

Constitutional Law
A Context and Practice
Casebook

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CHAPTER 1: LEGISLATIVE POWER

D. The Tenth Amendment

Insert at p. 135, after “Recap: Tenth Amendment”:

CASE NOTE: **Murphy v. NCAA, 138 S. Ct. 1461 (2018)**

The Court struck down the Professional and Amateur Sports Protection Act, a provision of which prohibited states from authorizing sports gambling. The 6-3 majority (*Alito*, Roberts (CJ), Kennedy, Thomas, Kagan, Gorsuch) held that the prohibition was not “Compatible with the system of ‘dual sovereignty’ embodied in the Constitution,” reaffirming the anticommandeering principle of *New York* and *Printz*:

The anticommandeering doctrine ... is simply the expression of a fundamental structural decision incorporated into the Constitution ... to withhold from Congress the power to issue orders directly to the States. When the original States declared their independence, they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority “to do all . . . Acts and Things which Independent States may of right do.” ¶32. The Constitution limited but did not abolish the sovereign powers of the States, which retained “a residuary and inviolable sovereignty.” The Federalist No. 39, p. 245 (C. Rossiter ed. 1961). Thus, both the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of “dual sovereignty.” *Gregory v. Ashcroft*, 501 U. S. 452, 457 (1991)....

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

First, the rule serves as “one of the Constitution’s structural protections of liberty.” *Printz*, *supra*, at 921. “The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities.... [but] for the protection of individuals.” *New York*. “[A] healthy balance of power between the States and the Federal Government [reduces] the risk of tyranny and abuse from either front.” *Id.* (quoting *Gregory*, 501 U. S., at 458).

Second, the anticommandeering rule promotes political accountability. When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame. By contrast, if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred. See *New York*, *supra*, at 168-169.

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

The federal statute violated the anticommandeering rule, the Court held, because it “unequivocally dictates what a state legislature may and may not do.” It was irrelevant that the law purported to prohibit rather than compel a state legislative enactment. “In either event, state legislatures are put under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.”

The Court continued to recognize that generally applicable laws that regulate states do not amount to commandeering: “The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage.” It may or may not be significant that the Court interpreted *Reno v. Condon* as standing for that principle. The law at issue there, said the Murphy Court,

applied equally to state and private actors. It did not regulate the States’ sovereign authority to ‘regulate their own citizens.’ [N]one of the prior decisions on which respondents and the United States rely involved federal laws that directed the States either to enact or to refrain from enacting a regulation of the conduct of activities occurring within their borders....

The dissenters argued that the offending provision of the statute was severable and that the remaining provisions should have been allowed to stand.

* * *

F. The Civil War Amendments

For insertion at p. 212 before “G. The Treaty Power”

3. Sovereign Immunity in other contexts

The above sections reviewed the doctrine of sovereign immunity primarily to inform your understanding of congressional powers under the enforcement provisions of the Civil War amendments. The Court recently has expanded the doctrine itself, holding in a case from the October 2018 term that states – contrary to the text of the 11th Amendment – enjoy sovereign immunity from suits brought by private citizens against a State in the court of another State (rather than in federal courts). This overturned a 1979 decision holding that the 11th Amendment did not cover this type of litigation. The new decision, *Franchise Tax Board of California v. Hyatt*, now protects states from being sued by private litigants for damages in other states. The case is interesting because of the different views of state power embraced by the justices in their separate opinions.

Guided Reading Questions: *Franchise Tax Board of California v. Hyatt*

1. What theory of constitutional interpretation does the majority rely on in concluding that the 11th Amendment immunizes California from the suit at bar?
2. Justice Scalia, writing in dissent in *McCreary County*, also claims adherence to the founders' intentions. Is his position consistent with, an extension of, or distinct from, Madison's?
3. The majority in each of these cases sees the passage of time since the displays were erected as important to resolving the question presented. Why?

Franchise Tax Board of California v. Hyatt

139 S. Ct. 1485 (2019)

Majority: *Thomas*, Roberts, C.J., Alito, Gorsuch, Kavanaugh

Dissent: *Breyer*, Ginsburg, Sotomayor, Kagan

JUSTICE THOMAS delivered the opinion of the Court.

