as Amazon.com, Washingtonpost.com, and Webmd.com.

Justice Kennedy, joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ., noted that, “While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the “vast democratic forums of the Internet” in general...and social media in particular. ... Even making the assumption that the statute is content neutral and thus subject to intermediate scrutiny, the provision cannot stand. In order to survive intermediate scrutiny, a law must be “narrowly tailored to serve a significant governmental interest.”... In other words, the law must not “burden substantially more speech than is necessary to further the government’s legitimate interests.” *McCullen v. Coakley* (2014)

While narrowly drawn statutes that target communication associated with predatory behavior could be constitutional, blanket prohibitions are not. (Packingham had gone on Facebook to express his happiness over the dismissal of a traffic ticket, a communication not remotely linked to his prior criminal conduct—having sex with a 13 year old girl when he was 21.)

Justice Alito filed an opinion concurring in the judgment, in which Roberts, C. J., and Thomas, J., joined. (Justice Gorsuch did not participate in the case.) Alito emphasized the right of the government to regulate communications that are linked to predatory behavior: “I cannot join the opinion of the Court, however, because of its undisciplined dicta. The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks. And this language is bound to be interpreted by some to mean that the States are largely powerless to restrict even the most dangerous sexual predators from visiting any internet sites, including, for example, teenage dating sites and sites designed to permit minors to discuss personal problems with their peers. I am troubled by the implications of the Court’s unnecessary rhetoric.”

Part III, Section III, The Non-public Forum

[Insert on page 1355 before *Watchtower Bible and Tract Society of New York*.]

Note: *Minnesota Voters Alliance v. Mansky* (2018)

Minnesota Voters Alliance (“MVA”), an organization advocating for election reforms, challenged Minnesota’s “political apparel ban,” which provided that a “political badge, political button, or other political insignia may not be worn at or about the polling place” on Election Day. The political apparel ban applied only within the polling place and was enforced by Minnesota election judges with the authority to decide whether a particular item was prohibited under the statute. The statute did not define the word “political”, but for clarification the State distributed to election judges an “Election Day Policy” that provided examples of apparel that fell within the ban. These included any item “including the name of a political party,” “including the name of a candidate,” “in support of or opposition to a ballot question,” including “[i]ssue oriented material designed to influence or impact voting,” or “promoting a group with recognizable political views.” Elections judges could not prevent individuals from voting, but requested anyone wearing apparel they judged to be in violation to remove or conceal the item. If a voter refused to do so, election judges were to report the incident. Each incident was referred to the Minnesota Office of Administrative Hearings which, upon finding a violation, held authority to issue a reprimand or impose civil penalties.

MVA and other plaintiffs argued that the statute was unconstitutional on its face and as applied to voters’ political apparel. The district court granted the State’s motion to dismiss as to the facial challenge and later the State’s motion for summary judgment as to the as-applied challenge. The Eighth Circuit affirmed both holdings. MVA petitioned for certiorari only in regard to the facial challenge.

The Supreme Court held 7-2 that Minnesota’s political apparel ban violated the First Amendment’s free speech clause. Writing for the majority, Chief Justice Roberts (joined by Kennedy, Thomas, Ginsburg, Alito, Kagan and Gorsuch, JJ.) explained that, while the political apparel ban pursued the permissible objective of setting aside the polling place as “an island of calm in which voters can peacefully contemplate their choices,” the statute and State-issued guidance offered little clarity as to what apparel was covered, and therefore the ban was not “a law capable of reasoned application.”

First holding that the political apparel ban plainly restricted expression protected by the First Amendment, the Court applied its forum-based approach to speech restrictions. Traditional public forums, such as parks, streets, and sidewalks, may be subject to “reasonable time, place and manner restrictions on public speech.” A content-based restriction in a traditional public forum must satisfy strict scrutiny, and viewpoint discrimination is entirely prohibited. Restrictions on speech in designated public forums, “which the government has ‘intentionally opened up for that purpose’” are subject to the same limitations as restrictions applied to traditional public forums. On the other hand, speech in nonpublic forums—spaces “not by tradition or designation a forum

for public communication”—may be subject to a restriction so long as it is “reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”

Because a polling place is, at least on Election Day, a “government-controlled property set aside for the sole purpose of voting,” the Court held that a polling place qualifies as a nonpublic forum. Under the applicable test, the Court would uphold content-based restrictions on speech in the polling places so long as they were “reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.” Finding nothing in the facts to indicate viewpoint discrimination, the issue was whether the apparel ban was “reasonable in light of the purpose served by the forum.”

