

First Amendment Law:

Freedom of Expression

and

Freedom of Religion

FOURTH EDITION

2019 Supplement

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Preface

The Supreme Court has decided several significant First Amendment cases since the authors completed work on the Fourth Edition of this Casebook before the end of the Court's 2017-2018 term. This annual supplement excerpts four of those cases, and presents notes discussing three others.

- In *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018) (Chapter 8 and Note Chapter 5), the Court struck down a Minnesota law restricting the wearing of apparel containing political statements while in a polling place. The Court continued to recognize that polling places are special locations where otherwise-unconstitutional speech regulations might be allowed. However, it found the Minnesota law to be too vague to be constitutional, given its broad definitions of the prohibited messages.
- In *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (Notes Chapters 5 and 9), the Court introduced the concept of content-neutrality into an analysis of compelled speech, in the course of striking down a California law requiring particular types of health clinics to post messages with state-created content regarding the availability of state-funded medical services and the license status of the clinic.
- One very important speech issue the Court resolved in the 2017-2018 term concerned compelled exactions from public sector employees who disagreed with the workplace union's position on collective bargaining issues. Two terms earlier the Court had been primed to issue a decision on whether such compelled exactions violated the dissenting employee's First Amendment rights, but the death of Justice Scalia in February 2016 resulted in a 4-4 split on that question. In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018) (Chapter 9 and Note Chapter 12), the Court, by a 5-4 vote, found such exactions to violate the First Amendment, and thus overruled *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977) (Casebook Chapter 9), which had allowed them. In addition to sparring over the merits of *Abood*, Justice Alito's majority opinion and Justice Kagan's dissent debated at length the applicability to this issue of the government employee speech doctrine. The compelled speech portions of the opinions are excerpted in Chapter 9, while a note in Chapter 12 considers the government employee speech facet.
- *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019) (Chapter 15) involved provisions of federal trademark law that prohibit the federal government from registering trademarks it deems "immoral" or "scandalous." Relying heavily on its decision invalidating the prohibition on registering "disparaging" trademarks in *Matal v. Tam* (2017) (Casebook Chapter 15), the Court in *Brunetti* unanimously held that the restriction on "immoral" trademarks was viewpoint-based and thus violated the First Amendment. However, the Justices split on whether the restriction on "scandalous" trademarks could be interpreted in a way that rendered it viewpoint-neutral and thus constitutional. Despite its resemblance to *Matal*, the Justices' varied

approaches in *Brunetti* reveal interesting and important views regarding the concepts of content- and viewpoint-neutrality, the proper First Amendment category for federal trademark law, and the appropriateness of the categorical approach more generally.

- In *American Legion v. American Humanist Assn.*, 139 S. Ct. 2067 (2019) (Chapter 17), a seven-Justice majority rejected an Establishment Clause challenge to the Bladensburg Peace Cross, a large Latin cross erected as a post-World War I war memorial, with only Justices Ginsburg and Sotomayor dissenting. Six of those seven justices took the opportunity the case presented to critique the *Lemon* test, with Justices Thomas and Gorsuch offering particularly sharp criticisms.
- In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (Note Chapter 17), a bare majority of the Justices relied on separation of powers principles to defer to Executive Branch authority over foreign affairs, and in turn to apply rational basis review to the so-called “Muslim travel ban.” The Court thus rejected a claim that it violated the Establishment Clause.
- *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 139 S. Ct. 1719 (2018) (Note Chapter 18), presented the Court with a stark choice between the free exercise and free speech rights of a baker versus the state’s interest in protecting a same-sex couple from sexual orientation discrimination — a choice the majority avoided. By a 7 to 2 vote, the Justices based their (narrow) decision on the *Smith/Lukumi* principle against religious discrimination. The Court found sufficient indicators of animus on the part of the state’s civil rights commission to persuade the majority that the commission had violated that principle.

For teachers looking to freshen up their course and make the in-class conversations more reflective of current controversies, the supplement includes six new problems about the Religion Clauses, as well as an additional problem in Chapter 12’s government employee speech materials. These problems should provide for interesting class discussion.

* * *

As always, the authors express their appreciation to the staff of the University of Pittsburgh School of Law Document Technology Center for their dedicated efforts that made it possible to produce this Supplement under a pressing deadline. As with the Casebook, we welcome comments and suggestions from users and readers.

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Chapter 5

Content-Based Regulation

A. The Principle

Page 312: *insert before Section B:*

In *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018) [Supplement Chapter 8], the Court may have limited the holding in *Burson* to some extent. In striking down a statute that barred political messages *within* the polling place, the Court reaffirmed *Burson's* reasoning that the state can permissibly limit campaign speech near or in polling places in order to prevent voter intimidation and fraud. However, it found the specific law at issue to be so vague regarding what sorts of political signs and apparel it prohibited that it was unconstitutional.

B. Defining Content Discrimination

Page 323: *insert before the Problems:*

5. In *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) the Court, in an opinion by Justice Thomas (the author of *Reed*), struck down a California statute regulating “crisis pregnancy centers.” These centers, typically operated by opponents of abortion, provide an assortment of services to pregnant women, but do not generally offer abortion services or referrals. The California statute required centers which are licensed as medical clinics by the state to prominently post a notice, dictated by the statute, which informed patients that California has public programs which provide an assortment of services, including abortions, at low or no cost to indigent women. The Court held that this notice requirement constituted a content-based regulation of the speech of the regulated clinics, because it “alters the content” of their speech by interfering with their ability to disseminate their anti-abortion message.

Is this analysis consistent with, or compelled by, *Reed*? In what sense does a disclosure requirement “alter the content” of the centers’ speech, if they remain free (as they did) to speak out against abortion? Chapter 9 takes up the issue of compelled speech. When you read those materials, consider whether the analysis in this case comports with the approach taken in other cases involving laws that require speakers to communicate a message of the government’s choosing.

Chapter 8

Speech on Government Property and the Public Forum Doctrine

C. Access to Nontraditional Forums and Facilities

Page 503: *insert before the Problem:*

Minnesota Voters Alliance v. Mansky

138 S. Ct. 1876 (2018)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Under Minnesota law, voters may not wear a political badge, political button, or anything bearing political insignia inside a polling place on Election Day. The question presented is whether this ban violates the Free Speech Clause of the First Amendment.

I

A

Today, Americans going to their polling places on Election Day expect to wait in a line, briefly interact with an election official, enter a private voting booth, and cast an anonymous ballot. Little about this ritual would have been familiar to a voter in the mid-to-late nineteenth century. [The Court summarized the nature of early voting systems, in which voting was largely conducted openly in public, and voters were susceptible to pressure or coercion.]

By the late nineteenth century, States began implementing reforms to address these vulnerabilities and improve the reliability of elections. Between 1888 and 1896, nearly every State adopted the secret ballot. Because voters now needed to mark their state-printed ballots on-site and in secret, voting moved into a sequestered space where the voters could “deliberate and make a decision in . . . privacy.” In addition, States enacted “viewpoint-neutral restrictions on election-day speech” in the immediate vicinity of the polls. *Burson v. Freeman* (Scalia, J., concurring in judgment) [Chapter 5 Note]. Today, all 50 States and the District of Columbia have laws curbing various forms of speech in and around polling places on Election Day.

Minnesota’s such law contains three prohibitions, only one of which is challenged here. See MINN. STAT. § 211B.11(1). The first sentence of § 211B.11(1) forbids any person to “display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet of the building in which a polling place is situated” to “vote for or refrain from voting for a candidate or ballot question.” The second sentence prohibits the distribution of “political badges, political buttons, or other political insignia to be worn at or about the polling place.” The third sentence — the “political apparel ban” — states that a “political badge, political button, or other political insignia may not be worn at or about the polling place.” Versions of all three prohibitions have been on the books in Minnesota for over a century.

There is no dispute that the political apparel ban applies only *within* the polling place, and covers articles of clothing and accessories with “political insignia” upon them. Minnesota election judges — temporary government

employees working the polls on Election Day — have the authority to decide whether a particular item falls within the ban. . . .

B

Petitioner Minnesota Voters Alliance (MVA) is a non-profit organization that “seeks better government through election reforms.” Petitioner Andrew Cilek is a registered voter in Hennepin County and the executive director of MVA; petitioner Susan Jeffers served in 2010 as a Ramsey County election judge. Five days before the November 2010 election, MVA, Jeffers, and other likeminded groups and individuals filed a lawsuit in Federal District Court challenging the political apparel ban on First Amendment grounds. The groups — calling themselves “Election Integrity Watch” (EIW) — planned to have supporters wear buttons to the polls printed with the words “Please I. D. Me,” a picture of an eye, and a telephone number and web address for EIW. (Minnesota law does not require individuals to show identification to vote.) One of the individual plaintiffs also planned to wear a “Tea Party Patriots” shirt. The District Court denied the plaintiffs’ request for a temporary restraining order and preliminary injunction and allowed the apparel ban to remain in effect for the upcoming election.

In response to the lawsuit, officials for Hennepin and Ramsey Counties distributed to election judges an “Election Day Policy,” providing guidance on the enforcement of the political apparel ban. The Minnesota Secretary of State also distributed the Policy to election officials throughout the State. The Policy specified that examples of apparel falling within the ban “include, but are not limited to”:

- Any item including the name of a political party in Minnesota, such as the Republican, [Democratic-Farmer-Labor], Independence, Green or Libertarian parties.
- Any item including the name of a candidate at any election.
- Any item in support of or opposition to a ballot question at any election.
- Issue oriented material designed to influence or impact voting (including specifically the “Please I. D. Me” buttons).
- Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on).

As alleged in the plaintiffs’ amended complaint and supporting declarations, some voters associated with EIW ran into trouble with the ban on Election Day. One individual was asked to cover up his Tea Party shirt. Another refused to conceal his “Please I. D. Me” button, and an election judge recorded his name and address for possible referral. And petitioner Cilek — who was wearing the same button and a T-shirt with the words “Don’t Tread on Me” and the Tea Party Patriots logo — was twice turned away from the polls altogether, then finally permitted to vote after an election judge recorded his information.

Back in court, MVA and the other plaintiffs (now joined by Cilek) argued that the ban was unconstitutional both on its face and as applied to their apparel. The District Court granted the State’s motions to dismiss, and the Court of Appeals for the Eighth Circuit affirmed in part and reversed in part. In evaluating MVA’s facial challenge, the Court of Appeals observed that this Court had previously upheld a state law restricting speech “related to a political campaign” in a 100-foot zone outside a polling place; the Court of Appeals determined that Minnesota’s law

likewise passed constitutional muster (quoting *Burson*). The Court of Appeals reversed the dismissal of the plaintiffs’ as-applied challenge, however. . . .

II

The First Amendment prohibits laws “abridging the freedom of speech.” Minnesota’s ban on wearing any “political badge, political button, or other political insignia” plainly restricts a form of expression within the protection of the First Amendment.

But the ban applies only in a specific location: the interior of a polling place. It therefore implicates our “‘forum based’ approach for assessing restrictions that the government seeks to place on the use of its property.” *International Soc. for Krishna Consciousness, Inc. v. Lee (ISKCON)* [*supra* this Chapter]. Generally speaking, our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums. In a traditional public forum — parks, streets, sidewalks, and the like — the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited. See *Pleasant Grove City v. Summum* [Chapter 13 Note]. The same standards apply in designated public forums — spaces that have “not traditionally been regarded as a public forum” but which the government has “intentionally opened up for that purpose.” In a nonpublic forum, on the other hand — a space that “is not by tradition or designation a forum for public communication” — the government has much more flexibility to craft rules limiting speech. *Perry Ed. Assn. v. Perry Local Educators’ Assn.* [*supra* this Chapter Note]. The government may reserve such a forum “for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view”. . . .

A polling place in Minnesota qualifies as a nonpublic forum. It is, at least on Election Day, government-controlled property set aside for the sole purpose of voting. The space is “a special enclave, subject to greater restriction.” *ISKCON*. Rules strictly govern who may be present, for what purpose, and for how long. And while the four-Justice plurality in *Burson* and Justice Scalia’s concurrence in the judgment parted ways over whether the public sidewalks and streets *surrounding* a polling place qualify as a nonpublic forum, neither opinion suggested that the interior of the building was anything but.

We therefore evaluate MVA’s First Amendment challenge under the nonpublic forum standard. The text of the apparel ban makes no distinction based on the speaker’s political persuasion, so MVA does not claim that the ban discriminates on the basis of viewpoint on its face. The question accordingly is whether Minnesota’s ban on political apparel is “reasonable in light of the purpose served by the forum”: voting. *Cornelius v. NAACP Legal Defense and Education Fund* [*supra* this Chapter].

III

A

We first consider whether Minnesota is pursuing a permissible objective in prohibiting voters from wearing particular kinds of expressive apparel or accessories while inside the polling place. The natural starting point for evaluating a First Amendment challenge to such a restriction is this Court’s decision in

Burson, which upheld a Tennessee law imposing a 100-foot campaign-free zone around polling place entrances. Under the Tennessee law — much like Minnesota’s buffer-zone provision — no person could solicit votes for or against a candidate, party, or ballot measure, distribute campaign materials, or “display . . . campaign posters, signs or other campaign materials” within the restricted zone. The plurality found that the law withstood even the strict scrutiny applicable to speech restrictions in traditional public forums. In his opinion concurring in the judgment, Justice Scalia argued that the less rigorous “reasonableness” standard of review should apply, and found the law “at least reasonable” in light of the plurality’s analysis.

That analysis emphasized the problems of fraud, voter intimidation, confusion, and general disorder that had plagued polling places in the past. Against that historical backdrop, the plurality and Justice Scalia upheld Tennessee’s determination, supported by overwhelming consensus among the States and “common sense,” that a campaign-free zone outside the polls was “necessary” to secure the advantages of the secret ballot and protect the right to vote. . . .

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

To be sure, our decisions have noted the “nondisruptive” nature of expressive apparel in more mundane settings. *Tinker v. Des Moines Independent Community School Dist.* [Chapter 12] (students wearing black armbands to protest the Vietnam War engaged in “silent, passive expression of opinion, unaccompanied by any disorder or disturbance”). But those observations do not speak to the unique context of a polling place on Election Day. Members of the public are brought together at that place, at the end of what may have been a divisive election season, to reach considered decisions about their government and laws. The State may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most. That interest may be thwarted by displays that do not raise significant concerns in other situations. . . .

Thus, in light of the special purpose of the polling place itself, Minnesota may choose to prohibit certain apparel there because of the message it conveys, so that voters may focus on the important decisions immediately at hand.

B

But the State must draw a reasonable line. Although there is no requirement of narrow tailoring in a nonpublic forum, the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out. See *Cornelius*. Here, the unmoored use of the term “political” in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota’s restriction to fail even this forgiving test.

Again, the statute prohibits wearing a “political badge, political button, or other political insignia.” It does not define the term “political.” And the word can be expansive. It can encompass anything “of or relating to government, a

government, or the conduct of governmental affairs,” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1755 (2002), or anything “[o]f, relating to, or dealing with the structure or affairs of government, politics, or the state,” AMERICAN HERITAGE DICTIONARY 1401 (3d ed. 1996). Under a literal reading of those definitions, a button or T-shirt merely imploring others to “Vote!” could qualify.

The State argues that the apparel ban should not be read so broadly. 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.”

At the same time, the State argues that the category of “political” apparel is *not* limited to campaign apparel. After all, the reference to “campaign material” in the first sentence of the statute — describing what one may not “display” in the buffer zone as well as inside the polling place — implies that the distinct term “political” should be understood to cover a broader class of items. As the State’s counsel explained to the Court, Minnesota’s law “expand[s] the scope of what is prohibited from campaign speech to additional political speech.”

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

For specific examples of what is banned under its standard, the State points to the 2010 Election Day Policy — which it continues to hold out as authoritative guidance regarding implementation of the statute. The first three examples in the Policy are clear enough: items displaying the name of a political party, items displaying the name of a candidate, and items demonstrating “support of or opposition to a ballot question.”

But the next example — “[i]ssue oriented material designed to influence or impact voting” — raises more questions than it answers. What qualifies as an “issue”? The answer, as far as we can tell from the State’s briefing and argument, is any subject on which a political candidate or party has taken a stance. For instance, the Election Day Policy specifically notes that the “Please I. D. Me” buttons are prohibited. But a voter identification requirement was not on the ballot in 2010, so a Minnesotan would have had no explicit “electoral choice” to make in that respect. The buttons were nonetheless covered, the State tells us, because the Republican candidates for Governor and Secretary of State had staked out positions on whether photo identification should be required.

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

The next broad category in the Election Day Policy — any item “promoting a group with recognizable political views” — makes matters worse. The State

construes the category as limited to groups with “views” about “the issues confronting voters in a given election.” The State does not, however, confine that category to groups that have endorsed a candidate or taken a position on a ballot question.

Any number of associations, educational institutions, businesses, and religious organizations could have an opinion on an “issue confronting voters in a given election.” For instance, the American Civil Liberties Union, the AARP, the World Wildlife Fund, and Ben & Jerry’s all have stated positions on matters of public concern. If the views of those groups align or conflict with the position of a candidate or party on the ballot, does that mean that their insignia are banned? Take another example: In the run-up to the 2012 election, Presidential candidates of both major parties issued public statements regarding the then-existing policy of the Boy Scouts of America to exclude members on the basis of sexual orientation. Should a Scout leader in 2012 stopping to vote on his way to a troop meeting have been asked to cover up his uniform?

The State emphasizes that the ban covers only apparel promoting groups whose political positions are sufficiently “well-known.” But that requirement, if anything, only increases the potential for erratic application. Well known by whom? The State tells us the lodestar is the “typical observer” of the item. But that measure may turn in significant part on the background knowledge and media consumption of the particular election judge applying it. . . .

“[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.” *Ward v. Rock Against Racism* [Chapter 6]. But the State’s difficulties with its restriction go beyond close calls on borderline or fanciful cases. And that is a serious matter when the whole point of the exercise is to prohibit the expression of political views.

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

* * *

Cases like this “present us with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote.” *Burson*. Minnesota, like other States, has sought to strike the balance in a way that affords the voter the opportunity to exercise his civic duty in a setting removed from the clamor and din of electioneering. While that choice is generally worthy of our respect, Minnesota has not supported its good intentions with a law capable of reasoned application.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins, dissenting.

I agree with the Court that “[c]asting a vote is a weighty civic act” and that “State[s] may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth,” including by “prohibit[ing] certain apparel [in polling places] because of the message it conveys.” I disagree, however, with the Court’s decision to declare Minnesota’s political apparel ban unconstitutional on its face because, in its view, the ban is not “capable of reasoned application,” when the Court has not first afforded the Minnesota state courts “‘a reasonable opportunity to pass upon’ ” and construe the statute. I would certify this case to the Minnesota Supreme Court for a definitive interpretation of the political apparel ban under Minn. Stat. § 211B.11(1), which likely would obviate the hypothetical line-drawing problems that form the basis of the Court’s decision today. . . .

Note: The “Reasonableness” Requirement

1. As a preliminary matter, notice that in its summary of the public forum doctrine the Court identifies three types of forums: traditional, designated, and nonpublic. The category of “limited” forums has disappeared. Has the Court now clarified the doctrine and made clear that there are only three categories of forums? Note that the distinction between “nonpublic” and “limited” forums has always been a bit obscure since in both types of forums the doctrine requires only that regulations be viewpoint neutral, and “reasonable.” Subject matter and speaker-based restrictions are allowed.

2. The Court first asks whether Minnesota’s restriction on campaign apparel advances a “permissible objective.” Since the parties do not dispute that the law at issue is viewpoint neutral, where does this come from? Is it an aspect of the “reasonableness analysis”? Or is it a different, and new requirement?

3. The key issue turns out to be whether the ban on political apparel is reasonable. The Court itself describes this as a “forgiving” standard, and in past cases the Court has tended to be highly deferential to regulators in applying this rule — Justice O’Connor’s separate opinion in *ISKCON* finding the distribution ban unreasonable was highly unusual. What made the Minnesota law unreasonable? Was it because it restricted too much speech? Apparently not — the Court clearly holds that the problem was the law’s failure to draw clear lines, and suggests that a more carefully drawn statute might survive. What is it about the lack of clarity of the law that made it “unreasonable?”

4. Aspects of the Court’s analysis clearly overlap with the Overbreadth and Void for Vagueness doctrines covered in Chapter 4. Why did the majority choose to apply forum analysis rather than one of those doctrines in this case?

Chapter 9

Compelled Expression

A. Compelled Speech

Page 526: *insert before Part B:*

Note: NIFLA, Compelled Speech, and Content (and Viewpoint) Neutrality

1. Recall from a note in Chapter 5 a case called *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. ____ (2018) (“*NIFLA*”). In that case the Court struck down a California law mandating that certain pregnancy-health centers post placards advising readers of State programs providing several free and lost-cost pregnancy-related services, including abortions. The centers that were subject to this posting rule were typically run by anti-abortion groups.

One might expect that a decision striking down such a law would be based squarely on the principle disfavoring government compulsion of speech — that is, the *Barnette* principle. Perhaps surprisingly, though, the five-justice *NIFLA* majority focused heavily on the fact that the law in question was content-based — that is, it required the pregnancy centers in question to speak certain messages. To be sure, the Court did not apply the strict scrutiny that it normally applies to content-based speech restrictions, and it acknowledged the possibility that a lesser standard might apply to the California law given its regulation of speech made by professionals (here, health care professionals). The Court did not have to decide that question, however, because it concluded that the law failed even more lenient review.

2. Leave aside the question of whether the California law regulated professional speech and thus merited lesser scrutiny, and focus instead on the Court’s emphasis on the content-neutrality question. Isn’t it *always* the case that government compulsion of speech would be content-based? Is it even possible realistically to imagine a law that compelled people to speak, but expressed no view on what the person had to say or what topic the person had to address? Writing for the four dissenters, Justice Breyer stated: “Virtually every disclosure law could be considered ‘content based,’ for virtually every disclosure law requires individuals ‘to speak a particular message.’” Isn’t he correct?