This case, now before us for the third time, requires us to decide whether the Constitution permits a State to be sued by a private party without its consent in the courts of a different State. We hold that it does not and overrule our decision to the contrary in *Nevada v. Hall*, 440 U.S. 410, (1979). ...

In 1998, Hyatt sued the Board in Nevada state court for torts he alleged the agency committed during the audit. After the trial court denied in part the Board's motion for summary judgment, the Board petitioned the Nevada Supreme Court for a writ of mandamus ordering dismissal on the ground that the State of California was immune from suit. The sole question presented is whether *Nevada v. Hall* should be overruled. ...

Hall held that the Constitution does not bar private suits against a State in the courts of another State. The opinion conceded that States were immune from such actions at the time of the founding, but it nonetheless concluded that nothing "implicit in the Constitution" requires States "to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." Instead, the Court concluded that the Founders assumed that "prevailing notions of comity would provide adequate protection against the unlikely prospect of an attempt by the courts of one State to assert jurisdiction over another." The Court's view rested primarily on the idea that the States maintained sovereign immunity vis-à-vis each other in the same way that foreign nations do, meaning that immunity is available only if the forum State "voluntar[ily]" decides "to respect the dignity of the [defendant State] as a matter of comity." The Hall majority was unpersuaded that the Constitution implicitly altered the relationship between the States. In the Court's view, the ratification debates, the Eleventh Amendment, and our sovereign-immunity precedents did not bear on the question because they "concerned questions of federal-court jurisdiction." The Court also found unpersuasive the fact that the Constitution delineates several limitations on States' authority, such as Article I powers granted exclusively to Congress

and Article IV requirements imposed on States.. Despite acknowledging “that ours is not a union of 50 wholly independent sovereigns,” Hall inferred from the lack of an express sovereign immunity granted to the States and from the Tenth Amendment that the States retained the power in their own courts to deny immunity to other States.

Hall’s determination that the Constitution does not contemplate sovereign immunity for each State in a sister State’s courts misreads the historical record and misapprehends the “implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers.” *Id.*, at 433, 99 S.Ct. 1182 (Rehnquist, J., dissenting). As Chief Justice Marshall explained, the Founders did not state every postulate on which they formed our Republic—“we must never forget, that it is a constitution we are expounding.” *McCulloch v. Maryland*. And although the Constitution assumes that the States retain their sovereign immunity except as otherwise provided, it also fundamentally adjusts the States’ relationship with each other and curtails their ability, as sovereigns, to decline to recognize each other’s immunity.

After independence, the States considered themselves fully sovereign nations. As the Colonies proclaimed in 1776, they were “Free and Independent States” with “full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.” Declaration of Independence ¶4. Under international law, then, independence “entitled” the Colonies “to all the rights and powers of sovereign states.” *McIlvaine v. Coxe’s Lessee*, 4 Cranch 209, 212, 2 L.Ed. 598 (1808).

(“[A]s the Constitution’s structure, its history, and the authoritative interpretations by this Court make clear, the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today ...”). This fundamental aspect of the States’ “inviolable sovereignty” was well established and widely accepted at the founding. *The Federalist* No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison); see Alden, *supra*, at 715–716, 119 S.Ct. 2240 (“[T]he doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified”). ...

The Founders believed that both “common law sovereign immunity” and “law-of-nations sovereign immunity” prevented States from being amenable to process in any court without their consent. See Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 Cal. L. Rev. 555, 581–588 (1994); see also Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1574–1579 (2002). The common-law rule was that “no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him.” 1 W. Blackstone, *Commentaries on the Laws of England* 235 (1765) (Blackstone). The law-of-nations rule followed from the “perfect equality and absolute independence of sovereigns” under that body of international law. *Schooner Exchange v. McFaddon*, 7 Cranch 116, 137, 3 L.Ed. 287 (1812); see C. Phillipson, *Wheaton’s Elements of International Law* 261 (5th ed. 1916) (recognizing that sovereigns “enjoy equality before international law”); 1 J. Kent, *Commentaries on American Law* 20 (G. Comstock ed. 1867). According to the founding era’s foremost expert on the law of nations, “[i]t does not ... belong to any foreign power to take cognisance of the administration of [another] sovereign, to set himself up for a judge