Applying the nonpublic forum standard, the Court first considered whether Minnesota pursued “a permissible objective in prohibiting voters from wearing particular kinds of expressive apparel or accessories while inside the polling place.” Looking to *Burson v. Freeman* (1992), in which the Court upheld a 100-foot “campaign-free zone” around polling place entrances, the Court held that Minnesota’s political apparel ban served the permissible objective of “designating an area for the voters as ‘their own,’” particularly inside the polling place itself. The Court explained:

[W]e see no basis for rejecting Minnesota’s determination that some forms of advocacy should be excluded from the polling place, to set it aside as “an island of calm in which voters can peacefully contemplate their choices.” Casting a vote is a weighty civic act, akin to a jury’s return of a verdict, or a representative’s vote on a piece of legislation. It is a time for choosing, not campaigning. The State may reasonably decide that the interior of the polling place should reflect that distinction....

Members of the public are brought together at that place, at the end of what may have been a divisive election season, to reach considered decisions about their government and laws. The State may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most. That interest may be thwarted by displays that do not raise significant concerns in other situations.

The Court then turned to whether the State had “articulate[d] some sensible basis for distinguishing what may come in from what must stay out.” The Court held that the restriction failed this test because the statute did not define what constituted “political” apparel, and the State failed to offer a construction of the statute that provided adequate clarity. The statute was, therefore, “not capable of reasoned application” by election law judges or the Office of Administrative Hearings. A literal reading of the statute would ban a broad range of political expression, including “a button or T-shirt merely imploring others to “Vote!” The Court rejected the State’s argument against such a broad reading:

According to the State, the statute does not prohibit “any conceivably ‘political’ message” or cover “all ‘political’ speech, broadly construed.” Instead, the State interprets the ban to proscribe “only words and symbols that an objectively reasonable observer would perceive as conveying a message about the electoral choices at issue in [the] polling place.” ...

We consider a State's “authoritative constructions” in interpreting a state law. *Forsyth County v. Nationalist Movement* (1992). But far from clarifying the indeterminate scope of the political apparel provision, the State's “electoral choices” construction introduces confusing line-drawing problems.

The 2010 Election Day Policy, considered to be authoritative guidance to the application of the statute, did little to clarify the statute. For example, the Policy specifically prohibited “[i]ssue oriented material designed to influence or impact voting.” The State considered this to be limited to “any subject on which a political candidate or party has taken a stance.” This included buttons that stated “Please I.D. Me,” the State explained, because Republican candidates for office had promoted voter I.D. requirements. Finding this standard unworkable, the Court noted:

A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable. Candidates for statewide and federal office and major political parties can be expected to take positions on a wide array of subjects of local and national import. Would a “Support Our Troops” shirt be banned, if one of the candidates or parties had expressed a view on military funding or aid for veterans? What about a “#MeToo” shirt, referencing the movement to increase awareness of sexual harassment and assault? At oral argument, the State indicated that the ban would cover such an item if a candidate had “brought up” the topic.

Similarly, the prohibition on items “promoting a group with recognizable political views” failed to provide consistent guidance to election judges or adequate notice to voters as to what apparel was prohibited. Unclear standards posed risks to voter’s free speech rights, the Court said:

It is “self-evident” that an indeterminate prohibition carries with it “[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation.” ... Election judges “have the authority to decide what is political” when screening individuals at the entrance to the polls. We do not doubt that the vast majority of election judges strive to enforce the statute in an evenhanded manner, nor that some degree of discretion in this setting is necessary. But that discretion must be guided by objective, workable standards. Without them, an election judge's own politics may shape his views on what counts as “political.” And if voters experience or witness episodes of unfair or inconsistent enforcement

of the ban, the State's interest in maintaining a polling place free of distraction and disruption would be undermined by the very measure intended to further it.