Writing for the majority, Justice Thomas wrote that “By compelling individuals to speak a particular message, such notices “alter the content of their speech.” (internal brackets omitted). Does this comment suggest that the content-based problem with the California law arose because the speakers were already speaking, with the result that the government’s compelled speech distorted what they were already saying? Indeed, Justice Thomas observed that the government-mandated message in *NIFLA* included information about the availability of abortion, which he described as “the very practice that petitioners are devoted to opposing.” Moreover, Justice Kennedy, concurring for himself and the three other justices in the majority other than Justice Thomas, went even further, concluding that “[it] does appear that *viewpoint* discrimination is inherent in the design and structure of the Act.” (emphasis added). As such, he concluded, “the State requires primarily pro-life pregnancy centers to promote the State’s own preferred message

advertising abortions. This compels individuals to contradict their most deeply held beliefs”

3. Think about these concerns. Wouldn’t they also arise in a “pure” compelled speech context, such as *Barnette* or *Wooley*, where the individual would prefer to remain silent but instead is forced to mouth the government’s message? If so, then what analytical work is being done by the analysis of whether the California law is content-based (or even viewpoint-based)? Is it possible that the majority is simply using the content-neutrality rule to formally import the strict scrutiny requirement into the compelled speech context? Reconsider *Barnette* and *Wooley*: did they prescribe a standard governing the constitutionality of government-compelled speech? Did any such standard flow from a conclusion that the government compulsion in those cases was content-based?

B. Compelled Subsidy

Page 535: *insert before the Problem:*

Note: The Overruling of Abood

1. For several years before 2018 the Court expressed its doubts about *Abood* in increasingly forceful terms. As set forth in a previous note, in 2012 a five-justice majority expressed doubts about *Abood*, although it stopped short of overruling the case outright. *Knox v. Service Employees International*, 567 U.S. 298 (2012).

Two years later, in *Harris v. Quinn*, 573 U.S. ____ (2014), the same five-justice majority declined to engage in what it described as “a very significant expansion” of *Abood* to a class of employees whose status as government employees was not as clear-cut as the public-school teacher in *Abood* itself. *Harris* also criticized *Abood* as “questionable on several grounds,” including (but not limited to) *Abood*’s alleged failure “to appreciate the difference between the core union speech involuntarily subsidized by dissenting public-sector employees and the core union speech involuntarily funded by their counterparts in the private sector” and failure “to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends.” *Harris* also concluded that “a critical pillar of *Abood*’s analysis rest[ed] on an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop.” Despite these criticisms, the Court again declined to overrule *Abood*, characterizing its decision against the union as simply a refusal to extend that case.

2. In 2016 it appeared that the Court was poised to overrule *Abood* in *Friedrichs v. California Teachers Association*, 578 U.S. ____ (2016). However, the death of Justice Scalia in February 2016 resulted in the lower court’s decision (which applied *Abood*) being affirmed by an equally divided Court. When Justice Gorsuch ascended to the Court in 2017, the Court again granted *certiorari* in a case in which the challenger requested that *Abood* be overruled.

**Janus v. American Federation of State, County,
and Municipal Employees, Council 31**

585 U.S. ____ (2018)

JUSTICE ALITO delivered the opinion of the Court.

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

We upheld a similar law in *Abood v. Detroit Bd. of Ed.* (1977) [*supra* this Chapter], and we recognize the importance of following precedent unless there are strong reasons for not doing so. But there are very strong reasons in this case. Fundamental free speech rights are at stake. *Abood* was poorly reasoned. It has led to practical problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions. Developments since *Abood* was handed down have shed new light on the issue of agency fees, and no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years. *Abood* is therefore overruled.

I

[The plaintiff, Janus, was an employee of the state of Illinois in a closed-shop workplace represented by a union to which Janus did not belong. Janus objected to the agency fees he was required to pay to offset the union’s representation expenses, alleging that he objected to the positions the union was taking on matters on which the union was bargaining with the state. He claimed that, in his view, the union’s positions did not adequately account for the state’s financial difficulties, and alleged that it violated his First Amendment rights to be forced to subsidize the union’s expression of those positions.] . . .

III

In *Abood*, the Court upheld the constitutionality of an agency-shop arrangement like the one now before us, but in more recent cases we have recognized that this holding is “something of an anomaly,” *Knox v. Service Employees*, 567 U.S. 298 (2012) [Note *supra* this Chapter], and that *Abood*’s “analysis is questionable on several grounds.” We have therefore refused to extend *Abood* to situations where it does not squarely control, while leaving for another day the question whether *Abood* should be overruled, see *Knox*.

We now address that question. We first consider whether *Abood*’s holding is consistent with standard First Amendment principles.

A

The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech. We have held time and again that freedom of speech “includes both the right to speak freely and the right to refrain from speaking at all.” *Wooley v. Maynard* (1977) [*supra* this Chapter]. The right to eschew association for expressive purposes is likewise protected. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (“Freedom of association . . . plainly presupposes a freedom not to associate”). As Justice Jackson memorably put it: “If there is any fixed star in our constitutional constellation, it is that no

official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein.*” *West Virginia Bd. of Ed. v. Barnette* (1943) (emphasis added) [*supra* this Chapter].

Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned. Suppose, for example, that the State of Illinois required all residents to sign a document expressing support for a particular set of positions on controversial public issues — say, the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this.

Perhaps because such compulsion so plainly violates the Constitution, most of our free speech cases have involved restrictions on what can be said, rather than laws compelling speech. But measures compelling speech are at least as threatening.

Free speech serves many ends. It is essential to our democratic form of government, and it furthers the search for truth, see, *e.g.*, *Thornhill v. Alabama*, 310 U.S. 88 (1940) [Note Chapter 4]. Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.

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

Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns. *Knox*; *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) [Note *supra* this Chapter]; *Abood*. As Jefferson famously put it, “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.” A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (emphasis deleted and footnote omitted). We have therefore recognized that a “‘significant impingement on First Amendment rights’” occurs when public employees are required to provide financial support for a union that “takes many positions during collective bargaining that have powerful political and civic consequences.” *Knox*.

Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed. Our free speech cases have identified “levels of scrutiny” to be applied in different contexts, and in three recent cases, we have considered the standard that should be used in judging the constitutionality of agency fees. See *Knox*; *Harris v. Quinn*, 573 U.S. ____ (2014) [Note *supra* this Chapter]; *Friedrichs v. California Teachers Assn.*, 578 U.S. ____ (2016) (*per curiam*) (affirming decision below by equally divided Court) [Note *supra* this Chapter].

In *Knox*, the first of these cases, we found it sufficient to hold that the conduct in question was unconstitutional under even the test used for the compulsory subsidization of commercial speech. Even though commercial speech

has been thought to enjoy a lesser degree of protection, see, *e.g.*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.* (1980) [Chapter 3], prior precedent in that area, specifically *United Foods*, had applied what we characterized as “exacting” scrutiny, *Knox*, a less demanding test than the “strict” scrutiny that might bethought to apply outside the commercial sphere. Under “exacting” scrutiny, we noted, a compelled subsidy must “serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.” *Ibid.*

In *Harris*, the second of these cases, we again found that an agency-fee requirement failed “exacting scrutiny.” But we questioned whether that test provides sufficient protection for free speech rights, since “it is apparent that the speech compelled” in agency-fee cases “is not commercial speech.” *Id.*

Picking up that cue, petitioner in the present case contends that the Illinois law at issue should be subjected to “strict scrutiny.” ... [We] again find it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even the more permissive standard applied in *Knox* and *Harris*. ...

B

In *Abood*, the main defense of the agency-fee arrangement was that it served the State’s interest in “labor peace.” By “labor peace,” the *Abood* Court meant avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union. In such a situation, the Court predicted, “inter-union rivalries” would foster “dissension within the work force,” and the employer could face “conflicting demands from different unions.” *Id.* Confusion would ensue if the employer entered into and attempted to “enforce two or more agreements specifying different terms and conditions of employment.” *Id.* And a settlement with one union would be “subject to attack from [a] rival labor organizatio[n].” *Id.*

We assume that “labor peace,” in this sense of the term, is a compelling state interest, but *Abood* cited no evidence that the pandemonium it imagined would result if agency fees were not allowed, and it is now clear that *Abood*’s fears were unfounded. The *Abood* Court assumed that designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees are inextricably linked, but that is simply not true. ...

C

In addition to the promotion of “labor peace,” *Abood* cited “the risk of ‘free riders’” as justification for agency fees. Respondents and some of their *amici* endorse this reasoning, contending that agency fees are needed to prevent nonmembers from enjoying the benefits of union representation without shouldering the costs. Petitioner strenuously objects to this free-rider label. ...

Whichever description fits the majority of public employees who would not subsidize a union if given the option, avoiding free riders is not a compelling interest. As we have noted, “free-rider arguments ... are generally insufficient to overcome First Amendment objections.” *Knox*. To hold otherwise across the board would have startling consequences. Many private groups speak out with the objective of obtaining government action that will have the effect of benefiting nonmembers. May all those who are thought to benefit from such efforts be compelled to subsidize this speech?

Suppose that a particular group lobbies or speaks out on behalf of what it thinks are the needs of senior citizens or veterans or physicians, to take just a few examples. Could the government require that all seniors, veterans, or doctors pay for that service even if they object? It has never been thought that this is permissible. . . .

Those supporting agency fees contend that the situation here is different because unions are statutorily required to “represen[t] the interests of all public employees in the unit,” whether or not they are union members. Why might this matter?

We can think of two possible arguments. It might be argued that a State has a compelling interest in requiring the payment of agency fees because (1) unions would otherwise be unwilling to represent nonmembers or (2) it would be fundamentally unfair to require unions to provide fair representation for nonmembers if nonmembers were not required to pay. Neither of these arguments is sound.

First, it is simply not true that unions will refuse to serve as the exclusive representative of all employees in the unit if they are not given agency fees. As noted, unions represent millions of public employees in jurisdictions that do not permit agency fees. No union is ever compelled to seek that designation. On the contrary, designation as exclusive representative is avidly sought. . . .

Nor can such fees be justified on the ground that it would otherwise be unfair to require a union to bear the duty of fair representation. That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit. . . .

In sum, we do not see any reason to treat the free-rider interest any differently in the agency-fee context than in any other First Amendment context. See *Knox*. We therefore hold that agency fees cannot be upheld on free-rider grounds.

IV

Implicitly acknowledging the weakness of *Abood*'s own reasoning, proponents of agency fees have come forward with alternative justifications for the decision, and we now address these arguments.

[Justice Alito then addressed, and rejected, the argument that the agency fee scheme satisfied the First Amendment because it constituted legitimate government regulation of government employee speech. He then considered whether *stare decisis* nevertheless prevented the Court from overruling *Abood*. The employee speech part of his opinion for the Court is set forth in a note in Chapter 12.] . . .

VII

For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees. Under Illinois law, if a public-sector collective-bargaining agreement includes an agency-fee provision and the union certifies to the employer the amount of the fee, that amount is automatically deducted from the nonmember's wages. §315/6(e). No form of employee consent is required. This procedure violates the First Amendment and cannot continue. . . .

* * *

Abood was wrongly decided and is now overruled. The judgment of the United States Court of Appeals for the Seventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

JUSTICE SOTOMAYOR, dissenting.

I join Justice Kagan’s dissent in full. Although I joined the majority in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) [Note Chapter 3], I disagree with the way that this Court has since interpreted and applied that opinion. Having seen the troubling development in First Amendment jurisprudence over the years, both in this Court and in lower courts, I agree fully with Justice Kagan that *Sorrell* — in the way it has been read by this Court — has allowed courts to “wiel[d] the First Amendment in . . . an aggressive way” just as the majority does today. *Post*.

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

For over 40 years, *Abood* struck a stable balance between public employees’ First Amendment rights and government entities’ interests in running their workforces as they thought proper. Under that decision, a government entity could require public employees to pay a fair share of the cost that a union incurs when negotiating on their behalf over terms of employment. But no part of that fair-share payment could go to any of the union’s political or ideological activities.

That holding fit comfortably with this Court’s general framework for evaluating claims that a condition of public employment violates the First Amendment. . . . Far from an “anomaly,” *ante*, the *Abood* regime was a paradigmatic example of how the government can regulate speech in its capacity as an employer. . . .

I

I begin with *Abood*, the 41-year-old precedent the majority overrules. That case involved a union that had been certified as the exclusive representative of Detroit’s public school teachers. The union’s collective-bargaining agreement with the city included an “agency shop” clause, which required teachers who had not joined the union to pay it “a service charge equal to the regular dues required of [u]nion members.” A group of non-union members sued over that clause, arguing that it violated the First Amendment.

In considering their challenge, the Court canvassed the purposes of the “agency shop” clause. It was rooted, the Court understood, in the “principle of exclusive union representation” — a “central element” in “industrial relations” since the New Deal. *Id.* Significant benefits, the Court explained, could derive from the “designation of a single [union] representative” for all similarly situated employees in a workplace. *Ibid.* In particular, such arrangements: “avoid[] the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment”; “prevent[] inter-union rivalries from creating dissension within the work force”; “free[] the employer from the possibility of facing conflicting demands from different unions”; and “permit[] the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.” *Id.* . . .

But for an exclusive-bargaining arrangement to work, such an employer often thought, the union needed adequate funding. . . .

With all that in mind, the Court recognized why both a government entity and its union bargaining partner would gravitate toward an agency-fee clause.

Those fees “counteract[] the incentive that employees might otherwise have to become ‘free riders.’” *Ibid.* . . .

But the Court acknowledged as well the “First Amendment interests” of dissenting employees. *Ibid.* It recognized that some workers might oppose positions the union takes in collective bargaining, or even “unionism itself.” *Ibid.* And still more, it understood that unions often advance “political and ideological” views outside the collective-bargaining context — as when they “contribute to political candidates.” *Id.* Employees might well object to the use of their money to support such “ideological causes.” *Id.*

So the Court struck a balance, which has governed this area ever since. On the one hand, employees could be required to pay fees to support the union in “collective bargaining, contract administration, and grievance adjustment.” *Id.* There, the Court held, the “important government interests” in having a stably funded bargaining partner justify “the impingement upon” public employees’ expression. *Id.* But on the other hand, employees could not be compelled to fund the union’s political and ideological activities. Outside the collective-bargaining sphere, the Court determined, an employee’s First Amendment rights defeated any conflicting government interest. See *id.*

II

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

A

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

The majority does not take issue with the first point. The majority claims that the second point never appears in *Abood*, but is willing to assume it for the sake of argument. So the majority stakes everything on the third point — the conclusion that maintaining an effective system of exclusive representation often entails agency fees.

But basic economic theory shows why a government would think that agency fees are necessary for exclusive representation to work. What ties the two together, as *Abood* recognized, is the likelihood of free-riding when fees are absent. Remember that once a union achieves exclusive-representation status, the law compels it to fairly represent all workers in the bargaining unit, whether or not they join or contribute to the union. Because of that legal duty, the union cannot give special advantages to its own members. And that in turn creates a collective action problem of nightmarish proportions. . . .

The majority’s initial response to this reasoning is simply to dismiss it. “[F]ree rider arguments,” the majority pronounces, “are generally insufficient to overcome First Amendment objections.” *Ante* (quoting *Knox*). “To hold

otherwise,” it continues, “would have startling consequences” because “[m]any private groups speak out” in ways that will “benefit[] nonmembers.” *Ante*. But that disregards the defining characteristic of *this* free-rider argument — that unions, unlike those many other private groups, must serve members and non-members alike. Groups advocating for “senior citizens or veterans” (to use the majority’s examples) have no legal duty to provide benefits to all those individuals: They can spur people to pay dues by conferring all kinds of special advantages on their dues-paying members. Unions are — by law — in a different position, as this Court has long recognized. Justice Scalia, responding to the same argument as the majority’s, may have put the point best. In a way that is true of no other private group, the “law *requires* the union to carry” non-members — “indeed, requires the union to *go out of its way* to benefit [them], even at the expense of its other interests.” *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991) (opinion concurring in part and dissenting in part). That special feature was what justified *Abood*: “Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them.” . . .

[Justice Kagan’s dissent then addressed the majority arguments on both the employee speech and *stare decisis* issues. The employee speech part of her opinion is explained in a note in Chapter 12.] . . .

IV

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

Departures from *stare decisis* are supposed to be “exceptional action[s]” demanding “special justification” — but the majority offers nothing like that here. . . . The majority has overruled *Abood* for no exceptional or special reason, but because it never liked the decision. It has overruled *Abood* because it wanted to.

Because, that is, it wanted to pick the winning side in what should be — and until now, has been — an energetic policy debate. . . . And maybe most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy. Today is not the first time the Court has wielded the First Amendment in such an aggressive way. See, e.g., *National Institute of Family and Life Advocates v. Becerra*, ___ U.S. ___ (2018) (invalidating a law requiring medical and counseling facilities to provide relevant information to users) [Notes *supra* Chapter 5 and this Chapter]; *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (striking down a law that restricted pharmacies from selling various data) [Note Chapter 3]. And it threatens not to be the last. Speech is everywhere — a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority’s road runs long. And at every stop are black-robed rulers overriding citizens’ choices. The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance — including over the role of public-sector unions.

Note: Questions about Janus

1. Much of the debate between Justice Alito and Justice Kagan in *Janus* concerns the strength of the government's interest in adopting agency-fees requirements for any employee who declines to join the public-sector union representing that employee's workplace. That question is a complex one, that turns on the empirical realities of union representation and the severity of the free-rider problem that Justice Kagan stresses (calling it "nightmarish") but that Justice Alito discounts. Leave that empirical question aside, and consider the broader First Amendment issues at stake in the case. Should the government enjoy any deference when it argues that it has legitimate interests in requiring such agency fees? Perhaps relatedly, how serious is the First Amendment harm suffered by these dissenting employees?

2. One way to think about the previous question is as presenting a framing question: is *Janus* "really" a case about labor-management relations (in which perhaps the government merits some deference in its decisions about what structures will lead to such relations being harmonious), or is it "really" a case about the dissenting employee's right not to subsidize speech with which he disagrees (in which case such deference might be less appropriate)? Is there a way to answer this question in a principled way? You'll see this framing question return when you encounter, in Chapter 12, the doctrine dealing with the free speech rights of government employees. That chapter will include a note that recounts a further aspect of *Janus*, in which the majority and dissent debate whether the agency fees structure in question reflects government regulation of employees' speech. In staking out their positions on that question, Justices Alito and Kagan again offer competing frames for understanding agency fees requirements.

3. Consider one additional question: is compelled *subsidization* of speech the same thing as compelled *speech* itself? All the justices in *Janus* assumed that compelled subsidization implicated the First Amendment, but note that this assumption was not compelled (no pun intended) by *Barnette* or *Wooley*. Is it justifiable? In thinking about this question, recall *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), where the Court unanimously upheld the Solomon Amendment (requiring universities receiving federal funds to provide equal access to military recruiters) and rejected a claim that that law compelled speech in a way that violated the First Amendment. In that case, Chief Justice Roberts dismissed that claim as "trivializing *Barnette*." Do you think *Janus*'s claim does the same? Why or why not?

4. Speaking of precedent, what effect might *Janus* have on the agricultural marketing subsidy cases presented in the casebook? In particular, does it undermine the first of those cases, *Glickman v. Wileman Brothers and Elliott*, 521 U.S. 457 (1997)? *Glickman* cited *Abod* several times. Re-read the excerpts from *Glickman* presented in the book. Is its reasoning now in question?

Chapter 12

Beyond Regulation: The Government as Employer and Educator

A. First Amendment Rights of Government Employees

Page 625: *insert before* Garcetti v. Ceballos:

Problem: A Border Patrol Facebook Group

During a period of heightened political tension over immigration enforcement policies, a journalist discovers that approximately 50 federal Border Patrol agents belong to a Facebook group that is dedicated, in the group's words, to "funny and serious discussion about work with the Border Patrol." Many postings, and comments to the postings, are troubling: they include real photos of immigrants injured or killed while trying to cross the border, coupled with captions such as "oh well" or "if he dies, he dies." Other postings include satirical doctored photos of politicians known to be critical of the Border Patrol, such as photos of congresswomen critical of the Patrol depicted as performing oral sex on persons clearly understood to be migrants. The Facebook group is private — that is, it can only be seen by members, and others can join it only if they are given a password by a member. The journalist discovered the group when a member disclosed the password to a fellow Border Patrol agent, who, appalled by the content, contacted the journalist and provided the password information.

The publicizing of this group's existence causes a furor. The Border Patrol leadership pledges to investigate. When it identifies current members of the Patrol that are members of the group, and others that both are members and have posted some of the content described above, it begins disciplinary proceedings against them.

James Heald is a Border Patrol agent who is a member of and has actively posted on the group. When he is notified that he is the subject of a disciplinary action, he sues, alleging a violation of his First Amendment rights.

Does Heald have a good First Amendment claim? Why or why not?

Page 640: *insert before the Note:*

Note: Union Agency Fees and Government Employee Speech

1. Recall from Chapter 9 that in 2018 the Supreme Court struck down legal requirements that non-union members working in unionized government workplaces contribute so-called "agency fees" to the union to defray the union's cost of representing the workers in collective bargaining. *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 585 U.S. ____ (2018). Chapter 9's presentation of *Janus* focused on the justices' disagreements about the relevant precedent, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which had upheld such compelled contributions. As set forth in Chapter 9, the five-justice majority in *Janus* overruled *Abood*.

2. In *Janus*, Justice Alito, writing for the Court, and Justice Kagan, writing the main dissent, debated, among other issues, the applicability to the agency fees issue of the government employee speech doctrine, as reflected in cases presented in this Chapter, beginning with *Pickering*. Justice Alito questioned the applicability

of the *Pickering* line of cases, describing it as a “painful fit” with the agency fees issue, for three reasons.

First, he argued that “the *Pickering* framework was developed for use in a very different context — in cases that involve ‘one employee’s speech and its impact on that employee’s public responsibilities.’ *United States v. Treasury Employees*, 513 U.S. 454 (1995) [Note *supra* this chapter]. This case, by contrast, involves a blanket requirement that all employees subsidize speech with which they may not agree. While we have sometimes looked to *Pickering* in considering general rules that affect broad categories of employees, we have acknowledged that the standard *Pickering* analysis requires modification in that situation.”

He then continued:

Second, the *Pickering* framework fits much less well where the government compels speech or speech subsidies in support of third parties. *Pickering* is based on the insight that the speech of a public-sector employee may interfere with the effective operation of a government office. When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different. Of course, if the speech in question is part of an employee’s official duties, the employer may insist that the employee deliver any lawful message. See *Garcetti v. Ceballos* (2006) [*supra* this chapter]. Otherwise, however, it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree. And we have never applied *Pickering* in such a case.

Justice Alito then provided a final argument for *Pickering*’s inapplicability:

Third, although both *Pickering* and *Abood* divided speech into two categories, the cases’ categorization schemes do not line up. Superimposing the *Pickering* scheme on *Abood* would significantly change the *Abood* regime.