of his conduct, and to oblige him to alter it.” 2 E. de Vattel, *The Law of Nations* § 55, p. 155 (J. Chitty ed. 1883). The sovereign is “exemp[t] ... from all [foreign] jurisdiction.” 4 *id.*, § 108, at 486. The founding generation thus took as given that States could not be haled involuntarily before each other’s courts. See Woolhandler, *Interstate Sovereign Immunity*, 2006 S. Ct. Rev. 249, 254–259. ...

One constitutional provision that abrogated certain aspects of this traditional immunity was Article III, which provided a neutral federal forum in which the States agreed to be amenable to suits brought by other States. Art. III, § 2. ... he States, in ratifying the Constitution, similarly surrendered a portion of their immunity by consenting to suits brought against them by the United States in federal courts. The Antifederalists worried that Article III went even further by extending the federal judicial power over controversies “between a State and Citizens of another State.” They suggested that this provision implicitly waived the States’ sovereign immunity against private suits in federal courts. But “[t]he leading advocates of the Constitution assured the people in no uncertain terms” that this reading was incorrect. Alden, 527 U.S. at 716, 119 S.Ct. 2240 (citing arguments by Hamilton, Madison, and John Marshall).

Not long after the founding, however, the Antifederalists’ fears were realized. In *Chisholm v. Georgia*, (1793), the Court held that Article III allowed the very suits that the “Madison-Marshall-Hamilton triumvirate” insisted it did not. That decision precipitated an immediate “furor” and “uproar” across the country. 1 J. Goebel, *Antecedents and Beginnings to 1801, History of the Supreme Court of the United States* 734, 737 (1971). Congress and the States accordingly acted swiftly to remedy the Court’s blunder by drafting and ratifying the Eleventh Amendment.

The Eleventh Amendment confirmed that the Constitution was not meant to “rais[e] up” any suits against the States that were “anomalous and unheard of when the Constitution was adopted.” *Hans v. Louisiana* (1890). Although the terms of that Amendment address only “the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision,” the “natural inference” from its speedy adoption is that “the Constitution was understood, in light of its history and structure, to preserve the States’ traditional immunity from private suits.” Alden, *supra*, at 723–724. We have often emphasized that “[t]he Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity.” *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.* (1993). In proposing the Amendment, “Congress acted not to change but to restore the original constitutional design.” Alden, 527 U.S. at 722. The “sovereign immunity of the States,” we have said, “neither derives from, nor is limited by, the terms of the Eleventh Amendment.” *Id.*, at 713.

Despite this historical evidence that interstate sovereign immunity is preserved in the constitutional design, Hyatt insists that such immunity exists only as a “matter of comity” and can be disregarded by the forum State. Hall. He reasons that, before the Constitution was ratified, the States had the power of fully independent nations to deny immunity to fellow sovereigns; thus, the States must retain that power today with respect to each other because “nothing in the Constitution or formation of the Union altered that balance among the still-sovereign states.” The problem with Hyatt’s argument is that the Constitution affirmatively altered the relationships between the States, so that they no longer relate to

each other solely as foreign sovereigns. Each State’s equal dignity and sovereignty under the Constitution implies certain constitutional “limitation[s] on the sovereignty of all of its sister States.” *World-Wide Volkswagen Corp. v. Woodson*, (1980). One such limitation is the inability of one State to hale another into its courts without the latter’s consent. The Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design. [Justice Thomas cites Article 1, divesting the States of diplomatic and military powers; Article IV, imposing duties on the States “not required by international law” such as the Full Faith and Credit Clause; and provisions prohibiting states from entering into interstate compacts without Congressional permission].