The Court, in a footnote, declined to certify the case to the Minnesota Supreme Court, on the grounds that the State's request came late in the litigation, and the Court's decision would not change even if the Minnesota Supreme Court adopted the State's interpretation of the statute.

Dissenting, Justice Sotomayor, joined by Justice Breyer, argued that the political apparel ban not be declared unconstitutional on its face before the Minnesota Supreme Court was first afforded the opportunity to construe the statute. Justice Sotomayor would have certified the case to the Minnesota Supreme Court "for a definitive interpretation of the political apparel ban ... which likely would obviate the hypothetical line-drawing problems that form the basis of the Court's decision."

Part III, Section VI, Government as the Speaker, Not as a Regulator

[Insert on page 1381 after Note on *Walker*.]

Note: *Matal v. Tam* (2017)

In *Matal v. Tam* the Court struck down a portion of the federal Trademark Act that allowed the Patent and Trademark Office (PTO) to deny trademark applications that may "disparage...or bring...into contemp[t] or disrepute" any "persons, living or dead." 15 U.S.C. 1052(a). This "disparagement" provision had most famously been at the center of a recent lawsuit brought by Native American activists to force the PTO to de-register the trademark of the NFL's Washington Redskins.

In *Matal*, the PTO had refused to register the name of an Asian rock band, "The Slants." The band had chosen the name *because* it is a derogatory term applied to Asians and they wished to dilute the term's denigrating force. In a case heard before Justice Gorsuch joined the Court, the Court ruled unanimously that the provision was unconstitutional, but split 4-4 on its reasoning. While the statute is now defunct, there is no binding opinion as to the analysis to be applied to such challenges.

All of the justices did agree that issuing a trademark did *not* constitute government speech. The government speech analysis of *Walker v. Texas Div., Sons of Confederate Veterans, Inc.* (2015), accordingly did not apply. The government had argued that trademarks constituted commercial speech and the statute should therefore be subjected only to intermediate scrutiny. Justice Alito, joined by Chief Justice Roberts and Breyer and Thomas, JJ., viewed the case through the lens of commercial speech. However, he said that the government's justifications for the statute failed even the intermediate scrutiny test set out in *Central Hudson Gas & Elect. v. Public Serv. Comm'n of N. Y.* (1980): "Under *Central Hudson*, a restriction of speech must serve "a substantial interest," and it must be "narrowly drawn." This means, among other things, that "[t]he regulatory technique may extend only as far as the interest it serves." The disparagement clause fails this requirement."

Justice Kennedy, joined by Ginsburg, Sotomayor, and Kagan, JJ., contended that the statute allowed viewpoint discrimination and must be subjected to strict scrutiny: “The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. That danger is all the greater if the ideas or perspectives are ones a particular audience might think offensive....” This opinion did not mention commercial speech at all.

Justice Thomas joined the Alito opinion, but concurred to say that he rejects the *Central Hudson* test and believes that statutes that restrict commercial speech should be subjected to strict scrutiny. Some commentators speculated that the Alito/Kennedy split may reflect a disagreement on whether or not to adopt the Thomas perspective on commercial speech should a proper case arise.

The *Matal* decision effectively ended the Washington Redskin litigation. The team’s trademark is now secure.

Chaper 12. Freedom of Religion. Section IV-A, The Development of the Required Accommodation Doctrine

[Insert on page 1442 after note on *Hosanna-Tabor Evangelical Lutheran Church and School* and before *Hobby Lobby*.

Note: *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018)

The Court in this case held that the Colorado Civil Rights Commission violated the free exercise clause of the First Amendment by disparaging the religious views of a baker who had refused on religious grounds to bake a wedding cake for a same-sex marriage. The Court therefore reversed a decision of the Colorado Court of Appeals ruling that the baker had violated the Colorado Anti-Discrimination Act (CADA) and rejecting his claims under the First Amendment's free exercise and free speech clauses. By basing its decision on the comments of members of the Commission, the Court bypassed the underlying issue of whether the free exercise and free speech clauses provided a defense to the baker's failure to comply with the statute. Seven Justices concurred in the judgment, while Justices Ginsburg and Kagan in a dissenting opinion favored the affirmation of the decision of the Colorado Court of Appeals.