Let us first look at speech that is not germane to collective bargaining but instead concerns political or ideological issues. Under *Abood*, a public employer is flatly prohibited from permitting nonmembers to be charged for this speech, but under *Pickering*, the employees’ free speech interests could be overcome if a court found that the employer’s interests outweighed the employees’.

A similar problem arises with respect to speech that *is* germane to collective bargaining. . . . Under *Abood*, nonmembers may be required to pay for all this speech, but *Pickering* would permit that practice only if the employer’s interests outweighed those of the employees. Thus, recasting *Abood* as an application of *Pickering* would substantially alter the *Abood* scheme.

3. Justice Kagan, dissenting in *Janus*, took issue with these arguments and argued that *Abood* “coheres with [the] framework” established in *Pickering*. She began by engaging Justice Alito’s final point above, stating that “Like *Pickering*, *Abood* drew the constitutional line by analyzing the connection between the government’s managerial interests and different kinds of expression.” She argued

that, just as *Pickering* would have required, in *Abood* the Court concluded that the government had no workplace managerial interest in compelling non-union members' subsidization of the union's political expression, and thus found a First Amendment right to be free of such compelled subsidization.

Justice Kagan then turned to Justice Alito's first two arguments recounted above. First, she noted that, in the very case he cited — *Treasury Employees* — the Court did in fact apply *Pickering* to a broad government policy restricting employee speech. With regard to his second argument, about the increased First Amendment harm of compelling, rather than restricting, speech, Justice Kagan cited cases in which the Court found the distinction irrelevant as a First Amendment matter. She acknowledged the Court's opinion in *Barnette* condemning compelled speech as particularly problematic, but sought to limit the force of that precedent by describing it as "(thankfully) the most exceptional in our First Amendment annals."

4. After setting forth reasons not to apply *Pickering* at all, Justice Alito then argued that an agency fees scheme would fail *Pickering* balancing even if it was appropriate to apply that approach. His analysis turned heavily on the argument that public employee union speech on matters such as pay and working conditions can be of significant public concern. For example, he noted the public's interest in states' fiscal stability, an issue that would be implicated by the union's collective bargaining speech on matters such as wages, and the public's interest in teacher tenure protections, which would be implicated by a teachers' union's insistence that such tenure be part of any union agreement with the state. Given the public's interest in the union's speech, the dissenting employee was held to have a significant interest in not being compelled to subsidize such speech. In turn, Justice Alito referred to the opinion's earlier analysis of the reasons for agency fee schemes when he concluded that the state lacked a sufficiently strong interest to outweigh the employee's interest against the compelled speech subsidization.

5. Justice Kagan disagreed on these points as well. She argued that the majority opinion misunderstood the first prong of *Pickering*'s test: "The question [asked by that first prong] is not, as the majority seems to think, whether the public is, or should be, interested in a government employee's speech. Instead, the question is whether that speech is about and directed to the workplace — as contrasted with the broader public square." She then continued that "Consistent with that focus, speech about the terms and conditions of employment — the essential stuff of collective bargaining — has never survived *Pickering*'s first step." In support of this conclusion, she observed that "even the Justices who originally objected to *Abood* conceded that the use of agency fees for bargaining on 'economic issues' like 'salaries and pension benefits' would not raise significant First Amendment questions." She then argued that, even if the speech in question in *Janus* satisfied *Pickering*'s first test, the government had shown adequate justification for compelling the non-members' subsidization of the union speech given the government's interest in ensuring "a stable and productive relationship with an exclusive bargaining agent." She concluded this part of her opinion with the following paragraph:

The key point about *Abood* is that it fit naturally with this Court's consistent teaching about the permissibility of regulating public employees' speech. The Court allows a government entity to regulate that expression in aid of managing its workforce to

effectively provide public services. That is just what a government aims to do when it enforces a fair-share agreement. And so, the key point about today's decision is that it creates an unjustified hole in the law, applicable to union fees alone. This case is *sui generis* among those addressing public employee speech — and will almost surely remain so.

6. How close a fit was *Abood* with *Pickering*? Justice Kagan conceded that *Abood* was not an “overt, one-to-one application of *Pickering*,” but she nevertheless insisted that both cases “raised variants of the same basic issue: the extent of the government’s authority to make employment decisions affecting expression.” She continued that “in both, the Court struck the same basic balance” By contrast, Justice Alito insisted that “[s]uperimposing the *Pickering* scheme on *Abood* would significantly change the *Abood* regime.” Re-read *Connick v. Myers*, which explains and applies *Pickering*. After doing so, consider which side has the better of this issue.

7. Consider in particular whether public sector union’s collective bargaining speech satisfies *Pickering*’s requirement that, in order to enjoy constitutional protection, government employee speech must implicate matters of public concern. The majority insists that, by definition, expression about the terms and conditions of government employment satisfies this requirement, given the effect those terms and conditions have on the public fisc. Justice Kagan countered by hypothesizing a government entity disciplining a group of government employees for “agitating for a better health plan at various inopportune times and places.” According to Justice Kagan, the *Janus* majority’s answer to the “public concern” question would necessarily mean either that such agitation would satisfy *Pickering*’s first step and would thus require courts to perform the balancing *Pickering* requires at step two, or, alternatively, that the *Janus* rule applies only (and, she implied, arbitrarily) to unions.

To be sure, even Justice Kagan presumably concedes that the “agitation” she hypothesizes might still end up punishable by the employer, depending on how that step two balancing comes out. If you were a government employer, would the prospect of such judicial balancing comfort you? Or would it make you more uncertain? If it’s the latter, is there a principled way to exclude such agitation from *Pickering* balancing consistent with what the majority says in *Janus* about how the union speech in question would satisfy *Pickering*’s first step and thus require such balancing?

Chapter 15

Testing the Boundaries of Doctrine

B. Government Programs and Offensive Speech

Page 772: insert before Part C:

The “disparagement” provision of the federal trademark statute, struck down in *Matal*, is not the only restriction on the eligibility of a trademark for federal registration. Two years after *Matal*, the Court confronted the statute’s prohibition on the registration of any “immoral” or “scandalous” trademark. The Court struck down that provision as well.

Iancu v. Brunetti

139 S. Ct. 2294 (2019)

JUSTICE KAGAN delivered the opinion of the Court.

Two Terms ago, in *Matal v. Tam* (2017) [Chapter 15] this Court invalidated the Lanham Act’s bar on the registration of “disparaging” trademarks. Although split between two non-majority opinions, all Members of the Court agreed that the provision violated the First Amendment because it discriminated on the basis of viewpoint. Today we consider a First Amendment challenge to a neighboring provision of the Act, prohibiting the registration of “immoral or scandalous” trademarks. We hold that this provision infringes the First Amendment for the same reason: It too disfavors certain ideas.

I

Respondent Erik Brunetti is an artist and entrepreneur who founded a clothing line that uses the trademark FUCT. According to Brunetti, the mark (which functions as the clothing’s brand name) is pronounced as four letters, one after the other: F-U-C-T. But you might read it differently and, if so, you would hardly be alone. That common perception caused difficulties for Brunetti when he tried to register his mark with the U.S. Patent and Trademark Office (PTO).

Under the Lanham Act, the PTO administers a federal registration system for trademarks. . . . This case involves another of the Lanham Act’s prohibitions on registration — one applying to marks that “consist of or comprise immoral or scandalous matter.” . . . To determine whether a mark fits in the category, the PTO asks whether a “substantial composite of the general public” would find the mark “shocking to the sense of truth, decency, or propriety”; “giving offense to the conscience or moral feelings”; “calling out for condemnation”; “disgraceful”; “offensive”; “disreputable”; or “vulgar.”

Both a PTO examining attorney and the PTO’s Trademark Trial and Appeal Board decided that Brunetti’s mark flunked that test. Brunetti then brought a facial challenge to the “immoral or scandalous” bar in the Court of Appeals for the Federal Circuit. That court found the prohibition to violate the First Amendment. As usual when a lower court has invalidated a federal statute, we granted certiorari.

II

This Court first considered a First Amendment challenge to a trademark registration restriction in *Tam*, just two Terms ago. There, the Court declared unconstitutional the Lanham Act’s ban on registering marks that “disparage” any

“person, living or dead.” The eight-Justice Court divided evenly between two opinions and could not agree on the overall framework for deciding the case. (In particular, no majority emerged to resolve whether a Lanham Act bar is a condition on a government benefit or a simple restriction on speech.) But all the Justices agreed on two propositions. First, if a trademark registration bar is viewpoint-based, it is unconstitutional. And second, the disparagement bar was viewpoint-based.

The Justices thus found common ground in a core postulate of free speech law: The government may not discriminate against speech based on the ideas or opinions it conveys. In Justice Kennedy’s explanation, the disparagement bar allowed a trademark owner to register a mark if it was “positive” about a person, but not if it was “derogatory.” That was the “essence of viewpoint discrimination,” he continued, because “the law thus reflects the Government’s disapproval of a subset of messages it finds offensive.” Justice Alito emphasized that the statute “denied registration to any mark” whose disparaging message was “offensive to a substantial percentage of the members of any group.” The bar thus violated the “bedrock First Amendment principle” that the government cannot discriminate against “ideas that offend.” Slightly different explanations, then, but a shared conclusion: Viewpoint discrimination doomed the disparagement bar.

If the “immoral or scandalous” bar similarly discriminates on the basis of viewpoint, it must also collide with our First Amendment doctrine. The Government does not argue otherwise. . . . So the key question becomes: Is the “immoral or scandalous” criterion in the Lanham Act viewpoint-neutral or viewpoint-based?

It is viewpoint-based. The meanings of “immoral” and “scandalous” are not mysterious, but resort to some dictionaries still helps to lay bare the problem. When is expressive material “immoral”? According to a standard definition, when it is “inconsistent with rectitude, purity, or good morals”; “wicked”; or “vicious.” WEBSTER’S NEW INTERNATIONAL DICTIONARY 1246 (2d ed. 1949). Or again, when it is “opposed to or violating morality”; or “morally evil.” SHORTER OXFORD ENGLISH DICTIONARY 961 (3d ed. 1947). So the Lanham Act permits registration of marks that champion society’s sense of rectitude and morality, but not marks that denigrate those concepts. And when is such material “scandalous”? Says a typical definition, when it “gives offense to the conscience or moral feelings”; “excites reprobation”; or “calls out condemnation.” WEBSTER’S NEW INTERNATIONAL DICTIONARY, at 2229. Or again, when it is “shocking to the sense of truth, decency, or propriety”; “disgraceful”; “offensive”; or “disreputable.” FUNK & WAGNALLS NEW STANDARD DICTIONARY 2186 (1944). So the Lanham Act allows registration of marks when their messages accord with, but not when their messages defy, society’s sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter. “Love rules”? “Always be good”? Registration follows. “Hate rules”? “Always be cruel”? Not according to the Lanham Act’s “immoral or scandalous” bar.

The facial viewpoint bias in the law results in viewpoint-discriminatory application. . . . The PTO, for example, asks whether the public would view the mark as “shocking to the sense of truth, decency, or propriety”; “calling out for

condemnation”; “offensive”; or “disreputable.” Using those guideposts, the PTO has refused to register marks communicating “immoral” or “scandalous” views about (among other things) drug use, religion, and terrorism. But all the while, it has approved registration of marks expressing more accepted views on the same topics. [Justice Kagan then provided several examples of PTO decisions that granted or denied trademark applications based on criteria such as offensiveness.]

How, then, can the Government claim that the “immoral or scandalous” bar is viewpoint-neutral? . . . At oral argument, the Government conceded: “If you just looked at the words like ‘shocking’ and ‘offensive’ on their face and gave them their ordinary meanings, they could easily encompass material that was shocking [or offensive] because it expressed an outrageous point of view or a point of view that most members” of society reject. But no matter, says the Government, because the statute is “susceptible of” a limiting construction that would remove this viewpoint bias. The Government’s idea, abstractly phrased, is to narrow the statutory bar to “marks that are offensive or shocking to a substantial segment of the public because of their *mode* of expression, independent of any views that they may express.” More concretely, the Government explains that this reinterpretation would mostly restrict the PTO to refusing marks that are “vulgar” — meaning “lewd,” “sexually explicit or profane.” Such a reconfigured bar, the Government says, would not turn on viewpoint, and so we could uphold it.

But we cannot accept the Government’s proposal, because the statute says something markedly different. This Court, of course, may interpret “ambiguous statutory language” to “avoid serious constitutional doubts.” But that canon of construction applies only when ambiguity exists. “We will not rewrite a law to conform it to constitutional requirements.” *United States v. Stevens* (2010) [Chapter 3]. So even assuming the Government’s reading would eliminate First Amendment problems, we may adopt it only if we can see it in the statutory language. And we cannot. The “immoral or scandalous” bar stretches far beyond the Government’s proposed construction. . . . To cut the statute off where the Government urges is not to interpret the statute Congress enacted, but to fashion a new one.*

And once the “immoral or scandalous” bar is interpreted fairly, it must be invalidated. The Government just barely argues otherwise. In the last paragraph of its brief, the Government gestures toward the idea that the provision is salvageable by virtue of its constitutionally permissible applications (in the Government’s view, its applications to lewd, sexually explicit, or profane marks). In other words, the Government invokes our First Amendment overbreadth doctrine, and asks us to uphold the statute against facial attack because its unconstitutional applications are not “substantial” relative to “the statute’s plainly legitimate sweep.” *Stevens*. But to begin with, this Court has never applied that kind of analysis to a viewpoint-discriminatory law. In *Tam*, for example, we did not pause to consider whether the disparagement clause might admit some permissible applications (say, to certain libelous speech) before striking it down. The Court’s finding of viewpoint bias ended the matter. And similarly, it seems unlikely we would compare permissible and impermissible applications if Congress outright banned “offensive” (or to use some other examples, “divisive” or “subversive”) speech. Once we have found that a law “aims at the suppression of” views, why would it matter that Congress could

* We reject the dissent’s statutory surgery for the same reason. . . .

have captured some of the same speech through a viewpoint-neutral statute? But in any event, the “immoral or scandalous” bar is substantially overbroad. There are a great many immoral and scandalous ideas in the world (even more than there are swearwords), and the Lanham Act covers them all. It therefore violates the First Amendment.

We accordingly affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE ALITO, concurring.

For the reasons explained in the opinion of the Court, the provision of the Lanham Act at issue in this case violates the Free Speech Clause of the First Amendment because it discriminates on the basis of viewpoint and cannot be fixed without rewriting the statute. Viewpoint discrimination is poison to a free society. But in many countries with constitutions or legal traditions that claim to protect freedom of speech, serious viewpoint discrimination is now tolerated, and such discrimination has become increasingly prevalent in this country. At a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination. We reaffirm that principle today.

Our decision is not based on moral relativism but on the recognition that a law banning speech deemed by government officials to be “immoral” or “scandalous” can easily be exploited for illegitimate ends. Our decision does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas. The particular mark in question in this case could be denied registration under such a statute. The term suggested by that mark is not needed to express any idea and, in fact, as commonly used today, generally signifies nothing except emotion and a severely limited vocabulary. The registration of such marks serves only to further coarsen our popular culture. But we are not legislators and cannot substitute a new statute for the one now in force.

CHIEF JUSTICE ROBERTS, concurring in part and dissenting in part.

... I agree with the majority that the “immoral” portion of the provision is not susceptible of a narrowing construction that would eliminate its viewpoint bias. As Justice Sotomayor explains, however, the “scandalous” portion of the provision is susceptible of such a narrowing construction. Standing alone, the term “scandalous” need not be understood to reach marks that offend because of the ideas they convey; it can be read more narrowly to bar only marks that offend because of their mode of expression — marks that are obscene, vulgar, or profane. That is how the PTO now understands the term, in light of our decision in *Tam*. I agree with Justice Sotomayor that such a narrowing construction is appropriate in this context.

I also agree that, regardless of how exactly the trademark registration system is best conceived under our precedents — a question we left open in *Tam* — refusing registration to obscene, vulgar, or profane marks does not offend the First Amendment. Whether such marks can be registered does not affect the extent to which their owners may use them in commerce to identify goods. No speech is being restricted; no one is being punished. The owners of such marks are merely denied certain additional benefits associated with federal trademark registration. The Government, meanwhile, has an interest in not associating itself

with trademarks whose content is obscene, vulgar, or profane. The First Amendment protects the freedom of speech; it does not require the Government to give aid and comfort to those using obscene, vulgar, and profane modes of expression. For those reasons, I concur in part and dissent in part.

JUSTICE BREYER, concurring in part and dissenting in part.

Our precedents warn us against interpreting statutes in ways that would likely render them unconstitutional. Following these precedents, I agree with Justice Sotomayor that, for the reasons she gives, we should interpret the word “scandalous” in the present statute to refer only to certain highly “vulgar” or “obscene” modes of expression.

The question, then, is whether the First Amendment permits the Government to rely on this statute, as narrowly construed, to deny the benefits of federal trademark registration to marks like the one at issue here, which involves the use of the term “FUCT” in connection with a clothing line that includes apparel for children and infants. Like Justice Sotomayor, I believe the answer is “yes,” though my reasons differ slightly from hers.

I

A

In my view, a category-based approach to the First Amendment cannot adequately resolve the problem before us. I would place less emphasis on trying to decide whether the statute at issue should be categorized as an example of “viewpoint discrimination,” “content discrimination,” “commercial speech,” “government speech,” or the like. Rather, as I have written before, I believe we would do better to treat this Court’s speech-related categories not as outcome-determinative rules, but instead as rules of thumb. *Reed v. Town of Gilbert* (2015) (opinion concurring in the judgment) [Chapter 5].

After all, these rules are not absolute. The First Amendment is not the Tax Code. Indeed, even when we consider a regulation that is ostensibly “viewpoint discriminatory” or that is subject to “strict scrutiny,” we sometimes find the regulation to be constitutional after weighing the competing interests involved. *See, e.g., Morse v. Frederick* (2007) (“Schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use”) [Chapter 12]; *Williams-Yulee v. Florida Bar* (2015) (explaining that although “it is the rare case” when a statute satisfies strict scrutiny, “those cases do arise.”) [Chapter 5].

Unfortunately, the Court has sometimes applied these rules — especially the category of “content discrimination” — too rigidly. In a number of cases, the Court has struck down what I believe are ordinary, valid regulations that pose little or no threat to the speech interests that the First Amendment protects. *See Janus v. State, County, and Municipal Employees* (2018) (Kagan, J., dissenting) [Supplement Chapter 9]; *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (Breyer, J., dissenting) [Chapter 3 Note]; *see generally Reed* (opinion of Breyer, J.).

Rather than deducing the answers to First Amendment questions strictly from categories, as the Court often does, I would appeal more often and more directly to the values the First Amendment seeks to protect. As I have previously written, I would ask whether the regulation at issue “works speech-related harm that is out of proportion to its justifications.” *United States v. Alvarez* (2012) (opinion concurring in judgment) [Chapter 3]; *see Reed* (opinion concurring in

judgment) (discussing the matter further, particularly in respect to the category of content discrimination).

B

This case illustrates the limits of relying on rigid First Amendment categories, for the statute at issue does not fit easily into any of these categories.

The Court has not decided whether the trademark statute is simply a method of regulating pure “commercial speech.” See *Tam* (2017) (opinion of Alito, J.); *id.* (opinion of Kennedy, J.) (same). There may be reasons for doubt on that score. Trademarks, after all, have an expressive component in addition to a commercial one, and the statute does not bar anyone from speaking. . . .

The trademark statute cannot easily be described as a regulation of “government speech,” either. *Tam*. The Government, however, may be loosely associated with the mark because it registers the mark and confers certain benefits upon the owner.

What about the concept of a “public forum”? Trademark registration has little in common with a traditional public forum, as the register of trademarks is not a public park, a street, or a similar forum for public debate. But one can find some vague resemblance between trademark registration and what this Court refers to as a “limited public forum” created by the government for private speech. The trademark registration system also bears some resemblance to cases involving government subsidies for private speech, as such programs — like trademark registration — may grant a benefit to some forms of speech without prohibiting other forms of speech.

As for the concepts of “viewpoint discrimination” and “content discrimination,” I agree with Justice Sotomayor that the boundaries between them may be difficult to discern. Even so, it is hard to see how a statute prohibiting the registration of only highly vulgar or obscene words discriminates based on “viewpoint.” Of course, such words often evoke powerful emotions. Standing by themselves, however, these words do not typically convey any particular viewpoint. See *FCC v. Pacifica Foundation* (1978) (noting that the Government’s regulation of vulgar words was based not on “point of view,” but on “the way in which [speech] is expressed”) [Chapter 3]. Moreover, while a restriction on the registration of highly vulgar words arguably places a content-based limit on trademark registration, it is hard to see why that label should be outcome-determinative here, for regulations governing trademark registration “inevitably involve content discrimination.”

In short, the trademark statute does not clearly fit within any of the existing outcome-determinative categories. Why, then, should we rigidly adhere to these categories? Rather than puzzling over categorization, I believe we should focus on the interests the First Amendment protects and ask a more basic proportionality question: Does “the regulation at issue work harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives”? *Reed* (opinion of Breyer, J.).

II

Based on this proportionality analysis, I would conclude that the statute at issue here, as interpreted by Justice Sotomayor, does not violate the First Amendment.

How much harm to First Amendment interests does a bar on registering highly vulgar or obscene trademarks work? Not much. The statute leaves

businesses free to use highly vulgar or obscene words on their products, and even to use such words directly next to other registered marks. Indeed, a business owner might even use a vulgar word as a trademark, provided that he or she is willing to forgo the benefits of registration.

Moreover, the field at issue here, trademark law, is a highly regulated one with a specialized mission: to “help consumers identify goods and services that they wish to purchase, as well as those they want to avoid.” As I have noted, that mission, by its very nature, requires the Government to impose limitations on speech. Trademark law therefore forbids the registration of certain types of words — for example, those that will likely “cause confusion,” or those that are “merely descriptive.” For that reason, an applicant who seeks to register a mark should not expect complete freedom to say what she wishes, but should instead expect linguistic regulation.

Now consider, by way of contrast, the Government’s interests in barring the registration of highly vulgar or obscene trademarks. For one thing, when the Government registers a mark, it is necessarily “involved in promoting” that mark. The Government has at least a reasonable interest in ensuring that it is not involved in promoting highly vulgar or obscene speech, and that it will not be associated with such speech.