Interstate sovereign immunity is similarly integral to the structure of the Constitution. Like a dispute over borders or water rights, a State’s assertion of compulsory judicial process over another State involves a direct conflict between sovereigns. The Constitution implicitly strips States of any power they once had to refuse each other sovereign immunity, just as it denies them the power to resolve border disputes by political means. Interstate immunity, in other words, is “implied as an essential component of federalism.” Hall, (Blackmun, J., dissenting). Hyatt argues that we should find no right to sovereign immunity in another State’s courts because no constitutional provision explicitly grants that immunity. But this is precisely the type of “ahistorical literalism” that we have rejected when “interpreting the scope of the States’ sovereign immunity since the discredited decision in *Chisholm*. Alden, 527 U.S. at 730, (“[T]he bare text of the Amendment is not an exhaustive description of the States’ constitutional immunity from suit”). In light of our constitutional structure, the historical understanding of state immunity, and the swift enactment of the Eleventh Amendment after the Court departed from this understanding in *Chisholm*, “[i]t is not rational to suppose that the sovereign power should be dragged before a court.” *Elliot’s Debates* 555 (Marshall). Indeed, the spirited historical debate over Article III courts and the immediate reaction to *Chisholm* make little sense if the Eleventh Amendment were the only source of sovereign immunity and private suits against the States could already be brought in “partial, local tribunals.” *Elliot’s Debates* 532 (Madison). Nor would the Founders have objected so strenuously to a neutral federal forum for private suits against States if they were open to a State being sued in a different State’s courts. Hyatt’s view thus inverts the Founders’ concerns about state-court parochialism.

Nevada v. Hall is irreconcilable with our constitutional structure and with the historical evidence showing a widespread preratification understanding that States retained immunity from private suits, both in their own courts and in other courts. We therefore overrule that decision. Because the Board is thus immune from Hyatt’s suit in Nevada’s courts, the judgment of the Nevada Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

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

Can a private citizen sue one State in the courts of another? Normally the answer to this question is no, because the State where the suit is brought will choose to grant its sister States immunity. But the question here is whether the Federal Constitution requires each

State to grant its sister States immunity, or whether the Constitution instead permits a State to grant or deny its sister States immunity as it chooses. We answered that question 40 years ago in *Nevada v. Hall*. The Court in *Hall* held that the Constitution took the permissive approach, leaving it up to each State to decide whether to grant or deny its sister States sovereign immunity. Today, the majority takes the contrary approach—the absolute approach—and overrules *Hall*. I can find no good reason to overrule *Hall*, however, and I consequently dissent. ...

The Court in *Hall* [] held that ratification of the Constitution did not alter principles of state sovereign immunity in any relevant respect. The Court concluded that express provisions of the Constitution—such as the Eleventh Amendment and the Full Faith and Credit Clause of Article IV—did not require States to accord each other sovereign immunity. See *id.*, at 418–424. And the Court held that nothing “implicit in the Constitution” treats States differently in respect to immunity than international law treats sovereign nations. *Id.* To the contrary, the Court in *Hall* observed that an express provision of the Constitution undermined the assertion that States were absolutely immune in each other’s courts. Unlike suits brought against a State in the State’s own courts, *Hall* noted, a suit against a State in the courts of a different State “necessarily implicates the power and authority of” both States. *Id.* The defendant State has a sovereign interest in immunity from suit, while the forum State has a sovereign interest in defining the jurisdiction of its own courts. The Court in *Hall* therefore justified its decision in part by reference to “the Tenth Amendment’s reminder that powers not delegated to the Federal Government nor prohibited to the States are reserved to the States or to the people.” Compelling States to grant immunity to their sister States would risk interfering with sovereign rights that the Tenth Amendment leaves to the States. ...

The majority [] draws on statements of the Founders concerning the importance of sovereign immunity generally. But, as *Hall* noted, those statements concerned matters entirely distinct from the question of state immunity at issue here. Those statements instead “concerned questions of federal-court jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts” (emphasis added). That issue was “a matter of importance in the early days of independence,” for it concerned the ability of holders of Revolutionary War debt owed by States to collect that debt in a federal forum. *Id.* There is no evidence that the Founders who made those statements intended to express views on the question before us. And it seems particularly unlikely that John Marshall, one of those to whom the Court refers, see *ante*, at 1495 – 1496, would have held views of the law in respect to States that he later repudiated in respect to sovereign nations.