The CADA prohibits discrimination based on sexual orientation in a "place of business engaged in any sales to the public and any place offering services...to the public." After the baker refused to bake their wedding cake, a same-gender couple filed a complaint with the Colorado Civil Rights Commission alleging violation of the Act. Pursuant to the provisions of the statute, the Colorado Civil Rights Division investigated the claim in order to determine whether there was probable cause for finding that the Act had been violated. After finding probable cause, the Division referred the complaint to the Commission, which exercised its discretion in deciding to initiate a formal hearing before a state administrative law judge, who ruled that CADA is a "valid and neutral law of general applicability" within the meaning of *Employment Div., Department of Human Resources of Oregon v. Smith* (1990) and that the free exercise clause therefore did not excuse the baker's compliance with the statute. The administrative law judge also determined that preparation of a wedding cake is not a form of protected speech. The seven-member Commission affirmed this decision in full and ordered the baker to cease and desist from discrimination and to prepare quarterly reports for two years documenting the reasons for any refusal to deny service to customers. The Colorado Court of Appeals affirmed the Commission's legal determinations and its order, concluding that the Commission's order did not violate the baker's free exercise rights.

In concluding that commissioners violated the baker's rights, Justice Kennedy's opinion for the Court, joined by (Roberts, C.J., and Breyer, Alito, Kagan, and Gorsuch, JJ.), identified various comments made by commissioners without objection from other commissioners, including one commissioner's remark that "it is one of the most despicable pieces of rhetoric that people can use to – to use their religion to hurt others." The Court observed that "[t]o describe a man's faith as 'one of the most despicable pieces of rhetoric that people can use' is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical – something insubstantial and even insincere." The Court found that this commissioner

also compared the baker's "invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust." The Court explained that endorsement of the commissioners of "the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain" implied "that religious beliefs and persons are less than fully welcome in Colorado's business community" and might demonstrate "lack of due consideration" for the baker's "free exercise rights and the dilemma he faced." The Court concluded that "the record here demonstrates that the Commission's consideration of [appellant's] case was neither tolerant nor respectful of [appellant's] religious beliefs."

Even though Kennedy's opinion did not reach the merits of the case, the Court, in an apparent reference to *Smith*, observed that "[t]he Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws." The Court added that "[s]till, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach."

Justice Ginsburg, in a dissent joined by Justice Sotomayor, argued that wedding cakes are not speech or expression entitled to First Amendment protection because there was no evidence that an objective observer would believe that a wedding cake conveys a message, "much less that the observer understands the message to be the baker's, rather than the marrying couple's." Her dissent for the most part did not address the baker's free exercise claim although she suggested that it lacked merit.

Ginsburg also denied that "the comments of one or two Commissioners" constituted the kind of anti-religious bias that "should be taken to overcome" the baker's "refusal to sell a wedding cake" to the same-gender couple. She explained that "[t]he proceedings involved several layers of independent decisionmaking, of which the Commission was but one." She pointed out that the Court failed to identify any prejudice infecting "the determinations of the adjudicators in the case before and after the Commission."

In a concurring opinion, Justice Thomas contended that the cake was expressive conduct and that the state's suppression of his conduct could not withstand strict scrutiny under the free speech clause of the First Amendment. He stated that "[s]tates cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified." Thomas explained that he failed to see how the baker's refusal to bake the cake "stigmatizes gays and lesbians more than blocking them from marching in a city parade, dismissing them from the Boy Scouts, or subjecting them to signs that say 'God Hates Fags,' all of which this Court has deemed protected by the First Amendment," citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995); *Boy Scouts of America v. Dale* (2000); and *Snyder v. Phelps* (2011). Thomas also said he could not understand how the baker's "statement is worse than the racist,

demeaning, and even threatening speech toward blacks that this Court has tolerated in previous decisions,” citing, *inter alia*, *Brandenburg v. Ohio* (1969).