For another, scientific evidence suggests that certain highly vulgar words have a physiological and emotional impact that makes them different in kind from most other words. . . . These attention-grabbing words, though financially valuable to some businesses that seek to attract interest in their products, threaten to distract consumers and disrupt commerce. And they may lead to the creation of public spaces that many will find repellant, perhaps on occasion creating the risk of verbal altercations or even physical confrontations. (Just think about how you might react if you saw someone wearing a t-shirt or using a product emblazoned with an odious racial epithet.) The Government thus has an interest in seeking to disincentivize the use of such words in commerce by denying the benefit of trademark registration. *Cf. Brandenburg v. Ohio* (1969) [Chapter 1] (permitting regulation of words “directed to inciting or producing imminent law-less action” and “likely to incite or produce such action”).

Finally, although some consumers may be attracted to products labeled with highly vulgar or obscene words, others may believe that such words should not be displayed in public spaces where goods are sold and where children are likely to be present. . . . To that end, the Government may have an interest in protecting the sensibilities of children by barring the registration of such words.

The upshot of this analysis is that the narrowing construction articulated by Justice Sotomayor risks some harm to First Amendment interests, but not very much. And applying that interpretation seems a reasonable way — perhaps the only way — to further legitimate government interests. . . .

I would conclude that the prohibition on registering “scandalous” marks does not “work harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives.” *Reed*. I would therefore uphold this part of the statute. I agree with the Court, however, that the bar on registering “immoral” marks violates the First Amendment. Because Justice Sotomayor reaches the same conclusions, using roughly similar reasoning, I join her opinion insofar as it is consistent with the views set forth here.

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins, concurring in part and dissenting in part.

The Court's decision today will beget unfortunate results. With the Lanham Act's scandalous-marks provision struck down as unconstitutional viewpoint discrimination, the Government will have no statutory basis to refuse (and thus no choice but to begin) registering marks containing the most vulgar, profane, or obscene words and images imaginable.

The coming rush to register such trademarks — and the Government's immediate powerlessness to say no — is eminently avoidable. Rather than read the relevant text as the majority does, it is equally possible to read that provision's bar on the registration of "scandalous" marks to address only obscenity, vulgarity, and profanity. Such a narrowing construction would save that duly enacted legislative text by rendering it a reasonable, viewpoint-neutral restriction on speech that is permissible in the context of a beneficial governmental initiative like the trademark-registration system. I would apply that narrowing construction to the term "scandalous" and accordingly reject petitioner Erik Brunetti's facial challenge.

I

* * *

A

As the majority notes, there are dictionary definitions for both "immoral" and "scandalous" that do suggest a viewpoint-discriminatory meaning. And as for the word "immoral," I agree with the majority that there is no tenable way to read it that would ameliorate the problem. The word clearly connotes a preference for "rectitude and morality" over its opposite.

It is with regard to the word "scandalous" that I part ways with the majority. Unquestionably, "scandalous" can mean something similar to "immoral" and thus favor some viewpoints over others. But it does not have to be read that way. To say that a word or image is "scandalous" can instead mean that it is simply indecent, shocking, or generally offensive. That offensiveness could result from the views expressed, but it could also result from the way in which those views are expressed: using a manner of expression that is "shocking to [one's] sense of . . . decency" or "extremely offensive to the sense of . . . propriety."

The word "scandalous" on its own, then, is ambiguous: It can be read broadly (to cover both offensive ideas and offensive manners of expressing ideas), or it can be read narrowly (to cover only offensive modes of expression). That alone raises the possibility that a limiting construction might be appropriate. But the broader text confirms the reasonableness of the narrower reading, because the word "scandalous" appears in the statute alongside other words that can, and should, be read to constrain its scope.

* * *

What would it mean for "scandalous" in § 1052(a) to cover only offensive modes of expression? The most obvious ways — indeed, perhaps the only conceivable ways — in which a trademark can be expressed in a shocking or offensive manner are when the speaker employs obscenity, vulgarity, or profanity. Obscenity has long been defined by this Court's decision in *Miller v. California* (1973) [Chapter 2]. As for what constitutes "scandalous" vulgarity or profanity, I do not offer a list, but I do interpret the term to allow the PTO to restrict (and

potentially promulgate guidance to clarify) the small group of lewd words or “swear” words that cause a visceral reaction, that are not commonly used around children, and that are prohibited in comparable settings. . . . Of course, “scandalous” offers its own limiting principle: if a word, though not exactly polite, cannot be said to be “scandalous” — *e.g.*, “shocking” or “extremely offensive,” 8 CENTURY DICTIONARY 5374 — it is clearly not the kind of vulgarity or profanity that Congress intended to target. Everyone can think of a small number of words (including the apparent homonym of Brunetti’s mark) that would, however, plainly qualify.⁵

* * *

II

Adopting a narrow construction for the word “scandalous” — interpreting it to regulate only obscenity, vulgarity, and profanity — would save it from unconstitutionality. Properly narrowed, “scandalous” is a viewpoint-neutral form of content discrimination that is permissible in the kind of discretionary governmental program or limited forum typified by the trademark-registration system.

A

Content discrimination occurs whenever a government regulates “particular speech because of the topic discussed or the idea or message expressed.” *Reed v. Town of Gilbert* (2015) [Chapter 5]; *see also Ward v. Rock Against Racism* (1989) [Chapter 6] (“Government regulation of expressive activity is content neutral so long as it is ‘justified without reference to the content of the regulated speech’”). Viewpoint discrimination is “an egregious form of content discrimination” in which “the government targets not subject matter, but particular views taken by speakers on a subject.” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995) [Notes Chapters 8, 13, and 19].

While the line between viewpoint-based and viewpoint-neutral content discrimination can be “slippery,” it is in any event clear that a regulation is not viewpoint discriminatory (or even content discriminatory) simply because it has an “incidental effect” on a certain subset of views. *Ward*. Some people, for example, may have the viewpoint that society should be more sexually liberated and feel that they cannot express that view sufficiently without the use of pornographic words or images. That does not automatically make a restriction on pornography into viewpoint discrimination, despite the fact that such a restriction limits communicating one’s views on sexual liberation in that way.

Restrictions on particular modes of expression do not inherently qualify as viewpoint discrimination; they are not by nature examples of “the government targeting . . . particular views taken by speakers on a subject.” *Rosenberger*. For example, a ban on lighting fires in the town square does not facially violate the First Amendment simply because it makes it marginally harder for would-be flag-

⁵ There is at least one particularly egregious racial epithet that would fit this description as well. While *Matal v. Tam* removed a statutory basis to deny the registration of racial epithets in general, the Government represented at oral argument that it is holding in abeyance trademark applications that use that particular epithet. As a result of today’s ruling, the Government will now presumably be compelled to register marks containing that epithet as well rather than treating it as a “scandalous” form of profanity under § 1052(a).

burners to express their views in that place. See *R.A.V. v. St. Paul* (1992) [*supra* this Chapter]. By the same token, “fighting words are categorically excluded from the protection of the First Amendment” not because they have no content or express no viewpoint (often quite the opposite), but because “their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey.” *Id.*

A restriction on trademarks featuring obscenity, vulgarity, or profanity is similarly viewpoint neutral, though it is naturally content-based.⁶ Indeed, the statute that the Court upheld in *Chaplinsky v. New Hampshire* (1942) [Chapter 2] itself had been construed to cover, among other kinds of “disorderly words,” “profanity, obscenity and threats,” despite the fact that such words had been used in that case to communicate an expressive message. To treat a restriction on vulgarity, profanity, or obscenity as viewpoint discrimination would upend decades of precedent.

Brunetti invokes *Cohen v. California* (1971) [Chapter 3], to argue that the restriction at issue here is viewpoint discriminatory. But *Cohen* — which did not employ the precise taxonomy that is more common today — does not reach as far as Brunetti wants. *Cohen* arose in the criminal context: Cohen had been arrested and imprisoned under a California criminal statute targeting disturbances of the peace because he was “wearing a jacket bearing the words ‘F[***] the Draft.’” The Court held that applying that statute to Cohen because of his jacket violated the First Amendment. But the Court did not suggest that the State had targeted Cohen to suppress his view itself (i.e., his sharp distaste for the draft), such that it would have accepted an equally colorful statement of praise for the draft (or hostility toward war protesters). Rather, the Court suggested that the State had simply engaged in what later courts would more precisely call viewpoint-neutral content discrimination — it had regulated “the form or content of individual expression.”

Cohen also famously recognized that “words are often chosen as much for their emotive as their cognitive force,” and that “one man’s vulgarity is another’s lyric.” That is all consistent with observing that a plain, blanket restriction on profanity (regardless of the idea to which it is attached) is a viewpoint-neutral form of content discrimination. The essence of Cohen’s discussion is that profanity can serve to tweak (or amplify) the viewpoint that a message expresses, such that it can be hard to disentangle the profanity from the underlying message — without the profanity, the message is not quite the same. But those statements merely reinforce that profanity is still properly understood as protected First Amendment content. *Cohen*’s discussion does not also go further to declare, as Brunetti suggests, that a provision that treats all instances of profanity equally is nevertheless by nature an instance of “the government targeting . . . particular views taken by speakers on a subject.” To be sure, such a restriction could have the incidental effect of tamping down the overall volume of debate on all sides. But

⁶ Of course, obscenity itself is subject to a longstanding exception to First Amendment protection, so it is proscribable in any event. As for vulgarity and profanity, however, they are not subject to any such exception, and a regulation like § 1052(a)’s ban on the registration of scandalous marks is not “‘justified without reference to the content of the regulated speech’” in the way that a simple regulation of time, place, or manner is. *Ward*.

differential effects alone, as explained above, do not render a restriction viewpoint (or even content) discriminatory.

Cohen therefore does not resolve this case in Brunetti's favor. Yes, Brunetti has been, as Cohen was, subject to content discrimination, but that content discrimination is properly understood as viewpoint neutral. And whereas even viewpoint-neutral content discrimination is (in all but the most compelling cases, such as threats) impermissible in the context of a criminal prosecution like the one that Cohen faced, Brunetti is subject to such regulation only in the context of the federal trademark-registration system. I discuss next why that distinction matters.

B

While the Court has often subjected even viewpoint-neutral content discrimination to strict constitutional scrutiny, *see, e.g., Reed*, there are contexts in which it does not. When that is the case, the difference between viewpoint-based and viewpoint-neutral content discrimination can be decisive. The federal trademark-registration system is such a context.

Rights to a trademark itself arise through use, not registration. Regardless of whether a trademark is registered, it can be used, owned, and enforced against would-be infringers. Trademark registration, meanwhile, confers several ancillary benefits on trademark-holders who meet Congress' specifications, including for example, additional protections against infringers. . . . Registration, in short, is a helpful system, but it is one that the Government is under no obligation to establish and that is collateral to the existence and use of trademarks themselves. There is no evidence that speech or commerce would be endangered if the Government were not to provide it at all.

When the Court has talked about governmental initiatives like this one before, it has usually used one of two general labels. In several cases, the Court has treated such initiatives as a limited public (or nonpublic) forum. *See, e.g., Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.* (1985) [Chapter 8] ("Combined Federal Campaign" literature enabling approved charitable organizations to solicit donations from federal employees). In other situations, the Court has discussed similar initiatives as government programs or subsidies. *See, e.g., Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001) [Chapter 13 Note] (government program distributing funds to legal-services organizations). In each of these situations, a governmental body established an initiative that supported some forms of expression without restricting others. Some speakers were better off, but no speakers were worse off.

Regardless of the finer distinctions between these labels, reasonable, viewpoint-neutral content discrimination is generally permissible under either framework. Perhaps for that reason, the Court has often discussed the two frameworks as at least closely related. *See, e.g., Velazquez* ("As this suit involves a subsidy, limited forum cases . . . may not be controlling in a strict sense, yet they do provide some instruction").

Whichever label one chooses here, the federal system of trademark registration fits: It is, in essence, an opportunity to include one's trademark on a list and thereby secure the ancillary benefits that come with registration. Just as in the limited-forum and government-program cases, some speakers benefit, but no speakers are harmed. Brunetti, for example, can use, own, and enforce his mark regardless of whether it has been registered. Whether he may register his mark can therefore turn on reasonable, viewpoint-neutral content regulations.

C

Prohibiting the registration of obscene, profane, or vulgar marks qualifies as reasonable, viewpoint-neutral, content-based regulation. Apart from any interest in regulating commerce itself, the Government has an interest in not promoting certain kinds of speech, whether because such speech could be perceived as suggesting governmental favoritism or simply because the Government does not wish to involve itself with that kind of speech. While “there is no evidence that the public associates the contents of trademarks with the Federal Government,” *Tam*, registration nevertheless entails Government involvement in promoting a particular mark. Registration requires the Government to publish the mark, as well as to take steps to combat international infringement. The Government has a reasonable interest in refraining from lending its ancillary support to marks that are obscene, vulgar, or profane. *Cf. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) [Chapter 2 Note] (“Speech that is vulgar, offensive, and shocking is not entitled to absolute constitutional protection under all circumstances”).

III

... In directing the PTO to deny the ancillary benefit of registration to trademarks featuring “scandalous” content, Congress used a word that is susceptible of different meanings. The majority’s reading would render the provision unconstitutional; mine would save it. Under these circumstances, the Court ought to adopt the narrower construction, rather than permit a rush to register trademarks for even the most viscerally offensive words and images that one can imagine.¹³

That said, I emphasize that Brunetti’s challenge is a facial one. That means that he must show that “‘a substantial number of [the scandalous-marks provision’s] applications are unconstitutional, judged in relation to the [provision’s] plainly legitimate sweep.’” With “scandalous” narrowed to reach only obscene, profane, and vulgar content, the provision would not be overly broad. Even so, hard cases would remain, and I would expect courts to take seriously as-applied challenges demonstrating a danger that the provision had been used to restrict speech based on the views expressed rather than the mode of expression.

Freedom of speech is a cornerstone of our society, and the First Amendment protects Brunetti’s right to use words like the one at issue here. The Government need not, however, be forced to confer on Brunetti’s trademark (and some more extreme) the ancillary benefit of trade-mark registration, when “scandalous” in § 1052(a) can reasonably be read to bar the registration of only those marks that are obscene, vulgar, or profane. Though I concur as to the unconstitutionality of the term “immoral” in § 1052(a), I respectfully dissent as to the term “scandalous” in the same statute and would instead uphold it under the narrow construction discussed here.

***Note: Content-Neutrality, Viewpoint Neutrality, and
“Government Programs”***

1. At one level, the disagreement between the majority and Justice Sotomayor’s dissent is a narrow one, centering on the susceptibility of the

¹³ As noted above, I agree with the majority that § 1052(a)’s bar on the registration of “immoral” marks is unconstitutional viewpoint discrimination. I would simply sever that provision and uphold the bar on “scandalous” marks.

“scandalous” restriction to a limiting interpretation that would focus on whether the trademark’s message was transmitted through a “scandalous” *mode* of communication — for example, communication via use of vulgarity. Why would such a limited interpretation of “scandalous” therefore be cured of any viewpoint discrimination? What is the constitutional difference between a “scandalous” trademark (as the majority understands that term — that is, as substantively scandalous) and a merely “vulgar” one that Chief Justice Roberts and Justices Alito, Breyer, and Sotomayor all suggest could be denied federal trademark registration? Is that suggestion by those justices consistent with *Cohen v. California* (1971) (Chapter 3)?

2. Justice Breyer argues that the federal trademark regime doesn’t easily fit within traditional First Amendment concepts such as forum doctrine and commercial speech. Do you agree with him? If not, where do you think it fits? If you do, how do you think a court should analyze challenges to laws such as the ones at issue in *Matal* and *Brunetti*?

3. Justice Sotomayor recognizes that a restriction on trademarks featuring vulgarity or profanity is content-based, even though viewpoint neutral. She nevertheless argues that such content-based restriction is permissible in the trademark law, because she finds the federal trademark system analogous to “a limited public (or nonpublic) forum” (citing cases including *Rosenberger*) or a government program or subsidy (citing cases including *Cornelius*). Do you agree with her categorization?

4. Finally, consider a seemingly minor detail in Justice Sotomayor’s dissent. When discussing *Cohen v. California*, she quotes the facts as the *Cohen* Court presented them (which it did by itself quoting the state court opinion). But she alters the quote. In *Cohen*, Justice Harlan wrote, quoting the state court, that the defendant was “wearing a jacket bearing the words ‘Fuck the Draft’”

By contrast, Justice Sotomayor writes (quoting *Cohen*) that “Cohen had been arrested . . . because he was ‘wearing a jacket bearing the words “F[***] the Draft.”’”

Why do you think Justice Sotomayor refrains from simply quoting *Cohen* (or, more precisely, Cohen’s quotation from the state court opinion)? Is she simply being squeamish? Or is she perhaps trying to make a point about the communicative importance (or lack thereof) of the word she declines to spell out? How would making that point buttress her argument that the First Amendment permits the government to decline to register “scandalous” trademarks, if that term is understood to apply only to trademarks expressed in a scandalous *manner*? The majority refused to pass judgment on this understanding of the First Amendment, since it declined to interpret the word “scandalous” in that more limited way. Does Justice Sotomayor’s treatment of the word in question influence your view about the constitutionality of this more limited understanding of “scandalous”? (For that matter, what about her reference in Footnote 5 of her opinion to “one particularly egregious racial epithet” — an epithet that she does not specify, let alone spell out?) If her treatment of those words influences your thinking on the First Amendment question, in which way does it push you?

Chapter 17

The Establishment Clause

A. Financial Aid to Religion

[1] Basic Principles

Page 818: *insert new Note after the Note:*

***Note: President Trump’s Travel Ban Does Not Violate the
Establishment Clause***

1. Justice Black’s landmark opinion in *Everson v. Board of Education* (1947), excerpted above, declared several basic principles about the separation of church and state, including:

The “establishment of religion” clause of the First Amendment means at least this: neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. . . .

These basic principles were invoked in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), which involved a challenge to a Presidential Proclamation to the extent that it indefinitely barred entry into the United States by nationals from six predominantly Muslim countries (Iran, Libya, Syria, Yemen, Somalia, and Chad). The State of Hawaii (as operator of a state university system), individual citizens or lawful permanent residents with relatives applying for immigrant or nonimmigrant visas, and a nonprofit organization that operated a mosque in Hawaii brought a pre-enforcement action to prohibit implementation and enforcement of the Presidential Proclamation. The U.S. District Court granted the plaintiffs’ motion for a temporary restraining order (TRO) and later granted a nationwide or universal preliminary injunction, which was stayed in part by the U.S. Court of Appeals for the Ninth Circuit and also by the Supreme Court. Defendants appealed. The Ninth Circuit affirmed in part and vacated in part. The Supreme Court reversed and remanded by a vote of 5 to 4. Chief Justice Roberts delivered the opinion of the Court, in which Justices Kennedy, Thomas, Alito, and Gorsuch joined. Justices Kennedy and Thomas filed concurring opinions. Justice Breyer filed a dissenting opinion joined by Justice Kagan. Justice Sotomayor filed a dissenting opinion joined by Justice Ginsburg.

2. In September 2017, President Trump issued Proclamation No. 9645, *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, the third in a series of travel bans which were all challenged in the lower federal courts on multiple grounds and with varying success. According to the Trump Administration, the Proclamation before the Supreme Court sought to improve vetting procedures for foreign nationals traveling to the United States by identifying ongoing deficiencies in the information needed to assess whether

nationals of particular countries present a security threat. 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. Foreign states were selected for inclusion based on a review pursuant to one of the President's earlier Executive Orders, undertaken by the Department of Homeland Security (DHS) in consultation with the State Department and U.S. intelligence agencies.

3. As a preliminary matter, the Court held that the President had lawfully exercised the broad discretion granted to him to suspend the entry of aliens into the United States under 8 U.S.C. § 1182(f):

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

4. The Supreme Court ultimately went on to hold that the plaintiffs had not demonstrated a likelihood of success on the merits of their claim that the Proclamation violated the Establishment Clause. The individual plaintiffs had Article III standing to challenge the exclusion of their relatives under the Establishment Clause because a person's interest in being united with family and relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact.

5. On the merits, Plaintiffs alleged that the primary purpose of the Proclamation was religious *animus* against Muslims:

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Our cases recognize that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Plaintiffs believe that the Proclamation violates this prohibition by singling out Muslims for disfavored treatment. The entry suspension, they contend, operates as a "religious gerrymander," in part because most of the countries covered by the Proclamation have Muslim-majority populations. And in their view, deviations from the information-sharing baseline criteria suggest that the results of the multi-agency review were "foreordained." Relying on Establishment Clause precedents concerning laws and policies applied domestically, plaintiffs allege that the primary purpose of the Proclamation was religious *animus* and that the President's stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims.

At the heart of plaintiffs' case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. For example, while a candidate on the campaign trail, the President published a "Statement on Preventing Muslim Immigration" that called for a "total and complete shutdown of

Muslims entering the United States until our country's representatives can figure out what is going on." That statement remained on his campaign website until May 2017. Then-candidate Trump also stated that "Islam hates us" and asserted that the United States was "having problems with Muslims coming into the country." Shortly after being elected, when asked whether violence in Europe had affected his plans to "ban Muslim immigration," the President replied, "You know my plans. All along, I've been proven to be right."

One week after his inauguration, the President issued EO-1. In a television interview, one of the President's campaign advisers explained that when the President "first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'" The adviser said he assembled a group of Members of Congress and lawyers that "focused on, instead of religion, danger. . . . [The order] is based on places where there [is] substantial evidence that people are sending terrorists into our country."

Plaintiffs also note that after issuing EO-2 to replace EO-1, the President expressed regret that his prior order had been "watered down" and called for a "much tougher version" of his "Travel Ban." Shortly before the release of the Proclamation, he stated that the "travel ban . . . should be far larger, tougher, and more specific," but "stupidly that would not be politically correct." More recently, on November 29, 2017, the President retweeted links to three anti-Muslim propaganda videos. In response to questions about those videos, the President's deputy press secretary denied that the President thinks Muslims are a threat to the United States, explaining that "the President has been talking about these security issues for years now, from the campaign trail to the White House" and "has addressed these issues with the travel order that he issued earlier this year and the companion proclamation." . . .

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

The case before us differs in numerous respects from the conventional Establishment Clause claim. Unlike the typical suit involving religious displays or school prayer, plaintiffs seek to invalidate a national security directive regulating the entry of aliens abroad. Their claim accordingly raises a number of delicate issues regarding the scope of the constitutional right and the manner of proof. The Proclamation, moreover, is facially neutral

toward religion. Plaintiffs therefore ask the Court to probe the sincerity of the stated justifications for the policy by reference to extrinsic statements — many of which were made before the President took the oath of office. These various aspects of plaintiffs' challenge inform our standard of review.