The majority next argues that “the Constitution affirmatively altered the relationships between the States” by giving them immunity that they did not possess when they were fully independent. The majority thus maintains that, whatever the nature of state immunity before ratification, the Constitution accorded States an absolute immunity that they did not previously possess. The most obvious problem with this argument is that no provision of the Constitution gives States absolute immunity in each other’s courts. The majority does not attempt to situate its newfound constitutional immunity in any provision of the Constitution itself. Instead, the majority maintains that a State’s immunity in other States’ courts is “implicit” in the Constitution, *ante*, at 1498 - 1499, “embed[ded] ... within the

constitutional design,” ante, at 1496 - 1497, and reflected in “ ‘the plan of the Convention,’ ” ante, at 1494 - 1495.

I agree with today’s majority and the dissenters in Hall that the Constitution contains implicit guarantees as well as explicit ones. But, as I have previously noted, concepts like the “constitutional design” and “plan of the Convention” are “highly abstract, making them difficult to apply”—at least absent support in “considerations of history, of constitutional purpose, or of related consequence.” [Citation omitted]. Such concepts “invite differing interpretations at least as much as do the Constitution’s own broad liberty-protecting phrases” such as “ ‘due process’ ” and “ ‘liberty,’ ” and “they suffer the additional disadvantage that they do not actually appear anywhere in the Constitution.” *Id.* At any rate, I can find nothing in the “plan of the Convention” or elsewhere to suggest that the Constitution converted what had been the customary practice of extending immunity by consent into an absolute federal requirement that no State could withdraw. None of the majority’s arguments indicates that the Constitution accomplished any such transformation.

The majority argues that the Constitution sought to preserve States’ “equal dignity and sovereignty.” That is true, but tells us nothing useful here. When a citizen brings suit against one State in the courts of another, both States have strong sovereignty-based interests. In contrast to a State’s power to assert sovereign immunity in its own courts, sovereignty interests here lie on both sides of the constitutional equation. The majority also says—also correctly—that the Constitution demanded that States give up certain sovereign rights that they would have retained had they remained independent nations. From there the majority infers that the Constitution must have implicitly given States immunity in each other’s courts to provide protection that they gave up when they entered the Federal Union. But where the Constitution alters the authority of States vis-à-vis other States, it tends to do so explicitly. The Import-Export Clause cited by the majority, for example, creates “harmony among the States” by preventing them from “burden[ing] commerce ... among themselves.” [Citation omitted]. The Full Faith and Credit Clause, also invoked by the majority, prohibits States from adopting a “policy of hostility to the public Acts” of another State. [Citation omitted]. By contrast, the Constitution says nothing explicit about interstate sovereign immunity. Nor does there seem to be any need to create implicit constitutional protections for States. As the history of this case shows, the Constitution’s express provisions seem adequate to prohibit one State from treating its sister States unfairly—even if the State permits suits against its sister States in its courts. See *id.*, at —, 136 S.Ct. at 1280–1281 (holding that the Full Faith and Credit Clause prohibits Nevada from subjecting the Board to greater liability than Nevada would impose upon its own agency in similar circumstances).

The majority may believe that the distinction between permissive and absolute immunity was too nuanced for the Framers. The Framers might have understood that most nations did in fact allow other nations to assert sovereign immunity in their courts. And they might have stopped there, ignoring the fact that, under international law, a nation had the sovereign power to change its mind. But there is simply nothing in the Constitution or its history to suggest that anyone reasoned in that way. No constitutional language supports that view. Chief Justice Marshall, Justice Story, and the Court itself took a somewhat

contrary view without mentioning the matter. And there is no strong reason for treating States differently than foreign nations in this context. Why would the Framers, silently and without any evident reason, have transformed sovereign immunity from a permissive immunity predicated on comity and consent into an absolute immunity that States must accord one another? The Court in *Hall* could identify no such reason. Nor can I.