6. Deferring to the President's constitutional and statutory authority over foreign affairs, the Supreme Court decided to apply a rational basis standard of review, i.e., whether the entry policy was plausibly related to the Government's stated objective to protect the country and improve the vetting processes:

Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. On the few occasions where we have done so, a common thread has been that the laws at issue lack any purpose other than a "bare . . . desire to harm a politically unpopular group." *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). . . . The Proclamation does not fit this pattern. It cannot be said that it is impossible to "discern a relationship to legitimate state interests" or that the policy is "inexplicable by anything but *animus*." Indeed, the dissent can only attempt to argue otherwise by refusing to apply anything resembling rational basis review. But because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.

The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks. . . .

The Proclamation, moreover, reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs seek to discredit the findings of the review, pointing to deviations from the review's baseline criteria resulting in the inclusion of Somalia and omission of Iraq. But as the Proclamation explains, in each case the determinations were justified by the distinct conditions in each country. . . . It is, in any event, difficult to see how exempting one of the largest predominantly Muslim countries in the region from coverage under the Proclamation can be cited as evidence of *animus* toward Muslims. . . .

More fundamentally, plaintiffs and the dissent challenge the entry suspension based on their perception of its effectiveness and wisdom. They suggest that the policy is overbroad and does little

to serve national security interests. But we cannot substitute our own assessment for the Executive's predictive judgments on such matters, all of which "are delicate, complex, and involve large elements of prophecy." While we of course "do not defer to the Government's reading of the First Amendment," the Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving "sensitive and weighty interests of national security and foreign affairs." *Holder v. Humanitarian Law Project* (2010) [Note Chapter 13].

Three additional features of the entry policy support the Government's claim of a legitimate national security interest. First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries — Iraq, Sudan, and Chad — have been removed from the list of covered countries. The [text of the] Proclamation emphasizes that its "conditional restrictions" will remain in force only so long as necessary to "address" the identified "inadequacies and risks," and establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be terminated. In fact, in announcing the termination of restrictions on nationals of Chad, the President also described Libya's ongoing engagement with the State Department and the steps Libya is taking "to improve its practices."

Second, for those countries that remain subject to entry restrictions, the Proclamation includes significant exceptions for various categories of foreign nationals. The policy permits nationals from nearly every covered country to travel to the United States on a variety of nonimmigrant visas, for example, permitting student and exchange visitors from Iran, while restricting only business and tourist nonimmigrant entry for nationals of Libya and Yemen, and imposing no restrictions on nonimmigrant entry for Somali nationals. These carveouts for nonimmigrant visas are substantial: Over the last three fiscal years — before the Proclamation was in effect — the majority of visas issued to nationals from the covered countries were nonimmigrant visas. The Proclamation also exempts permanent residents and individuals who have been granted asylum.

Third, the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants. According to the Proclamation, consular officers are to consider in each admissibility determination whether the alien demonstrates that (1) denying entry would cause undue hardship; (2) entry would not pose a threat to public safety; and (3) entry would be in the interest of the United States. . . . The Proclamation also directs DHS and the State Department to issue guidance elaborating upon the circumstances that would justify a waiver. . . .

Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis

review. We express no view on the soundness of the policy. We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim.

Because plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion. The case now returns to the lower courts for such further proceedings as may be appropriate. . . .

7. Justice Kennedy's concurring opinion added this admonition:

[There] are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.

The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression. It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.

This was his last Supreme Court opinion; the next day he hand-delivered his letter of resignation to President Trump.

8. Justice Thomas wrote a separate concurring opinion emphasizing his skepticism whether District Courts have the constitutional authority to enter universal or nationwide injunctions, i.e., an order prohibiting the Executive Branch from applying a law or policy against anyone. The majority opinion did not reach this issue.

9. Justice Breyer wrote a dissenting opinion, joined by Justice Kagan, that called into question whether the Government was fairly applying the elaborate system of exemptions and waivers in the Presidential Proclamation, which would suggest it did have the effect of a "Muslim ban." Furthermore, he determined there was sufficient evidence of antireligious bias set forth in Justice Sotomayor's dissent to set aside the Proclamation.

10. Justice Sotomayor wrote the principal dissent, joined by Justice Ginsburg, which moved straight away to the Establishment Clause:

The United States of America is a Nation built upon the promise of religious liberty. Our Founders honored that core promise by embedding the principle of religious neutrality in the First Amendment. The Court's decision today fails to safeguard

that fundamental principle. It leaves undisturbed a policy first advertised openly and unequivocally as a “total and complete shutdown of Muslims entering the United States” because the policy now masquerades behind a facade of national-security concerns. But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President’s words have created. Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim *animus*. That alone suffices to show that plaintiffs are likely to succeed on the merits of their Establishment Clause claim. The majority holds otherwise by ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens. Because that troubling result runs contrary to the Constitution and our precedent, I dissent. . . .

The Establishment Clause forbids government policies “respecting an establishment of religion.” The “clearest command” of the Establishment Clause is that the Government cannot favor or disfavor one religion over another. . . . Consistent with that clear command, this Court has long acknowledged that governmental actions that favor one religion “inevitably” foster “the hatred, disrespect, and even contempt of those who hold contrary beliefs.” *Engel v. Vitale* (1962) [*infra* this chapter]. That is so, this Court has held, because such acts send messages to members of minority faiths “that they are outsiders, not full members of the political community.” To guard against this serious harm the Framers mandated a strict “principle of denomination neutrality.” . . . “When the government acts with the ostensible and predominant purpose” of disfavoring a particular religion, “it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.” *McCreary County v. American Civil Liberties Union of Ky.* (2005) [*infra* this chapter]. To determine whether plaintiffs have proved an Establishment Clause violation, the Court asks whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion. *See id.*; *Town of Greece v. Galloway* (2014) [*infra* this chapter].

In answering that question, this Court has generally considered the text of the government policy, its operation, and any available evidence regarding “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by” the decisionmaker. *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993) [Chapter 18]; *McCreary County*. At the same time, however, courts must take care not to engage in “any judicial psychoanalysis of a drafter’s heart of hearts.” *Id.*

Although the majority briefly recounts a few of the statements and background events that form the basis of plaintiffs' constitutional challenge, that highly abridged account does not tell even half of the story. *See* Brief for The Roderick & Solange MacArthur Justice Center as *Amicus Curiae* 5-31 (outlining President Trump's public statements expressing *animus* toward Islam). The full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and *animus* toward the Muslim faith. [Here Justice Sotomayor detailed seven pages of candidate Trump's campaign statements promising a "Muslim ban" and President Trump's statements, speeches, interviews, and official tweets defending his Executive Orders and criticizing the multiple lawsuits challenging them.]

As the majority correctly notes, "the issue before us is not whether to denounce" these offensive statements. Rather, the dispositive and narrow question here is whether a reasonable observer, presented with all "openly available data," the text and "historical context" of the Proclamation, and the "specific sequence of events" leading to it, would conclude that the primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country. The answer is unquestionably yes.

Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim *animus*, rather than by the Government's asserted national-security justifications. Even before being sworn into office, then-candidate Trump stated that "Islam hates us," warned that "we're having problems with the Muslims, and we're having problems with Muslims coming into the country," promised to enact a "total and complete shutdown of Muslims entering the United States," and instructed one of his advisers to find a "legal" way to enact a Muslim ban. The President continued to make similar statements well after his inauguration. . . .

Moreover, despite several opportunities to do so, President Trump has never disavowed any of his prior statements about Islam. Instead, he has continued to make remarks that a reasonable observer would view as an unrelenting attack on the Muslim religion and its followers. Given President Trump's failure to correct the reasonable perception of his apparent hostility toward the Islamic faith, it is unsurprising that the President's lawyers have, at every step in the lower courts, failed in their attempts to launder the Proclamation of its discriminatory taint. Notably, the Court recently found less pervasive official expressions of hostility and the failure to disavow them to be constitutionally significant. *Cf. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n* (2018) [Supplement Chapter 18] ("The official expressions of hostility to religion in some of the

commissioners’ comments — comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to the affirmance of the order — were inconsistent with what the Free Exercise Clause requires”). It should find the same here.

Ultimately, what began as a policy explicitly “calling for a total and complete shutdown of Muslims entering the United States” has since morphed into a “Proclamation” putatively based on national-security concerns. But this new window dressing cannot conceal an unassailable fact: the words of the President and his advisers create the strong perception that the Proclamation is contaminated by impermissible discriminatory *animus* against Islam and its followers. . . .

[None] of the features of the Proclamation highlighted by the majority supports the Government’s claim that the Proclamation is genuinely and primarily rooted in a legitimate national-security interest. What the unrebutted evidence actually shows is that a reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country. . . .

The First Amendment stands as a bulwark against official religious prejudice and embodies our Nation’s deep commitment to religious plurality and tolerance. That constitutional promise is why, “for centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom.” *Town of Greece v. Galloway* (Kagan, J., dissenting). Instead of vindicating those principles, today’s decision tosses them aside. In holding that the First Amendment gives way to an executive policy that a reasonable observer would view as motivated by *animus* against Muslims, the majority opinion upends this Court’s precedent, repeats tragic mistakes of the past, and denies countless individuals the fundamental right of religious liberty. . . .

D. Displays in Public Places

Page 885: *omit* County of Allegheny v. Greater Pittsburgh ACLU.

Page 921: *insert new case after the case and before the Problem:*

American Legion et al. v. American Humanist Assn. et al.
588 U.S. __ (2019)

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

Since 1925, the Bladensburg Peace Cross (Cross) has stood as a tribute to 49 area soldiers who gave their lives in the First World War. Eighty-nine years after the dedication of the Cross, respondents filed this lawsuit, claiming that they are offended by the sight of the memorial on public land and that its presence there

and the expenditure of public funds to maintain it violate the Establishment Clause of the First Amendment. To remedy this violation, they asked a federal court to order the relocation or demolition of the Cross or at least the removal of its arms. The Court of Appeals for the Fourth Circuit agreed that the memorial is unconstitutional and remanded for a determination of the proper remedy. We now reverse.

Although the cross has long been a preeminent Christian symbol, its use in the Bladensburg memorial has a special significance. After the First World War, the picture of row after row of plain white crosses marking the overseas graves of soldiers who had lost their lives in that horrible conflict was emblazoned on the minds of Americans at home, and the adoption of the cross as the Bladensburg memorial must be viewed in that historical context. For nearly a century, the Bladensburg Cross has expressed the community's grief at the loss of the young men who perished, its thanks for their sacrifice, and its dedication to the ideals for which they fought. It has become a prominent community landmark, and its removal or radical alteration at this date would be seen by many not as a neutral act but as the manifestation of "a hostility toward religion that has no place in our Establishment Clause traditions." *Van Orden v. Perry* (2005) [*supra* this chapter] (Breyer, J., concurring in judgment). And contrary to respondents' intimations, there is no evidence of discriminatory intent in the selection of the design of the memorial or the decision of a Maryland commission to maintain it. The Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously, and the presence of the Bladensburg Cross on the land where it has stood for so many years is fully consistent with that aim.

I

A

The cross came into widespread use as a symbol of Christianity by the fourth century, and it retains that meaning today. But there are many contexts in which the symbol has also taken on a secular meaning. Indeed, there are instances in which its message is now almost entirely secular.

A cross appears as part of many registered trademarks held by businesses and secular organizations, including Blue Cross Blue Shield, the Bayer Group, and some Johnson & Johnson products. Many of these marks relate to health care, and it is likely that the association of the cross with healing had a religious origin. But the current use of these marks is indisputably secular. The familiar symbol of the Red Cross — a red cross on a white background — shows how the meaning of a symbol that was originally religious can be transformed. The International Committee of the Red Cross (ICRC) selected that symbol in 1863 because it was thought to call to mind the flag of Switzerland, a country widely known for its neutrality. . . . Thus, the ICRC selected this symbol for an essentially secular reason, and the current secular message of the symbol is shown by its use today in nations with only tiny Christian populations. But the cross was originally chosen for the Swiss flag for religious reasons. So an image that began as an expression of faith was transformed.

The image used in the Bladensburg memorial — a plain Latin cross⁶ — also took on new meaning after World War I. "During and immediately after the war,

⁶ The Latin form of the cross "has a longer upright than crossbar. The intersection of the two is usually such that the upper and the two horizontal arms are all of about equal length,

the army marked soldiers' graves with temporary wooden crosses or Stars of David" — a departure from the prior practice of marking graves in American military cemeteries with uniform rectangular slabs. G. PIEHLER, REMEMBERING WAR THE AMERICAN WAY 101 (1995). The vast majority of these grave markers consisted of crosses, and thus when Americans saw photographs of these cemeteries, what struck them were rows and rows of plain white crosses. As a result, the image of a simple white cross "developed into a 'central symbol' " of the conflict. *Id.* Contemporary literature, poetry, and art reflected this powerful imagery. *See* Brief for Veterans of Foreign Wars of the United States et al. as *Amici Curiae*. Perhaps most famously, John McCrae's poem, *In Flanders Fields*, began with these memorable lines:

In Flanders fields the poppies blow
Between the crosses, row on row.

In FLANDERS FIELDS AND OTHER POEMS 3 (G.P. Putnam's Sons ed. 1919). The poem was enormously popular. *See* P. FUSSELL, THE GREAT WAR AND MODERN MEMORY 248-49 (1975). . . . The image of "the crosses, row on row," stuck in people's minds, and even today for those who view World War I cemeteries in Europe, the image is arresting.

After the 1918 armistice, the War Department announced plans to replace the wooden crosses and Stars of David with uniform marble slabs like those previously used in American military cemeteries. But the public outcry against that proposal was swift and fierce. . . . When the American Battle Monuments Commission took over the project of designing the headstones, it responded to this public sentiment by opting to replace the wooden crosses and Stars of David with marble versions of those symbols. . . . This national debate and its outcome confirmed the cross's widespread resonance as a symbol of sacrifice in the war.

B

Recognition of the cross's symbolism extended to local communities across the country. In late 1918, residents of Prince George's County, Maryland, formed a committee for the purpose of erecting a memorial for the county's fallen soldiers. . . . Although we do not know precisely why the committee chose the cross, it is unsurprising that the committee — and many others commemorating World War I¹⁰ — adopted a symbol so widely associated with that wrenching event. . . . The Cross was to stand at the terminus of another World War I memorial — the National Defense Highway, which connects Washington to Annapolis. The community gathered for a joint groundbreaking ceremony for both memorials on September 28, 1919. . . . By 1922, however, the committee had run out of funds, and

but the lower arm is conspicuously longer." G. FERGUSON, SIGNS & SYMBOLS IN CHRISTIAN ART 294 (1954). *See also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1276 (1981) ("latin cross, n.": "a figure of a cross having a long upright shaft and a shorter crossbar traversing it above the middle").

¹⁰ Other World War I memorials that incorporate the cross include the Argonne Cross and the Canadian Cross of Sacrifice in Arlington National Cemetery; the Wayside Cross in Towson, Maryland; the Wayside Cross in New Canaan, Connecticut; the Troop K Georgia Cavalry War Memorial Front in Augusta, Georgia; the Chestnut Hill and Mt. Airy World War Memorial in Philadelphia, Pennsylvania; and the Great War for Democracy Memorial in Waterbury, Connecticut.

progress on the Cross had stalled. The local post of the American Legion took over the project, and the monument was finished in 1925.

The completed monument is a 32-foot tall Latin cross that sits on a large pedestal. [A photograph of the monument is appended to the dissenting opinion.] The American Legion's emblem is displayed at its center, and the words "Valor," "Endurance," "Courage," and "Devotion" are inscribed at its base, one on each of the four faces. The pedestal also features a 9- by 2.5-foot bronze plaque explaining that the monument is "Dedicated to the heroes of Prince George's County, Maryland who lost their lives in the Great War for the liberty of the world." The plaque lists the names of 49 local men, both Black and White, who died in the war. It identifies the dates of American involvement, and quotes President Woodrow Wilson's request for a declaration of war: "The right is more precious than peace. We shall fight for the things we have always carried nearest our hearts. To such a task we dedicate our lives." . . .

Since its dedication, the Cross has served as the site of patriotic events honoring veterans, including gatherings on Veterans Day, Memorial Day, and Independence Day. Like the dedication itself, these events have typically included an invocation, a keynote speaker, and a benediction. Over the years, memorials honoring the veterans of other conflicts have been added to the surrounding area, which is now known as Veterans Memorial Park. These include a World War II Honor Scroll; a Pearl Harbor memorial; a Korea-Vietnam veterans memorial; a September 11 garden; a War of 1812 memorial; and two recently added 38-foot-tall markers depicting British and American soldiers in the Battle of Bladensburg. Because the Cross is located on a traffic island with limited space, the closest of these other monuments is about 200 feet away in a park across the road.

As the area around the Cross developed, the monument came to be at the center of a busy intersection. In 1961, the Maryland-National Capital Park and Planning Commission (Commission) acquired the Cross and the land on which it sits in order to preserve the monument and address traffic-safety concerns. The American Legion reserved the right to continue using the memorial to host a variety of ceremonies, including events in memory of departed veterans. Over the next five decades, the Commission spent approximately \$117,000 to maintain and preserve the monument. In 2008, it budgeted an additional \$100,000 for renovations and repairs to the Cross.¹²

C

In 2012, nearly 90 years after the Cross was dedicated and more than 50 years after the Commission acquired it, the American Humanist Association (AHA) lodged a complaint with the Commission. The complaint alleged that the Cross's presence on public land and the Commission's maintenance of the memorial violate the Establishment Clause of the First Amendment. The AHA, along with three residents of Washington, D.C., and Maryland, also sued the Commission in the District Court for the District of Maryland, making the same claim. The AHA sought declaratory and injunctive relief requiring "removal or demolition of the Cross, or removal of the arms from the Cross to form a non-religious slab or obelisk." The American Legion intervened to defend the Cross.

¹² Of the budgeted \$100,000, the Commission had spent only \$5,000 as of 2015. The Commission put off additional spending and repairs in light of this lawsuit.

The District Court granted summary judgment for the Commission and the American Legion. The Cross, the District Court held, satisfies both the three-pronged test announced in *Lemon v. Kurtzman* (1971) [*supra* this chapter], and the analysis applied by Justice Breyer in upholding the Ten Commandments monument at issue in *Van Orden v. Perry* (2005). . . . A divided panel of the Court of Appeals for the Fourth Circuit reversed. The majority relied primarily on the *Lemon* test but also took cognizance of Justice Breyer's *Van Orden* concurrence. . . . The Commission and the American Legion each petitioned for *certiorari*. We granted the petitions and consolidated them for argument.

II

A

The Establishment Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion.” While the concept of a formally established church is straightforward, pinning down the meaning of a “law respecting an establishment of religion” has proved to be a vexing problem. Prior to the Court’s decision in *Everson v. Board of Ed. of Ewing* (1947) [*supra* this chapter], the Establishment Clause was applied only to the Federal Government, and few cases involving this provision came before the Court. After *Everson* recognized the incorporation of the Clause, however, the Court faced a steady stream of difficult and controversial Establishment Clause issues, ranging from Bible reading and prayer in the public schools, to Sunday closing laws, to state subsidies for church-related schools or the parents of students attending those schools. After grappling with such cases for more than 20 years, *Lemon* ambitiously attempted to distill from the Court’s existing case law a test that would bring order and predictability to Establishment Clause decisionmaking. That test, as noted, called on courts to examine the purposes and effects of a challenged government action, as well as any entanglement with religion that it might entail. The Court later elaborated that the “effect[s]” of a challenged action should be assessed by asking whether a “reasonable observer” would conclude that the action constituted an “endorsement” of religion. *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter* [*supra* this chapter]; *id.* (O’Connor, J., concurring in part and concurring in judgment).

If the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met. In many cases, this Court has either expressly declined to apply the test or has simply ignored it. . . . This pattern is a testament to the *Lemon* test’s shortcomings. As Establishment Clause cases involving a great array of laws and practices came to the Court, it became more and more apparent that the *Lemon* test could not resolve them. . . . The test has been harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars [omitted footnotes contain lengthy string citations for each of these groups].

For at least four reasons, the *Lemon* test presents particularly daunting problems in cases, including the one now before us, that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations. Together, these considerations counsel against efforts to evaluate such cases under *Lemon* and toward application of a presumption of constitutionality for longstanding monuments, symbols, and practices.

B

First, these cases often concern monuments, symbols, or practices that were first established long ago, and in such cases, identifying their original purpose or purposes may be especially difficult. . . . Yet it would be inappropriate for courts to compel their removal or termination based on supposition.

Second, as time goes by, the purposes associated with an established monument, symbol, or practice often multiply. . . . The existence of multiple purposes is not exclusive to longstanding monuments, symbols, or practices, but this phenomenon is more likely to occur in such cases. Even if the original purpose of a monument was infused with religion, the passage of time may obscure that sentiment. As our society becomes more and more religiously diverse, a community may preserve such monuments, symbols, and practices for the sake of their historical significance or their place in a common cultural heritage.

Third, just as the purpose for maintaining a monument, symbol, or practice may evolve, “the ‘message’ conveyed . . . may change over time.” . . . With sufficient time, religiously expressive monuments, symbols, and practices can become embedded features of a community’s landscape and identity. The community may come to value them without necessarily embracing their religious roots. . . .

Fourth, when time’s passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning. A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion. Militantly secular regimes have carried out such projects in the past, and for those with a knowledge of history, the image of monuments being taken down will be evocative, disturbing, and divisive. . . .

These four considerations show that retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones. The passage of time gives rise to a strong presumption of constitutionality.

C

The role of the cross in World War I memorials is illustrative of each of the four preceding considerations. Immediately following the war, “communities across America built memorials to commemorate those who had served the nation in the struggle to make the world safe for democracy.” G. PIEHLER, *THE AMERICAN MEMORY OF WAR*. Although not all of these communities included a cross in their memorials, the cross had become a symbol closely linked to the war. “The First World War witnessed a dramatic change in . . . the symbols used to commemorate the service” of the fallen soldiers. *Id.* In the wake of the war, the United States adopted the cross as part of its military honors, establishing the Distinguished Service Cross and the Navy Cross in 1918 and 1919, respectively. And . . . the fallen soldiers’ final resting places abroad were marked by white crosses or Stars of David. The solemn image of endless rows of white crosses became inextricably linked with and symbolic of the ultimate price paid by 116,000 soldiers. And this relationship between the cross and the war undoubtedly influenced the design of the many war memorials that sprang up across the Nation.