Review Questions and Explanations: *Franchise Tax Board*

1. The more conservative Justices in *Franchise Tax Board* adopt a non-textual constitutional rule grounded in implied constitutional reasoning and international law. The more liberal justices reject this approach. What principled reasons to Justices Thomas and Breyer give for this somewhat unusual situation?
2. Both Thomas and Breyer use structuralism reasoning, arguing that different provisions of the constitution, not directly applicable to the case at bar, nonetheless support their outcome here. In your opinion, whose argument on this point is more persuasive?

CHAPTER 3: EXECUTIVE POWER

C. War and National Security

For inclusion at p. 403, after Boumediene v. Bush.

4. Immigration Policy

Immigration policy lies at the boundary between national security and foreign affairs – if “boundary” is even the right word for these overlapping fields.

Guided Reading Questions: *Trump v. Hawaii*

1. What are the questions presented for review in this case?
2. What relevance do Trump’s various statements have in deciding the Free Exercise claims? How do the majority and dissent differ about this?
3. What standard of review do the majority and dissent propose for the Proclamation? Do they propose different standards or review, or apply the same standard differently? How so?

Trump v. Hawaii

138 S. Ct. 2392 (2018)

Judges: *Roberts* (CJ), Kennedy, Thomas, Alito Gorsuch

Concurrences: *Kennedy* (omitted), *Thomas*

Dissents: *Breyer*, Kagan (omitted); *Sotomayor*, Ginsburg

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Under the Immigration and Nationality Act, foreign nationals seeking entry into the United States undergo a vetting process to ensure that they satisfy the numerous requirements for admission. The Act also vests the President with authority to restrict the entry of aliens whenever he finds that their entry “would be detrimental to the interests of the United States.” 8 U. S. C. §1182(f). Relying on that delegation, the President concluded that it was necessary to impose entry restrictions on nationals of countries that do not share adequate information for an informed entry determination, or that otherwise present national security risks. Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017) (Proclamation). The plaintiffs in this litigation, respondents here, challenged the application of those entry restrictions to certain aliens abroad. We now decide whether the

President had authority under the Act to issue the Proclamation, and whether the entry policy violates the Establishment Clause of the First Amendment.

I

A

Shortly after taking office, President Trump signed Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States. 82 Fed. Reg. 8977 (2017) (EO-1). EO-1 directed the Secretary of Homeland Security to conduct a review to examine the adequacy of information provided by foreign governments about their nationals seeking to enter the United States. §3(a). Pending that review, the order suspended for 90 days the entry of foreign nationals from seven countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—that had been previously identified by Congress or prior administrations as posing heightened terrorism risks. §3(c). The District Court for the Western District of Washington entered a temporary restraining order blocking the entry restrictions, and the Court of Appeals for the Ninth Circuit denied the Government’s request to stay that order. *Washington v. Trump*, 847 F. 3d 1151 (2017) (*per curiam*).

In response, the President revoked EO-1, replacing it with Executive Order No. 13780, which again directed a worldwide review. 82 Fed. Reg. 13209 (2017) (EO-2). Citing investigative burdens on agencies and the need to diminish the risk that dangerous individuals would enter without adequate vetting, EO-2 also temporarily restricted the entry (with case-by-case waivers) of foreign nationals from six of the countries covered by EO-1: Iran, Libya, Somalia, Sudan, Syria, and Yemen. §§2(c), 3(a). The order explained that those countries had been selected because each “is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones.” §1(d). The entry restriction was to stay in effect for 90 days, pending completion of the worldwide review.

These interim measures were immediately challenged in court. The District Courts for the Districts of Maryland and Hawaii entered nationwide preliminary injunctions barring enforcement of the entry suspension, and the respective Courts of Appeals upheld those injunctions, albeit on different grounds. This Court granted certiorari and stayed the injunctions.... The temporary restrictions in EO-2 expired before this Court took any action, and we vacated the lower court decisions as moot.