This is not to say that the cross's association with the war was the sole or dominant motivation for the inclusion of the symbol in every World War I memorial that features it. But today, it is all but impossible to tell whether that was so. The passage of time means that testimony from those actually involved in the decisionmaking process is generally unavailable, and attempting to uncover their motivations invites rampant speculation. And no matter what the original purposes for the erection of a monument, a community may wish to preserve it for very different reasons, such as the historic preservation and traffic-safety concerns the Commission has pressed here. In addition, the passage of time may have altered the area surrounding a monument in ways that change its meaning and provide new reasons for its preservation. Such changes are relevant here, since the Bladensburg Cross now sits at a busy traffic intersection, and numerous additional monuments are located nearby.

Even the AHA recognizes that there are instances in which a war memorial in the form of a cross is unobjectionable. The AHA is not offended by the sight of the Argonne Cross or the Canadian Cross of Sacrifice, both Latin crosses commemorating World War I that rest on public grounds in Arlington National Cemetery. The difference, according to the AHA, is that their location in a cemetery gives them a closer association with individual gravestones and interred soldiers. *See* Brief for Respondents; Tr. of Oral Arg. But a memorial's placement in a cemetery is not necessary to create such a connection. . . . Whether in a cemetery or a city park, a World War I cross remains a memorial to the fallen.

Similar reasoning applies to other memorials and monuments honoring important figures in our Nation's history. When faith was important to the person whose life is commemorated, it is natural to include a symbolic reference to faith in the design of the memorial. For example, many memorials for Dr. Martin Luther King, Jr., make reference to his faith. . . . National Statuary Hall in the Capitol honors a variety of religious figures These monuments honor men and women who have played an important role in the history of our country, and where religious symbols are included in the monuments, their presence acknowledges the centrality of faith to those whose lives are commemorated.

Finally, as World War I monuments have endured through the years and become a familiar part of the physical and cultural landscape, requiring their removal would not be viewed by many as a neutral act. . . . Thus, a campaign to obliterate items with religious associations may evidence hostility to religion even if those religious associations are no longer in the forefront. . . .

D

While the *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause, in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance. Our cases involving prayer before a legislative session are an example.

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court upheld the Nebraska Legislature's practice of beginning each session with a prayer by an official chaplain, and in so holding, the Court conspicuously ignored *Lemon* and did not respond to Justice Brennan's argument in dissent that the legislature's practice could not satisfy the *Lemon* test. Instead, the Court found it highly persuasive that Congress for more than 200 years had opened its sessions with a prayer and that many state legislatures had followed suit. . . . In *Town of Greece v. Galloway* (2014) [*infra* this chapter], which concerned prayer before a town council meeting, there

was disagreement about the inclusiveness of the town's practice. . . . But there was no disagreement that the Establishment Clause permits a nondiscriminatory practice of prayer at the beginning of a town council session. Of course, the specific practice challenged in *Town of Greece* lacked the very direct connection, via the First Congress, to the thinking of those who were responsible for framing the First Amendment. But what mattered was that the town's practice "fit within the tradition long followed in Congress and the state legislatures." The practice begun by the First Congress stands out as an example of respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans. Where categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional.

III

Applying these principles, we conclude that the Bladensburg Cross does not violate the Establishment Clause.

As we have explained, the Bladensburg Cross carries special significance in commemorating World War I. . . . Not only did the Bladensburg Cross begin with this meaning, but with the passage of time, it has acquired historical importance. . . . The Cross now stands among memorials to veterans of later wars. It has become part of the community. . . . Finally, it is surely relevant that the monument commemorates the death of particular individuals. It is natural and appropriate for those seeking to honor the deceased to invoke the symbols that signify what death meant for those who are memorialized. In some circumstances, the exclusion of any such recognition would make a memorial incomplete. This well explains why Holocaust memorials invariably include Stars of David or other symbols of Judaism. . . . And this is why the memorial for soldiers from the Bladensburg community features the cross — the same symbol that marks the graves of so many of their comrades near the battlefields where they fell.

IV

The cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else that the Bladensburg Cross has come to represent. For some, that monument is a symbolic resting place for ancestors who never returned home. For others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark. For many of these people, destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment. For all these reasons, the Cross does not offend the Constitution.

* * *

We reverse the judgment of the Court of Appeals for the Fourth Circuit and remand the cases for further proceedings.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE KAGAN joins, concurring.

I have long maintained that there is no single formula for resolving Establishment Clause challenges. *See Van Orden v. Perry* (2005) [*supra* this chapter] (opinion concurring in judgment). The Court must instead consider each case in light of the basic purposes that the Religion Clauses were meant to serve: assuring religious liberty and tolerance for all, avoiding religiously based social

conflict, and maintaining that separation of church and state that allows each to flourish in its “separate sphere.” *Id.*; see also *Zelman v. Simmons-Harris* (2002) [*supra* this chapter] (Breyer, J., dissenting).

I agree with the Court that allowing the State of Maryland to display and maintain the Peace Cross poses no threat to those ends. The Court’s opinion eloquently explains why that is so The case would be different, in my view, if there were evidence that the organizers had “deliberately disrespected” members of minority faiths or if the Cross had been erected only recently, rather than in the aftermath of World War I. But those are not the circumstances presented to us here, and I see no reason to order *this* cross torn down simply because *other* crosses would raise constitutional concerns.

Nor do I understand the Court’s opinion today to adopt a “history and tradition test” that would permit any newly constructed religious memorial on public land. The Court appropriately “looks to history for guidance” (plurality opinion), but it upholds the constitutionality of the Peace Cross only after considering its particular historical context and its long-held place in the community (majority opinion). A newer memorial, erected under different circumstances, would not necessarily be permissible under this approach.

. . . In light of all the circumstances here, I agree with the Court that the Peace Cross poses no real threat to the values that the Establishment Clause serves.

JUSTICE KAVANAUGH, concurring.

I join the Court’s eloquent and persuasive opinion in full. I write separately to emphasize two points.

I

Consistent with the Court’s case law, the Court today applies a history and tradition test in examining and upholding the constitutionality of the Bladensburg Cross. See *Marsh v. Chambers* (1983); *Van Orden v. Perry* (2005) (plurality opinion); *Town of Greece v. Galloway* (2014). . . .

Today, the Court declines to apply *Lemon* in a case in the religious symbols and religious speech category, just as the Court declined to apply *Lemon* in *Town of Greece v. Galloway*, *Van Orden v. Perry*, and *Marsh v. Chambers*. The Court’s decision in this case again makes clear that the *Lemon* test does not apply to Establishment Clause cases in that category. And the Court’s decisions over the span of several decades demonstrate that the *Lemon* test is not good law and does not apply to [other categories of] Establishment Clause cases. . . .

On the contrary, each category of Establishment Clause cases has its own principles based on history, tradition, and precedent. And the cases together lead to an overarching set of principles: If the challenged government practice is not coercive *and* if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation.

The practice of displaying religious memorials, particularly religious war memorials, on public land is not coercive and is rooted in history and tradition. The Bladensburg Cross does not violate the Establishment Clause. *Cf. Town of Greece*.

II

... I agree with the Court that the Bladensburg Cross is constitutional. At the same time, I have deep respect for the plaintiffs' sincere objections to seeing the cross on public land. I have great respect for the Jewish war veterans who in an *amicus* brief say that the cross on public land sends a message of exclusion. I recognize their sense of distress and alienation. Moreover, I fully understand the deeply religious nature of the cross. It would demean both believers and nonbelievers to say that the cross is not religious, or not all that religious. A case like this is difficult because it represents a clash of genuine and important interests. Applying our precedents, we uphold the constitutionality of the cross. In doing so, it is appropriate to also restate this bedrock constitutional principle: All citizens are equally American, no matter what religion they are, or if they have no religion at all.

The conclusion that the cross does not violate the Establishment Clause does not necessarily mean that those who object to it have no other recourse. The Court's ruling *allows* the State to maintain the cross on public land. The Court's ruling does not *require* the State to maintain the cross on public land. The Maryland Legislature could enact new laws requiring removal of the cross or transfer of the land. The Maryland Governor or other state or local executive officers may have authority to do so under current Maryland law. And if not, the legislature could enact new laws to authorize such executive action. The Maryland Constitution, as interpreted by the Maryland Court of Appeals, may speak to this question. And if not, the people of Maryland can amend the State Constitution. Those alternative avenues of relief illustrate a fundamental feature of our constitutional structure: This Court is not the *only* guardian of individual rights in America. . . . Other federal, state, and local government entities generally possess authority to safeguard individual rights above and beyond the rights secured by the U.S. Constitution.

JUSTICE KAGAN, concurring in part.

I fully agree with the Court's reasons for allowing the Bladensburg Peace Cross to remain as it is, and so join Parts I, II-B, II-C, III, and IV of its opinion, as well as Justice Breyer's concurrence. Although I agree that rigid application of the *Lemon* test does not solve every Establishment Clause problem, I think that test's focus on purposes and effects is crucial in evaluating government action in this sphere — as this very suit shows. I therefore do not join Part II-A. I do not join Part II-D out of perhaps an excess of caution. Although I too “look to history for guidance” (plurality opinion), I prefer at least for now to do so case-by-case, rather than to sign on to any broader statements about history's role in Establishment Clause analysis. But I find much to admire in this section of the opinion Here, as elsewhere, the opinion shows sensitivity to and respect for this Nation's pluralism, and the values of neutrality and inclusion that the First Amendment demands.

JUSTICE THOMAS, concurring in the judgment.

The Establishment Clause states that “Congress shall make no law respecting an establishment of religion.” U.S. CONST., Amdt. 1. The text and history of this Clause suggest that it should not be incorporated against the States. Even if the Clause expresses an individual right enforceable against the States, it is limited by its text to “law[s]” enacted by a legislature, so it is unclear whether the Bladensburg Cross would implicate any incorporated right. And even if it did,

this religious display does not involve the type of actual legal coercion that was a hallmark of historical establishments of religion. Therefore, the Cross is clearly constitutional.

I

[Here Justice Thomas repeated his previous critique of the precedents incorporating the Establishment Clause into the Due Process Clause of the Fourteenth Amendment and making it applicable to the states. *See Note: The Incorporation Doctrine in Chapter 16.*]

II

Even if the Clause applied to state and local governments in some fashion, “[t]he mere presence of the monument along [respondents’] path involves no coercion and thus does not violate the Establishment Clause.” *Van Orden* (opinion of Thomas, J.). The *sine qua non* of an establishment of religion is “‘actual legal coercion.’” *Id.* At the founding, “[t]he coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty.” *Lee v. Weisman* (1992) [*supra* this chapter] (Scalia, J., dissenting). “In a typical case, attendance at the established church was mandatory, and taxes were levied to generate church revenue. Dissenting ministers were barred from preaching, and political participation was limited to members of the established church.” *Town of Greece* (opinion of Thomas, J.). In an action claiming an unconstitutional establishment of religion, the plaintiff must demonstrate that he was actually coerced by government conduct that shares the characteristics of an establishment as understood at the founding.

Here, respondents briefly suggest that the government’s spending their tax dollars on maintaining the Bladensburg Cross represents coercion, but they have not demonstrated that maintaining a religious display on public property shares any of the historical characteristics of an establishment of religion. The local commission has not attempted to control religious doctrine or personnel, compel religious observance, single out a particular religious denomination for exclusive state subsidization, or punish dissenting worship. Instead, the commission has done something that the founding generation, as well as the generation that ratified the Fourteenth Amendment, would have found commonplace: displaying a religious symbol on government property. *See* Brief for Becket Fund for Religious Liberty as *Amicus Curiae*. Lacking any characteristics of “the coercive state establishments that existed at the founding,” the Bladensburg Cross is constitutional. . . .

III

As to the long-discredited test set forth in *Lemon v. Kurtzman* (1971), and reiterated in *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter* (1989), the plurality rightly rejects its relevance to claims, like this one, involving “religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies.” I agree with that aspect of its opinion. I would take the logical next step and overrule the *Lemon* test in all contexts. . . . It is our job to say what the law is, and because the *Lemon* test is not good law, we ought to say so.

* * *

Regrettably, I cannot join the Court's opinion because it does not adequately clarify the appropriate standard for Establishment Clause cases. Therefore, I concur only in the judgment.

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

The American Humanist Association wants a federal court to order the destruction of a 94 year-old war memorial because its members are offended. Today, the Court explains that the plaintiffs are not entitled to demand the destruction of longstanding monuments, and I find much of its opinion compelling. In my judgment, however, it follows from the Court's analysis that suits like this one should be dismissed for lack of standing. Accordingly, while I concur in the judgment to reverse and remand the court of appeals' decision, I would do so with additional instructions to dismiss the case.

*

The Association claims that its members "regularly" come into "unwelcome direct contact" with a World War I memorial cross in Bladensburg, Maryland "while driving in the area." . . . This "offended observer" theory of standing has no basis in law. Federal courts may decide only those cases and controversies that the Constitution and Congress have authorized them to hear. And to establish standing to sue consistent with the Constitution, a plaintiff must show: (1) injury-in-fact, (2) causation, and (3) redressability. The injury-in-fact test requires a plaintiff to prove "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). . . . [Here Justice Gorsuch discussed the case law of Article III standing, including some cases decided under the Religion Clauses.]

*

Offended observer standing cannot be squared with this Court's longstanding teachings about the limits of Article III. Not even today's dissent seriously attempts to defend it. So at this point you might wonder: How *did* the lower courts in this case indulge the plaintiffs' "offended observer" theory of standing? And why have other lower courts done similarly in other cases?

The truth is, the fault lies here. Lower courts invented offended observer standing for Establishment Clause cases in the 1970s in response to this Court's decision in *Lemon v. Kurtzman* (1971). *Lemon* held that whether governmental action violates the Establishment Clause depends on its (1) purpose, (2) effect, and (3) potential to "excessively entangle" church and state, a standard this Court came to understand as prohibiting the government from doing anything that a "reasonable observer" might perceive as "endorsing" religion, *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter* (1989) (opinion of Blackmun, J.); *id.* (O'Connor, J., concurring in part and concurring in judgment). And lower courts reasoned that, if the Establishment Clause forbids anything a reasonable observer would view as an endorsement of religion, then such an observer must be able to sue. Here alone, lower courts concluded, though never with this Court's approval, an observer's offense must "suffice to make an Establishment Clause claim justiciable."

As today's plurality rightly indicates in Part II-A, however, *Lemon* was a misadventure. It sought a "grand unified theory" of the Establishment Clause but

left us only a mess. *See ante* (plurality opinion). . . . Today, not a single Member of the Court even tries to defend *Lemon* against these criticisms — and they don’t because they can’t. . . .

In place of *Lemon*, Part II-D of the plurality opinion relies on a more modest, historically sensitive approach, recognizing that “the Establishment Clause must be interpreted by reference to historical practices and understandings.” *Ante* (quoting *Town of Greece v. Galloway* (2014); *see also ante* (Kavanaugh, J., concurring)). . . . The constitutionality of a practice doesn’t depend on some artificial and indeterminate three-part test; what matters, the plurality reminds us, is whether the challenged practice fits “‘within the tradition’” of this country. *Ante*.

I agree with all this and don’t doubt that the monument before us is constitutional in light of the nation’s traditions. But then the plurality continues on to suggest that “longstanding monuments, symbols, and practices” are “presumptively” constitutional. *Ante*. And about that, it’s hard not to wonder: How old must a monument, symbol, or practice be to qualify for this new presumption? It seems 94 years is enough, but what about the Star of David monument erected in South Carolina in 2001 to commemorate victims of the Holocaust, or the cross that marines in California placed in 2004 to honor their comrades who fell during the War on Terror? And where exactly in the Constitution does this presumption come from? The plurality does not say, nor does it even explain what work its presumption does. To the contrary, the plurality proceeds to analyze the “presumptively” constitutional memorial in this case for its consistency with “‘historical practices and understandings’” — exactly the same approach that the plurality recognizes “‘must be’” used *whenever* we interpret the Establishment Clause. *Ante*; *see also ante* (Kavanaugh, J., concurring). Though the plurality does not say so in as many words, the message for our lower court colleagues seems unmistakable: Whether a monument, symbol, or practice is old or new, apply *Town of Greece*, not *Lemon*. Indeed, some of our colleagues recognize this implication and blanch at its prospect. *See ante* (Breyer, J., concurring); *ante* (Kagan, J., concurring in part) (declining to join Parts II-A & II-D); *post* (Ginsburg, J., dissenting). But if that’s the real message of the plurality’s opinion, it seems to me exactly right — because what matters when it comes to assessing a monument, symbol, or practice isn’t its age but its compliance with ageless principles. The Constitution’s meaning is fixed, not some good-for-this-day-only coupon, and a practice consistent with our nation’s traditions is just as permissible whether undertaken today or 94 years ago.

*

With *Lemon* now shelved, little excuse will remain for the anomaly of offended observer standing, and the gaping hole it tore in standing doctrine in the courts of appeals should now begin to close. Nor does this development mean colorable Establishment Clause violations will lack for proper plaintiffs. By way of example only, a public school student compelled to recite a prayer will still have standing to sue. *See School Dist. of Abington Township v. Schempp* (1963) [*supra* this chapter]. So will persons denied public office because of their religious affiliations or lack of them. And so will those who are denied government benefits because they do not practice a favored religion or any at all. On top of all that, States remain free to supply other forms of relief consistent with their own laws and constitutions.

Abandoning offended observer standing will mean only a return to the usual demands of Article III, requiring a real controversy with real impact on real persons to make a federal case out of it. Along the way, this will bring with it the welcome side effect of rescuing the federal judiciary from the sordid business of having to pass aesthetic judgment, one by one, on every public display in this country for its perceived capacity to give offense. It's a business that has consumed volumes of the federal reports, invited erratic results, frustrated generations of judges, and fomented "the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden v. Perry* (2005) [*supra* this chapter] (Breyer, J., concurring in judgment). Courts applying *Lemon's* test have upheld Ten Commandment displays and demanded their removal; they have allowed memorial crosses and insisted that they be razed; they have permitted Christmas displays and pulled the plug on them; and they have pondered seemingly endlessly the inclusion of "In God We Trust" on currency or similar language in our Pledge of Allegiance. No one can predict the rulings — but one thing is certain: Between the challenged practices and the judicial decisions, just about everyone will wind up offended.

... In light of today's decision, we should be done with this business, and our lower court colleagues may dispose of cases like these on a motion to dismiss rather than enmeshing themselves for years in intractable disputes sure to generate more heat than light.

*

In a large and diverse country, offense can be easily found. Really, most every governmental action probably offends *somebody*. No doubt, too, that offense can be sincere, sometimes well taken, even wise. But recourse for disagreement and offense does not lie in federal litigation. Instead, in a society that holds among its most cherished ambitions mutual respect, tolerance, self-rule, and democratic responsibility, an "offended viewer" may "avert his eyes," or pursue a political solution. Today's decision represents a welcome step toward restoring this Court's recognition of these truths, and I respectfully concur in the judgment.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, dissenting.

An immense Latin cross stands on a traffic island at the center of a busy three-way intersection in Bladensburg, Maryland.¹ "Monumental, clear, and bold" by day, the cross looms even larger illuminated against the night-time sky. . . . Both the Peace Cross and the traffic island are owned and maintained by the Maryland-National Capital Park and Planning Commission (Commission), an agency of the State of Maryland.

Decades ago, this Court recognized that the Establishment Clause of the First Amendment to the Constitution demands governmental neutrality among religious faiths, and between religion and nonreligion. See *Everson v. Board of Ed. of Ewing* (1947) [*supra* this chapter]. Numerous times since, the Court has reaffirmed the Constitution's commitment to neutrality. Today the Court erodes that neutrality commitment, diminishing precedent designed to preserve individual

¹ A photograph of the monument [is] reproduced in the Appendix.

liberty and civic harmony in favor of a “presumption of constitutionality for longstanding monuments, symbols, and practices.” *Ante* (plurality opinion).²

The Latin cross is the foremost symbol of the Christian faith, embodying the “central theological claim of Christianity: that the son of God died on the cross, that he rose from the dead, and that his death and resurrection offer the possibility of eternal life.” Brief for Baptist Joint Committee for Religious Liberty et al. as *Amici Curiae* (Brief for Christian and Jewish Organizations). Precisely because the cross symbolizes these sectarian beliefs, it is a common marker for the graves of Christian soldiers. For the same reason, using the cross as a war memorial does not transform it into a secular symbol . . . Just as a Star of David is not suitable to honor Christians who died serving their country, so a cross is not suitable to honor those of other faiths who died defending their nation. Soldiers of all faiths “are united by their love of country, but they are not united by the cross.” Brief for Jewish War Veterans of the United States of America, Inc., as *Amicus Curiae*. By maintaining the Peace Cross on a public highway, the Commission elevates Christianity over other faiths, and religion over nonreligion. . . .

I

A

The First Amendment commands that the government “shall make no law” either “respecting an establishment of religion” or “prohibiting the free exercise thereof.” See *Everson v. Bd. Educ.* (1947) [*supra* this chapter]. Adoption of these complementary provisions followed centuries of “turmoil, civil strife, and persecution, generated in large part by established sects determined to maintain their absolute political and religious supremacy.” *Id.* Mindful of that history, the fledgling Republic ratified the Establishment Clause, in the words of Thomas Jefferson, to “buil[d] a wall of separation between church and state.” . . .

The Establishment Clause essentially instructs: “The government may not favor one religion over another, or religion over irreligion.” *McCreary County v. ACLU* (2005) [*supra* this chapter]. For, as James Madison observed, the government is not “a competent Judge of Religious Truth.” *Memorial and Remonstrance Against Religious Assessments*. When the government places its “power, prestige [or] financial support . . . behind a particular religious belief,” the government’s imprimatur “makes adherence to that religion relevant . . . to a person’s standing in the political community,” *County of Allegheny v. Greater Pittsburgh ACLU* (1989) [*supra* this chapter]. Correspondingly, “the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.” *Engel v. Vitale* (1962) [*supra* this chapter]. And by demanding neutrality between religious faith and the absence thereof, the Establishment Clause shores up an individual’s “right to select any religious faith or none at all.” *Wallace v. Jaffree* (1985) [*supra* this chapter].

² Some of my colleagues suggest that the Court’s new presumption extends to all governmental displays and practices, regardless of their age. See *ante* (Kavanaugh, J., concurring); *ante* (Thomas, J., concurring in judgment); *ante* (Gorsuch, J., concurring in judgment). But see *ante* (Breyer, J., joined by Kagan, J., concurring). I read the Court’s opinion to mean what it says: “Retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones,” and, consequently, only “longstanding monuments, symbols, and practices” enjoy “a presumption of constitutionality,” *ante* (plurality opinion).

B

In cases challenging the government's display of a religious symbol, the Court has tested fidelity to the principle of neutrality by asking whether the display has the "effect of 'endorsing' religion." *County of Allegheny*. The display fails this requirement if it objectively "convey[s] a message that religion or a particular religious belief is favored or preferred." *Id.* . . . This inquiry has been described by some Members of the Court as the "reasonable observer" standard. *See, e.g., County of Allegheny* (O'Connor, J., concurring in part and concurring in judgment).³

As I see it, when a cross is displayed on public property, the government may be presumed to endorse its religious content. The venue is surely associated with the State; the symbol and its meaning are just as surely associated exclusively with Christianity. . . . To non-Christians — nearly 30% of the population of the United States, Pew Research Center, *America's Changing Religious Landscape* (2015) — the State's choice to display the cross on public buildings or spaces conveys a message of exclusion: It tells them they "are outsiders, not full members of the political community," *County of Allegheny*, 492 U.S. at 625 (O'Connor, J., concurring in part and concurring in judgment).

A presumption of endorsement, of course, may be overcome. A display does not run afoul of the neutrality principle if its "setting . . . plausibly indicates" that the government has not sought "either to adopt [a] religious message or to urge its acceptance by others." *Van Orden* (Souter, J., dissenting). The "typical museum setting," for example, "though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Lynch v. Donnelly* (O'Connor, J., concurring). Similarly, when a public school history teacher discusses the Protestant Reformation, the setting makes clear that the teacher's purpose is to educate, not to proselytize. The Peace Cross, however, is not of that genre.

II

A

"For nearly two millennia," the Latin cross has been the "defining symbol" of Christianity, R. JENSEN, *THE CROSS: HISTORY, ART, AND CONTROVERSY* ix (2017), evoking the foundational claims of that faith. Christianity teaches that Jesus Christ was "a divine Savior" who "illuminate[d] a path toward salvation and redemption." *Lynch v. Donnelly* (Brennan, J., dissenting). Central to the religion are the beliefs that "the son of God," Jesus Christ, "died on the cross," that "he rose from the dead," and that "his death and resurrection offer the possibility of eternal life." Brief for Christian and Jewish Organizations. "From its earliest times," Christianity was known as "*religio crucis*— the religion of the cross." R. VILADESAU, *THE BEAUTY OF THE CROSS: THE PASSION OF CHRIST IN THEOLOGY AND THE ARTS, FROM THE CATACOMBS TO THE EVE OF THE RENAISSANCE* 7 (2006). Christians wear crosses, not as an ecumenical symbol, but to proclaim their adherence to Christianity. An exclusively Christian symbol, the Latin cross is not emblematic of any other faith. The principal symbol of Christianity around the

³ Justice Gorsuch's "no standing" opinion is startling in view of the many religious-display cases this Court has resolved on the merits. *But see* Brief for Law Professors as *Amici Curiae* (explaining why offended observer standing is necessary and proper).

world should not loom over public thoroughfares, suggesting official recognition of that religion's paramouncy.

B

The Commission urges in defense of its monument that the Latin cross “is not merely a reaffirmation of Christian beliefs”; rather, “when used in the context of a war memorial,” the cross becomes “a universal symbol of the sacrifices of those who fought and died.” Brief for Petitioner Maryland-National Capital Park and Planning Commission (Brief for Planning Commission). *See also* Brief for United States as *Amicus Curiae*.

The Commission's “attempts to secularize what is unquestionably a sacred [symbol] defy credibility and disserve people of faith.” *Van Orden* (Stevens, J., dissenting). *See, e.g.*, Brief for *Amici* Christian and Jewish Organizations (“For Christians who think seriously about the events and message that the cross represents, the Commission's claims are deeply offensive.”). The asserted commemorative meaning of the cross rests on — and is inseparable from — its Christian meaning: “the crucifixion of Jesus Christ and the redeeming benefits of his passion and death,” specifically, “the salvation of man.”

Because of its sacred meaning, the Latin cross has been used to mark Christian deaths since at least the fourth century. The cross on a grave “says that a Christian is buried here,” Brief for *Amici* Christian and Jewish Organizations, and “commemorates [that person's death] by evoking a conception of salvation and eternal life reserved for Christians,” Brief for *Amicus* Jewish War Veterans. As a commemorative symbol, the Latin cross simply “makes no sense apart from the crucifixion, the resurrection, and Christianity's promise of eternal life.” Brief for *Amici* Christian and Jewish Organizations.⁸ The cross affirms that, thanks to the soldier's embrace of Christianity, he will be rewarded with eternal life. “To say that the cross honors the Christian war dead does not identify a secular meaning of the cross; it merely identifies a common application of the religious meaning.” *Id.* Every Court of Appeals to confront the question has held that “making a . . . Latin cross a war memorial does not make the cross secular,” it “makes the war memorial sectarian.” [Here Justice Ginsburg cited and quoted opinions from the Fourth Circuit, the Seventh Circuit, the Ninth Circuit, and the D.C. Circuit.]

The Peace Cross is no exception. That was evident from the start. At the dedication ceremony, the keynote speaker analogized the sacrifice of the honored soldiers to that of Jesus Christ, calling the Peace Cross “symbolic of Calvary,” where Jesus was crucified. Local reporters variously described the monument as “a mammoth cross, a likeness of the Cross of Calvary, as described in the Bible”; “a monster Calvary cross”; and “a huge sacrifice cross.” The character of the monument has not changed with the passage of time.

C

The Commission nonetheless urges that the Latin cross is a “well-established” secular symbol commemorating, in particular, “military valor and sacrifice in World War I.” Brief for Planning Commission. Calling up images of

⁸ The Court sets out familiar uses of the Greek cross, including the Red Cross and the Navy Cross, and maintains that, today, they carry no religious message. But because the Latin cross has never shed its Christian character, its commemorative meaning is exclusive to Christians. . . .

United States cemeteries overseas showing row upon row of cross-shaped gravemarkers, *id.*; *see ante*; Brief for United States as *Amicus Curiae*, the Commission overlooks this reality: The cross was never perceived as an appropriate headstone or memorial for Jewish soldiers and others who did not adhere to Christianity.

1

A page of history is worth retelling. . . . [Here Justice Ginsburg retold the history of the graveyards of American soldiers who were killed in World War I and buried in military cemeteries in Europe. She detailed their numbers, their religious identifications, the political controversy over whether to repatriate their bodies — soldiers who were neither Christian nor Jewish could be repatriated in the U.S. and buried under a slab headstone — and the religious controversy over how to properly and permanently mark their gravesites either with a generic slab marker or with a religious symbol. She noted that Jews composed only 3% of the U.S. population but 6% of the U.S. Forces in World War I. But she pointed out that individual graves of Jewish soldiers in fact were marked with Stars of David among the “crosses row on row.”]

2

Reiterating its argument that the Latin cross is a “universal symbol” of World War I sacrifice, the Commission states that “40 World War I monuments . . . built in the United States . . . bear the shape of a cross.” Brief for Planning Commission. This figure includes memorials that merely “incorporate” a cross.¹⁵ Moreover, the 40 monuments compose only 4% of the “948 outdoor sculptures commemorating the First World War.” The Court lists just seven freestanding cross memorials, *ante*, less than 1% of the total number of monuments to World War I in the United States. Cross memorials, in short, are outliers. The overwhelming majority of World War I memorials contain no Latin cross. . . .

Like cities and towns across the country, the United States military comprehended the importance of “paying equal respect to all members of the Armed Forces who perished in the service of our country,” and therefore avoided incorporating the Latin cross into memorials. The construction of the Tomb of the Unknown Soldier is illustrative. When a proposal to place a cross on the Tomb was advanced, the Jewish Welfare Board objected; no cross appears on the Tomb. In sum, “there is simply ‘no evidence . . . that the cross has been widely embraced by’ — or even applied to — ‘non-Christians as a secular symbol of death’ or of sacrifice in military service” in World War I or otherwise. *Trunk v. San Diego*, 629 F.3d 1099 (CA9 2011).

D

Holding the Commission’s display of the Peace Cross unconstitutional would not, as the Commission fears, “inevitably require the destruction of other cross-shaped memorials throughout the country.” Brief of Planning Commission. When a religious symbol appears in a public cemetery — on a headstone, or as the headstone itself, or perhaps integrated into a larger memorial — the setting counters the inference that the government seeks “either to adopt the religious message or to urge its acceptance by others.” *Van Orden* (Souter, J., dissenting). In a cemetery, the “privately selected religious symbols on individual graves are

¹⁵ No other monument in Bladensburg’s Veterans Memorial Park displays the Latin cross.

best understood as the private speech of each veteran.” Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 CASE W. RES. L. REV. 1211, 1242 (2011). Such displays are “linked to, and show respect for, the individual honoree’s faith and beliefs.” They do not suggest governmental endorsement of those faith and beliefs. [As to the Argonne Cross Memorial and the Canadian Cross of Sacrifice in Arlington National Cemetery, visitors to the cemetery “expect to view religious symbols, whether on individual headstones or as standalone monuments.” Brief for *Amicus* Jewish War Veterans.]

Recognizing that a Latin cross does not belong on a public highway or building does not mean the monument must be “torn down.” *Ante* (Breyer, J., concurring); *ante* (Gorsuch, J., concurring in judgment). . . . In some instances, the violation may be cured by relocating the monument to private land or by transferring ownership of the land and monument to a private party.

* * *

. . . The Establishment Clause, which preserves the integrity of both church and state, guarantees that “however . . . individuals worship, they will count as full and equal American citizens.” *Town of Greece* (Kagan, J., dissenting). “If the aim of the Establishment Clause is genuinely to uncouple government from church,” the Clause does “not permit . . . a display of the character” of Bladensburg’s Peace Cross. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (Ginsburg, J., dissenting).

APPENDIX



The Bladensburg Peace Cross

Page 921: insert new *Problem* after the *Problem*:

Problem: Is it a Sign from God?

Your law firm represents the city of Hondo, Texas. Mayor Joe Quimby has asked you to draft a formal letter on behalf of the city to respond to a demand

letter from the Freedom From Religion Foundation (FFRF) that the city take down its two welcome signs which appear at the city limits alongside U.S. Highway 90 that runs through town. The signs say: “Welcome. This is God’s country. Please don’t drive through it like hell. Hondo, Texas.”

The signs were originally erected in the 1930s by a local Lion’s Club. They have appeared on postcards and are a popular place for taking selfies with locals and tourists alike. They were temporarily removed to allow for the widening of the highway in 2012. New signs were erected that year on the city-owned right-of-way, using city funds, and adding the word “please.” The local garden society planted and maintains the landscaping surrounding the new signs. A picture of the new sign also appears on the homepage of the city’s website and the sign’s motto appears on the masthead of the city’s monthly newsletter. Mayor Quimby has publicly and repeatedly pledged in interviews in the local newspaper and media, “There’s no way in hell we are taking down those signs!” Large numbers of local supporters have registered their approval of his announcement on various social media, including the town’s Facebook page. Here is the gist of the FFRF demand letter, which was addressed to the Mayor, to which you are expected to draft a formal legal response:

I am writing on behalf of the Freedom From Religion Foundation (FFRF) to object to two divisive religious displays on government property in the City of Hondo. We have been contacted about this issue by multiple concerned Texans. FFRF is a national nonprofit organization with nearly 24,000 members nationwide, including almost 1,000 in Texas. Our purpose is to protect the constitutional separation between state and church.

It is our understanding that signs proclaiming: “WELCOME — THIS IS GOD’S COUNTRY — PLEASE DON’T DRIVE THROUGH IT LIKE HELL — HONDO, TEXAS” are displayed prominently along U.S. 90, at the Hondo city borders. See the enclosed photo. A picture of one of the signs is also featured on the city’s website.

We write to encourage the city to find an alternative way to promote safe driving that doesn’t also endorse a religious message.

It is inappropriate for the City of Hondo to display religious signs that convey government preference for religion over nonreligion. The display of the religious message “THIS IS GOD’S COUNTRY” on public property violates the Establishment Clause of the First Amendment, which prohibits public grounds from being used to advance, support, or promote religion. It is also needlessly divisive.

A prominent declaration to visitors and Hondo residents that “THIS IS GOD’S COUNTRY” sends the message that non-believers are not welcome in the city. By endorsing such a statement, the sign sends the message to non-adherents “that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members.” *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring). The message assumes a common god,

yet imagine the public outrage had the city posted a sign saying “THIS IS VISHNU’S COUNTRY” or “THIS IS NO GOD’S COUNTRY.” It is equally inflammatory and inappropriate to post a sign dedicating a city to the god of the bible.

Like the Ten Commandments posting in the county buildings in *McCreary County v. ACLU*, 545 U.S. 844 (2005), and the crèche display on county land in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), these displays are unconstitutional under the precedent of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). A reasonable observer would view the signs as an endorsement of religion by the City of Hondo.

Because the signs are currently on public land, and because city funds have recently been expended to make and install the new signs, they are not protected as private speech, even if private groups have contributed to restoring and maintaining the signs in the past. As a legal matter, it is settled that permanent displays on public land are government speech. *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009). And all “government speech must comport with the Establishment Clause.” *Id.* at 468.

We ask that the City of Hondo immediately remove these signs from public property and refrain from displaying any messages that endorse religion in the future. Please inform us in writing of the actions you are taking to remedy this First Amendment violation. We look forward to a reply at your earliest convenience.



E. Legislative Prayer

Page 938: *after the case insert new Note and new Problem:*

Note: “Congress shall make no law respecting an establishment of religion”

Since 1789, the House of Representatives has begun each legislative day with a prayer, a practice the Supreme Court seemingly has found compatible with the Establishment Clause by its decision in *Marsh v. Chambers*, 463 U.S. 783 (1983) to approve the Nebraska legislature’s employment of a chaplain. Every member of the Court in the principal case, *Town of Greece v. Galloway* (2014), explicitly approved of that earlier decision.

House of Representatives Rule II, clause 5 provides that “the Chaplain shall offer a prayer at the commencement of each day’s sitting of the House.” H.R. Doc. No. 114-192, Rule II, cl. 5 (2017). The House also allows guest chaplains to deliver the opening prayer, although the chamber’s rules make no provision for that practice. In the last fifteen years, guest chaplains have delivered approximately forty percent of all invocations. The House’s Office of the Chaplain approves guest chaplains and coordinates their visits. Between 2000 and 2015, although the vast majority of individuals allowed to deliver opening prayers were Christian, the House also welcomed guest chaplains of the Muslim, Jewish, and Hindu faiths. However, the House has never had an openly atheist or agnostic guest chaplain.

A recent dispute arose when a member of the House asked the Chaplain, Father Patrick J. Conroy, to invite Daniel Barker — a former Christian minister turned atheist — to serve as guest chaplain and deliver a secular invocation. Conroy denied the request, and Barker sued, alleging that the Chaplain unconstitutionally excluded him from the guest chaplain program. The U.S. Court of Appeals for the District of Columbia Circuit ruled in favor of Conroy and against Barker. *Barker v. Conroy*, 921 F.3d 1118 (D.C. Cir. 2019).

Parse the separate opinions in *Town of Greece v. Galloway* and predict how the current Justices would rule on this controversy.

Problem: “Please rise and bow your heads!”

The Erewhon County Board of Commissioners has nine elected members. The Board holds a monthly public meeting. Each meeting begins with a “call to order,” when the Chair directs those in attendance to “rise” and “assume a reverent posture.” Then one of the Commissioners delivers a prayer, after which the Chair invites a resident being honored or a group of residents — sometimes a social group from the community or a class of students from one of the local schools — to come forward and lead the assembly in the Pledge of Allegiance. The Chair then announces that “everyone should be seated” and proceeds through the published agenda for the meeting.

The Commissioners take turns reciting the opening prayer. They adopted this practice to avoid having to select prayer-givers and then having to monitor the content of the prayers of those selected. They were worried that some clergy and some self-ordained ministers might possibly deliver inappropriate prayers or awkwardly sectarian prayers that would be controversial. The Commissioners agreed upon this internal guideline for themselves:

The prayer-giver should be mindful that citizens of our County are members of many different faith traditions. Each prayer should not exceed 150 words and should avoid excessive sectarian references and personal or partisan political beliefs. Appropriate themes include: citizenship, community, tolerance, respect, values, and the importance of responsible and wise government for the common good.

The denominational make-up of the current Commission includes five Catholics, three Jews, and one Episcopalian and their individual prayers somewhat reflect their individual faiths. Thus, the Commissioners claim to be adhering to the Judeo-Christian tradition. Here is an example of a prayer, composed by one of the Catholic commissioners, which she has delivered each time it is has been her turn to pray:

Please stand and bow your heads. Our heavenly Father we thank you for allowing us to gather here in your presence tonight. We ask that you watch over us and keep your guiding hand on our shoulder as we deliberate tonight. Please protect and watch over the men and women serving this great nation in our military, whether at home or abroad, as well as our police officers and firefighters. In this we pray, in Jesus's name, Amen.

When the president of the local chapter of Americans United for the Separation of Church and State ("AUSCS") appeared at a recent Commission meeting to object to this prayer practice, one of the Commissioners responded: "With all due respect, I will continue to pray in the Lord's name. I am human. I need inspiration and grace. I am asking for guidance to make good decisions for the best of the whole community — for all our citizens whatever they believe." It was moved and seconded to continue the policy and practice; the motion passed unanimously. Now, AUSCS has brought suit on behalf of its organization and some individual members, alleging that the Commissioners' prayer practice is unconstitutionally sectarian and exclusionary, as well as unduly coercive, and therefore violates the First and Fourteenth Amendments. How should the district court rule and why?

Chapter 18

The Free Exercise Clause

C. Discrimination against Religion

Page 988: *insert new Note after the case and before Problem:*

Note: State Administrative Agencies Must Remain Neutral, Fair, and Impartial Towards Religious Claims

1. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court relied on *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (Casebook p. 978) to conclude that there was unconstitutional discrimination against religion during the administrative proceedings of the state's Civil Rights Commission.

Masterpiece Cakeshop, Ltd., is a Colorado bakery owned and operated by Jack Phillips, an expert baker and devout Christian. In 2012, he told a same-sex couple that he would not make a cake for their wedding celebration because of his religious opposition to same-sex marriages — marriages that Colorado did not then recognize — but that he would sell them any other baked goods (e.g., birthday cakes) that did not have anything to do with a same-sex wedding. The couple filed a charge with the Colorado Civil Rights Commission (Commission) pursuant to the Colorado Anti-Discrimination Act (CADA), which prohibits, *inter alia*, 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.” Under the CADA's administrative review system, the Colorado Civil Rights Division first found probable cause for a violation and referred the case to the Commission. The Commission then referred the case for a formal hearing before a state Administrative Law Judge (ALJ), who ruled in the couple's favor. In so doing, the ALJ rejected both of Phillips' First Amendment claims: (1) that requiring him to “create” a cake for a same-sex wedding would violate his right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed, and (2) that such a requirement also would violate his right to the free exercise of religion because his sincere religious belief was that marriage was limited to a man and a woman. Both the Commission and the Colorado Court of Appeals affirmed.

The Supreme Court reversed by a vote of 7 to 2. Justice Kennedy wrote the majority opinion. Justice Kagan, joined by Justice Breyer, wrote a concurring opinion. Justice Gorsuch, joined by Justice Alito, wrote a concurring opinion. Justice Thomas, joined by Justice Gorsuch, wrote an opinion concurring in part and concurring in the judgment. Justice Ginsburg, joined by Justice Sotomayor, wrote a dissenting opinion disagreeing with the majority's analysis.

2. The Court framed the facts as a contest of oppositional rights, but went on to decide the case on the basis of a discriminatory animus on the part of the Commission against the religious beliefs of Jack Phillips:

The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second

is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.

The freedoms asserted here are both the freedom of speech and the free exercise of religion. . . . Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality. The reason and motive for the baker's refusal were based on his sincere religious beliefs and convictions. The Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.

The Court did not reach the free speech claim of the baker; the Court did not attempt to balance the free exercise rights of the baker against the state's interest to protect the same-sex couple from sexual orientation discrimination.

3. The *ratio decidendi* for the reversal was in the details of the state administrative proceedings. The majority opinion parsed the record on appeal and set out the particulars of how the Commission violated this First and Fourteenth Amendment norm of religious neutrality:

The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.

That hostility surfaced at the Commission's formal, public hearings, as shown by the record. On May 30, 2014, the seven-member Commission convened publicly to consider Phillips' case. At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community. One commissioner suggested that Phillips can believe "what he wants to believe," but cannot act on his religious beliefs "if he decides to do business in the state." A few moments later, the commissioner restated the same position: "[I]f a businessman wants to do business in the state and he's got an issue with the — the law's impacting his personal belief system, he needs to look at being able to compromise." Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to

provide services based on sexual orientation, regardless of the proprietor's personal views. On the other hand, they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced. In view of the comments that followed, the latter seems the more likely.

On July 25, 2014, the Commission met again. This meeting, too, was conducted in public and on the record. On this occasion another commissioner made specific reference to the previous meeting's discussion but said far more to disparage Phillips' beliefs. The commissioner stated:

I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be — I mean, we — we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to — to use their religion to hurt others.

To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical — something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law — a law that protects discrimination on the basis of religion as well as sexual orientation.

The record shows no objection to these comments from other commissioners. And the later state-court ruling reviewing the Commission's decision did not mention those comments, much less express concern with their content. Nor were the comments by the commissioners disavowed in the briefs filed in this Court. For these reasons, the Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case. Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. In this case, however, the remarks were made in a very different context — by an adjudicatory body deciding a particular case.

Another indication of hostility is the difference in treatment between Phillips' case and the cases of other bakers who objected

to a requested cake on the basis of conscience and prevailed before the Commission.

[On] at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the Civil Rights Division, the requested cake included “wording and images the baker deemed derogatory,” *Jack v. Gateaux, Ltd.*; featured “language and images the baker deemed hateful,” *Jack v. Le Bakery Sensual, Inc.*; or displayed a message the baker “deemed as discriminatory,” *Jack v. Azucar Bakery*.

The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission’s treatment of Phillips’ objection. The Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet, the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism. Additionally, the Division found no violation of CADA in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips’ willingness to sell “birthday cakes, shower cakes, and cookies and brownies,” to gay and lesbian customers as irrelevant. The treatment of the other cases and Phillips’ case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished. In short, the Commission’s consideration of Phillips’ religious objection did not accord with its treatment of these other objections.

Before the Colorado Court of Appeals, Phillips protested that this disparity in treatment reflected hostility on the part of the Commission toward his beliefs. He argued that the Commission had treated the other bakers’ conscience-based objections as legitimate, but treated his as illegitimate — thus sitting in judgment of his religious beliefs themselves. The Court of Appeals addressed the disparity only in passing and relegated its complete analysis of the issue to a footnote. There, the court stated that “this case is distinguishable from the Commission’s recent findings that the other bakeries in Denver did not discriminate against a Christian patron on the basis of his creed” when they refused to create the requested cakes. In those cases, the court continued, there was no impermissible discrimination because “the Division found that the bakeries . . . refused the patron’s request . . . because of the offensive nature of the requested message.”

A principled rationale for the difference in treatment of these two instances cannot be based on the government’s own

assessment of offensiveness. Just as “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,” *West Virginia Bd. of Ed. v. Barnette* (1943) [Chapter 9], it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. *See Matal v. Tam* (2017) (Alito, J.) [Chapter 15]. The Colorado court’s attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips’ religious beliefs. The court’s footnote does not, therefore, answer the baker’s concern that the State’s practice was to disfavor the religious basis of his objection.

For the reasons just described, the Commission’s treatment of Phillips’ case violated the State’s duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.

In *Church of Lukumi Babalu Aye* [*supra* this chapter], the Court made clear that the government, if it is to respect the Constitution’s guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even “subtle departures from neutrality” on matters of religion. *Id.* Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips’ religious beliefs. The Constitution “commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.” *Id.*

Factors relevant to the assessment of governmental neutrality include “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.” *Id.* In view of these factors the record here demonstrates that the Commission’s consideration of Phillips’ case was neither tolerant nor respectful of Phillips’ religious beliefs. The Commission gave “every appearance,” of adjudicating Phillips’ religious objection based on a negative normative “evaluation of the particular justification” for his objection and the religious grounds for it. *Id.* It hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for Phillips’ conscience-based objection is legitimate or illegitimate. On these facts, the Court must draw the inference that Phillips’ religious objection was not considered with the neutrality that the Free Exercise Clause requires.

While the issues here are difficult to resolve, it must be concluded that the State’s interest could have been weighed

against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. The official expressions of hostility to religion in some of the commissioners' comments — comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order — were inconsistent with what the Free Exercise Clause requires. The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside.

4. The majority was careful to explain that a religious person's sincere religious objections would not always outweigh the state's interest to prohibit discrimination based on sexual orientation in places of public accommodation. Justice Kennedy thus narrowed the holding:

The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided. In this case the adjudication concerned a context that may well be different going forward in the respects noted above. However later cases raising these or similar concerns are resolved in the future, for these reasons the rulings of the Commission and of the state court that enforced the Commission's order must be invalidated.

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.

5. A thought experiment: Remove the particularized religious bias in this case, which tainted the Colorado Commission's proceedings and triggered the reversal of the Commission's order. Reboot the facts. Rehearse the legal arguments of the parties. Answer the question the Supreme Court did not answer. Who should prevail — the religious baker invoking his free speech and free exercise rights or the state enforcing its civil rights statute to protect the same sex couple from discrimination based on sexual orientation?

6. Reconsider *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), excerpted in Chapter 17 of this Supplement, which considered an Establishment Clause challenge to President Trump's travel ban. Chief Justice Roberts' majority opinion did not refer to *Masterpiece Cakeshop*, which had been decided under the Free Exercise Clause. Justice Sotomayor dissented in both cases. In her dissent in the travel ban case, she nonetheless invoked *Masterpiece Cakeshop* as a precedent:

Just weeks ago, the Court rendered its decision in *Masterpiece Cakeshop* [Supplement Chapter 17] which applied the bedrock principles of religious neutrality and tolerance in considering a First Amendment challenge to government action. Those

principles should apply equally here. In both instances, the question is whether a government actor exhibited tolerance and neutrality in reaching a decision that affects individuals' fundamental religious freedom. But unlike in *Masterpiece Cakeshop*, where a state civil rights commission was found to have acted without "the neutrality that the Free Exercise Clause requires," the government actors in this case will not be held accountable for breaching the First Amendment's guarantee of religious neutrality and tolerance [under the Establishment Clause]. Unlike in *Masterpiece Cakeshop*, where the majority considered the state commissioners' statements about religion to be persuasive evidence of unconstitutional government action, the majority here completely sets aside the President's charged statements about Muslims as irrelevant. That holding erodes the foundational principles of religious tolerance that the Court elsewhere has so emphatically protected, and it tells members of minority religions in our country "that they are outsiders, not full members of the political community."

Is Justice Sotomayor right? Or are there valid ways to distinguish the two cases?

Page 988: insert new Problem after the Problem:

Problem: "أخيره كلمات اي لديك هل؟" (*Arabic: "Do you have any last words?"*)

Complete this draft opinion from the United States District Court:

Petitioner John Hakeem Smith has moved this Court for an emergency stay of his execution, scheduled to take place at 12:00 Midnight (CST) two weeks from today at the State Correctional Facility (SCF), for the 1995 rape, robbery, and brutal murder of a fifteen-year-old girl he abducted on her way home from school. He is relying on the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc, *et seq.* and the due process clause of the Fourteenth Amendment incorporating the religion clauses of the First Amendment, 42 U.S.C. § 1983.

Smith has been a committed Muslim since at least 2006. He has been meeting with his current Imam, Zaid Brown, who has provided religious ministry to Muslim prisoners in SCF since 2015. Imam Brown has stated that Smith was a devout Muslim when the Imam began his ministry at SCF and that Smith continues to be committed to Islam to this day. Moreover, the Warden of SCF and the Commissioner of the State Department of Corrections do not dispute the sincerity of Smith's religious beliefs.

Two weeks ago, Smith met with the Warden of SCF, who, apparently for the first time, explained to Smith the practices and policies that were followed by the State Department of Corrections during the administration of the death penalty following the state's official written protocol for conducting executions. Among other things, the Warden explained that the prison Chaplain, a Southern Baptist minister, would be in the execution chamber during the administration of the lethal injection along with the other prison officials. The Warden has further explained to this court that since his employment in 1997 the prison Chaplain has witnessed every execution conducted in the state as part of his official duties. During an execution, if the prisoner requests, the Chaplain kneels at the side of the

condemned prisoner on the gurney and prays aloud with him until the prisoner loses consciousness during the intravenous lethal injection procedure. If the prisoner does not want pastoral care from the Chaplain, however, the Chaplain still remains in the execution chamber standing unobtrusively by the wall praying silently to himself. The inmate's six designated witnesses, along with any spiritual advisor other than the prison Chaplain, may be seated in the adjacent witness room, separated from the execution chamber by a large glass window. Only the official prison Chaplain is permitted to be present in the execution chamber; all other religious advisors are only allowed in the adjacent witness room.

During that meeting with the Warden, Smith made two requests for the accommodation of his Muslim religious beliefs: that the institutional Christian Chaplain be excluded from the execution chamber and that instead his Imam be present in the execution chamber in order to provide spiritual guidance and comfort to him at the moment of his death. Specifically, Smith and Imam Brown would recite together the Muslim profession of faith — the *Shahāda* — at that fateful moment: “*I bear witness that (there is) no god except Allah; One is He, no partner hath He, and I bear witness that Muhammad is His Servant and Messenger.*”

The Warden agreed to the first request to exclude the prison Chaplain from the execution chamber but cited the SCF execution protocol to deny the second request to admit the Imam into the execution chamber. However, the Warden explained that Smith's Imam would be permitted contact visits with him in the days leading up to and on the day of his execution. Further, Smith's Imam would be permitted to accompany him on the walk from his death row cell to the holding cell adjacent to the execution chamber and remain with him until Smith was escorted into the execution chamber to be secured onto the gurney. Then the Imam would be required to take his place in the adjacent witness room, along with Smith's relatives, invited friends, and members of the media. The Warden insisted that only employees of the SCF who were individually vetted and trained in the official execution protocol would be allowed to remain in the execution chamber in order to carry out the judicial order of execution with the necessary prison security and the proper medical procedures. Otherwise, the risk of improper interference or untoward distraction by someone untrained and unfamiliar with the execution protocol was deemed wholly unacceptable by the state prison officials.

It is hornbook law that this court may solemnly grant a stay of a state execution if — and only if — the condemned prisoner establishes that: (1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the State's interests; and (4) if issued, the injunction would not be averse to the public interest. The controlling question here is the first requirement.

The first and most important question concerning his petition for a stay of execution is whether Smith is substantially likely to succeed on the merits of his claim, i.e., whether the Warden's refusal to allow Smith's Imam to remain in the execution chamber up to and including the moment of his death violates the statute and the Constitution.

Chapter 19

Interrelationships among the Clauses

A. Definition of Religion

Page 999: *insert new Problem after the Note:*

Problem: Honor thy Father or thy Mother?

Melissa and Matthew Solomon divorced seven years ago. They both agreed to — and they were both awarded — joint legal and physical custody of their daughter, four-year-old R.A. Regarding their daughter's education, the original divorce decree provided: "Subject to both parties mutually agreeing to send their daughter to private school, the parties agree to be equally responsible for the cost of private school tuition." The parents initially agreed to enroll their daughter at Bayside Montessori School (Bayside), a small, private, secular school. Three years ago, they agreed in a stipulated order that she would continue to attend Bayside, but Matthew would be responsible for all future tuition costs. Last year, when 11-year-old R.A. was about to finish her elementary education, the parents agreed that, although Bayside did offer middle school education, she should attend a larger middle school with more varied educational resources. They could not agree, however, on which middle school.

Matthew moved the state district court for an order directing that R.A. attend a religious private middle school and high school, Faith Lutheran School, which was administered by the Lutheran parish he attended. He argued that it was in R.A.'s best interest to attend Faith Lutheran School because she was used to private schooling, she wanted to enroll there, she would benefit from the educational continuity of attending the same school for middle school and high school, the high school had a high college placement rate, and as a member of the congregation he would qualify for a tuition discount.

Melissa objected to her child receiving a religious education at Faith Lutheran School because she was not a Lutheran and she did not want her daughter raised a Lutheran. Furthermore, she opposed any religious schooling because she was non-religious and she insisted that it was in her daughter's best interest to be raised non-religious. She argued that R.A. should attend the local public magnet school, J.P. Wynne Middle School — which is highly ranked for academics and has strong extra-curriculars and is even a few blocks closer to R.A.'s primary residence than Faith Lutheran School.

Without holding an evidentiary hearing, on the sole basis of Melissa's vehement objection to any religious schooling of her daughter, the state district court ordered that R.A. would attend J.P. Wynne Middle School. The district court's order is notably devoid of any findings of fact. After briefly summarizing the factual background, procedural history, and both parents' arguments, the order found that attending *both* schools would, in the abstract, satisfy the relevant controlling standard of "the child's best interest," given the overall quality of the two middle schools. Recognizing, however, that it was "not feasible" for R.A. to attend two schools at the same time, the court chose J.P. Wynne Middle School as the preferable school placement. The state district court's stated logic was that "the irreconcilable religious preferences of the parents could not both be

implemented and, therefore, the mother's strong objection to any religious schooling must be dispositive."

Matthew appeals the portion of the order directing R.A. to attend J.P. Wynne Middle School. How should the appellate court rule and why?

Page 1008: *insert new Problem after the Problem:*

Problem: "By the powers vested in me by the State"

The Center for Inquiry (Center) describes itself as "a community of freethinkers, atheists, humanists, and non-believers who question and challenge the extraordinary claims of religion and fight for secularism." The Center pursues this mission through various online media, print publications, educational initiatives directed at the general public, engaging with college campus organizations and other like-minded grassroots groups, and advocacy work in the state and federal courts.

The Center filed suit in United States District Court challenging the constitutionality of State Family Code § 143, *Solemnizers of Marriage*, which provides in relevant part:

- (a) The following persons are authorized to conduct a marriage ceremony:
 - (1) a licensed or ordained Christian minister or priest;
 - (2) a Jewish rabbi;
 - (3) a member or adherent of a religion who is authorized by that religion to conduct a marriage ceremony;
 - (4) an active or retired judge of any state or federal court of record in this state.
- (b) A person commits an offense if the person knowingly conducts a marriage ceremony without authorization under this section. An offense under this subsection is a Class A misdemeanor.

The Center contends that § 143 violates the Establishment Clause and the Equal Protection Clause. The basis of the complaint is that the statute discriminates to exclude non-religious secular celebrants from those who are authorized to solemnize a wedding. How should the District Court rule and why?

C. Religious Speech

Page 1052: *insert new Problem after the Problem:*

Problem: Flying the Christian Flag on the City Hall Flagpole

The City of Boston owns and manages three flagpoles in front of the entrance to City Hall, in a park-like area called City Hall Plaza located in the central downtown business district. The three poles are the same height, approximately 80 feet tall. One pole displays the flag of the United States. A second pole flies the flag of the Commonwealth of Massachusetts. This dispute involves the third flagpole, which displays the City of Boston flag except when replaced by another flag — usually at the request of a third party. Such a request is often made in conjunction with a proposed third party event to take place in City Hall Plaza, such as political rallies, charitable fundraisers, fraternal gatherings, and nonviolent social protests. Examples of other flags that have been raised recently on the third flagpole are flags of some countries, *e.g.*, Brazil, Ethiopia, Portugal, Puerto Rico, the People's

Republic of China, and Cuba, and the flags of some private organizations, *e.g.*, the banner of the National Juneteenth Observation Foundation, the rainbow flag of the LGBT Movement, the Transgender Pride flag, the Free Masonry flag, the Shriner's International flag, and the Bunker Hill Historical Association's flag.

To apply for a permit to raise a flag at City Hall and hold an event on a City-owned property, a third party submits an application to the City. The City has published guidelines on its website for applicants. The guidelines state that an application may be denied if the event involves illegal or dangerous activities or if it conflicts with scheduled events. In addition, an application may be denied if the applicant lacks an insurance certification, materially misrepresents anything on the application, has a history of damaging City property or failing to pay City fees, or fails to comply with other administrative requirements particular to the event. The City's Commissioner of Property Management (Commissioner) reviews applications for the City flagpole to ensure flag requests are "consistent with the City's message, policies, and practices." The City does not otherwise have a written policy regarding the content of flags allowed to be raised.

In July, the president of Camp Constitution emailed the City on behalf of the organization, submitting an application requesting to "raise the Christian flag on the flagpole at the City Hall Plaza," in conjunction with a program for young people in the City Hall Plaza of "patriotic music and speeches by some local clergy focusing on Boston's revolutionary history" to be held on September 17th, Constitution Day.

The Christian flag is an ecumenical flag designed to represent all of Christianity and Christendom. Since its adoption by the Federal Council of Churches in 1942, it has been used by many Christian traditions, especially those of Protestant origin, including the Anglican, Baptist, Mennonite, Moravian, Lutheran, Presbyterian, Quaker, Methodist, and Calvinist Reformed, among others. The flag has a white field, with a red Latin cross inside a blue canton. The shade of red on the cross symbolizes the blood that Jesus shed on Calvary. The blue represents the waters of baptism as well as the faithfulness of Jesus Christ. The white represents the sinless purity of Jesus. Camp Constitution's email attached this illustration of the Christian flag:



Camp Constitution (<http://campconstitution.net/>) is an ecumenical, non-denominational Protestant organization that sponsors outdoor gatherings or rallies of young people ("camps") to instill patriotic and Christian values. Its mission statement reads in part:

The mission of Camp Constitution is to enhance understanding of our Judeo-Christian moral heritage, our American heritage of

courage and ingenuity, including the genius of our United States Constitution, and the application of free enterprise, which together gave our nation an unprecedented history of growth and prosperity, making us the envy of the world. We want to motivate, inspire and activate this generation of Patriots as well as the next generation of Patriots. We want to help find, develop, and train leaders in the freedom fight.

We will have ample opportunity to enjoy our natural surroundings and celebrate our American cultural heritage, especially through our evening campfire programs which inspire our participation in melodic music, good humor and camaraderie, as well as inspiring respect for, and appreciation of, God, home, and country.

The Commissioner granted permission to hold the “camp” in the City Plaza, but denied the application to raise the Christian flag without explanation. Camp Constitution then asked for the official reason for denying the flag permit. The Commissioner responded in an email that “the City of Boston maintains a policy and practice of respectfully refraining from flying non-secular flags on the City Hall flagpoles.” The Commissioner further explained that the City’s “policy and practice” was based on the First Amendment prohibition on government establishing religion and the City’s authority to decide how to use its flagpoles, which are “a limited government space” and on full display to all passersby. The Commissioner concluded that “the City would be willing to consider a request to fly a non-religious flag on the City’s flagpole, should Camp Constitution elect to offer one.” Alternatively, the Commissioner stated the City had no objection to Camp Constitution displaying the Christian flag at ground level on stage during the event in City Plaza. In response, Camp Constitution’s counsel sent a letter to the City, taking the position that the denial to fly the flag from the City’s flagpole was unconstitutional and further declining to submit a “non-religious” flag.

Instead, Camp Constitution, joined by its president and several representative individual members, filed a lawsuit in United States District Court seeking to enjoin the City of Boston from denying them permission to display the Christian flag on the City Hall flagpole in conjunction with their planned “camp” on September 17th in the City Hall Plaza. What arguments are available to the Plaintiffs? How should the District Court rule?

Appendix B

THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1946-2018 TERMS

<u>U.S. Reports</u>	<u>Term</u> [*]	<u>The Court</u> ^{**}
329-332 ¹	1946	Vinson , Black, Reed, Frankfurter, Douglas, Murphy, Jackson, Rutledge, Burton
332 ¹ -335 ²	1947	"
335 ² -338 ³	1948	"
338 ³ -339	1949	Vinson, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton
340-341	1950	"
342-343	1951	"
344-346 ⁴	1952	"
346 ⁴ -347	1953	Warren , Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton
348-349	1954	Warren, Black, Reed, Frankfurter, Douglas, Burton, Clark, Minton, Harlan ⁵
350-351	1955	"
352-354	1956	Warren, Black, Reed, ⁶ Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker ⁷
355-357	1957	Warren, Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker
358-360	1958	Warren, Black, Frankfurter, Douglas, Clark, Harlan, Brennan, Whittaker, Stewart
361-364 ⁸	1959	"
364 ⁸ -367	1960	"

^{*} Rule 3 of the Supreme Court's Rules provides in part: "The Court holds a continuous annual Term commencing on the first Monday in October and ending on the day before the first Monday in October of the following year."

^{**} Justices are listed in order of seniority. Boldface indicates a new Chief Justice.

¹ The 1947 Term begins at 332 U.S. 371.

² The 1948 Term begins at 335 U.S. 281.

³ The 1949 Term begins at 338 U.S. 217.

⁴ The 1953 Term begins at 346 U.S. 325.

⁵ Participation begins with 349 U.S.

⁶ Participation ends with 352 U.S. 564.

⁷ Participation begins with 353 U.S.

⁸ The 1960 Term begins with 364 U.S. 285.

<u>U.S. Reports</u>	<u>Term</u>	<u>The Court*</u>
368-370	1961	Warren, Black, Frankfurter, ⁹ Douglas, Clark, Harlan, Brennan, Whittaker, ¹⁰ Stewart, White ¹¹
371-374	1962	Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg
375-378	1963	"
379-381	1964	"
382-384	1965	Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Fortas
385-388	1966	"
389-392	1967	Warren, Black, Douglas, Harlan, Brennan, Stewart, White, Fortas, Marshall
393-395	1968	Warren, Black, Douglas, Harlan, Brennan, Stewart, White, Fortas, ¹² Marshall
396-399	1969	Burger , Black, Douglas, Harlan, Brennan, Stewart, White, Marshall, [vacancy]
400-403	1970	Burger, Black, Douglas, Harlan, Brennan, Stewart, White, Marshall, Blackmun
404-408	1971	Burger, Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell, ¹³ Rehnquist ¹³
409-413	1972	"
414-418	1973	"
419-422	1974	"
423-428	1975	Burger, Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist, Stevens ¹⁴
429-433	1976	"
434-438	1977	"
439-443	1978	"
444-448	1979	"
449-453	1980	"
454-458	1981	Burger, Brennan, White, Marshall, Blackmun, Powell, Rehnquist, Stevens, O'Connor
459-463	1982	"
464-468	1983	"
469-473	1984	"
474-478	1985	"
479-483	1986	Rehnquist , Brennan, White, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia
484-487	1987	"

* Justices are listed in order of seniority. Boldface indicates a new Chief Justice.

⁹ Participation ends with 369 U.S. 422.

¹⁰ Participation ends with 369 U.S. 120.

¹¹ Participation begins with 370 U.S.

¹² Participation ends with 394 U.S.

¹³ Participation begins with 405 U.S.

¹⁴ Participation begins with 424 U.S.

<u>U.S. Reports</u>	<u>Term</u>	<u>The Court*</u>
488-492	1988	Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy
493-497	1989	"
498-501	1990	Rehnquist, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter
502-505	1991	Rehnquist, White, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas
506-509	1992	"
510-512	1993	Rehnquist, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg
513-515	1994	Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer
516-518	1995	"
519-521	1996	"
522-524	1997	"
525-527	1998	"
528-530	1999	"
531-533	2000	"
534-536	2001	"
537-539	2002	"
540-542	2003	"
543-545	2004 ¹⁵	Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer
546-548	2005	Roberts , Stevens, O'Connor, ¹⁶ Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Alito ¹⁷
549-551	2006	Roberts, Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Alito
552-554	2007	"
555-557	2008	"
558-561	2009	Roberts, Stevens, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor
562-564	2010	Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan
565-567	2011	"
568-570	2012	"
571-573	2013	"
574-576	2014	"

* Justices are listed in order of seniority. Boldface indicates a new Chief Justice.

¹⁵ Chief Justice Rehnquist died on Sept. 3, 2005, shortly before the 2004 Term officially concluded, but after all opinions from that Term had been delivered.

¹⁶ Participation ends with 546 U.S. 417.

¹⁷ Participation begins with 547 U.S.

<u>U.S. Reports</u>	<u>Term</u>	<u>The Court</u>[*]
577-579	2015	Roberts, Scalia, ¹⁸ Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan
580-582	2016	Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch ¹⁹
583-585	2017	Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch
586-588	2018	Roberts, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh

* Justices are listed in order of seniority. Boldface indicates a new Chief Justice.

¹⁸ Justice Scalia died on February 13, 2016, before most of the cases argued in the 2015 Term were decided. His participation ended with 136 S. Ct. 760.

¹⁹ Justice Gorsuch joined the Court on April 10, 2017. He took no part in any of the cases from the 2016 Term discussed in the casebook except *Trinity Lutheran Church of Columbia, Inc. v. Comer* (Chapter 19).