On September 24, 2017, after completion of the worldwide review, the President issued the Proclamation before us—Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats. 82 Fed. Reg. 45161. The Proclamation (as its title indicates) sought to improve vetting procedures by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present “public safety threats.” §1(a). To further that purpose, the Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate.

The Proclamation described how foreign states were selected for inclusion based on

the review undertaken pursuant to EO-2. As part of that review, the Department of Homeland Security (DHS) collected and evaluated data regarding all foreign governments. §1(d). It identified 16 countries as having deficient information-sharing practices and presenting national security concerns, and another 31 countries as “at risk” of similarly failing to meet the baseline. §1(e). The State Department then undertook diplomatic efforts over a 50-day period to encourage all foreign governments to improve their practices. §1(f). As a result of that effort, numerous countries provided DHS with travel document exemplars and agreed to share information on known or suspected terrorists. *Ibid.*

Following the 50-day period, the Acting Secretary of Homeland Security concluded that eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—remained deficient in terms of their risk profile and willingness to provide requested information. ...

After consulting with multiple Cabinet members and other officials, the President adopted the Acting Secretary’s recommendations and issued the Proclamation. Invoking his authority under 8 U. S. C. §§1182(f) and 1185(a), the President determined that certain entry restrictions were necessary to “prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information”; “elicit improved identity management and information-sharing protocols and practices from foreign governments”; and otherwise “advance [the] foreign policy, national security, and counterterrorism objectives” of the United States. Proclamation §1(h). The President explained that these restrictions would be the “most likely to encourage cooperation” while “protect[ing] the United States until such time as improvements occur.”

The Proclamation imposed a range of restrictions that vary based on the “distinct circumstances” in each of the eight countries. For countries that do not cooperate with the United States in identifying security risks (Iran, North Korea, and Syria), the Proclamation suspends entry of all nationals, except for Iranians seeking nonimmigrant student and exchange-visitor visas. §§2(b)(ii), (d)(ii), (e)(ii). For countries that have information-sharing deficiencies but are nonetheless “valuable counterterrorism partner[s]” (Chad, Libya, and Yemen), it restricts entry of nationals seeking immigrant visas and nonimmigrant business or tourist visas. §§2(a)(i), (c)(i), (g)(i). Because Somalia generally satisfies the baseline standards but was found to present special risk factors, the Proclamation suspends entry of nationals seeking immigrant visas and requires additional scrutiny of nationals seeking nonimmigrant visas. §2(h)(ii). And for Venezuela, which refuses to cooperate in information sharing but for which alternative means are available to identify its nationals, the Proclamation limits entry only of certain government officials and their family members on nonimmigrant business or tourist visas. §2(f)(ii).

The Proclamation exempts lawful permanent residents and foreign nationals who have been granted asylum. §3(b). It also provides for case-by-case waivers when a foreign national demonstrates undue hardship, and that his entry is in the national interest and would not pose a threat to public safety. §3(c)(i); see also §3(c)(iv) (listing examples of when a waiver might be appropriate, such as if the foreign national seeks to reside with a close family member, obtain urgent medical care, or pursue significant business obligations). The Proclamation further directs DHS to assess on a continuing basis whether

entry restrictions should be modified or continued, and to report to the President every 180 days. §4. Upon completion of the first such review period, the President, on the recommendation of the Secretary of Homeland Security, determined that Chad had sufficiently improved its practices, and he accordingly lifted restrictions on its nationals. Presidential Proclamation No. 9723, 83 Fed. Reg. 15937 (2018).

B

Plaintiffs in this case are the State of Hawaii, three individuals (Dr. Ismail Elshikh, John Doe #1, and John Doe #2), and the Muslim Association of Hawaii. The State operates the University of Hawaii system, which recruits students and faculty from the designated countries. The three individual plaintiffs are U. S. citizens or lawful permanent residents who have relatives from Iran, Syria, and Yemen applying for immigrant or nonimmigrant visas. The Association is a nonprofit organization that operates a mosque in Hawaii.

Plaintiffs challenged the Proclamation—except as applied to North Korea and Venezuela—on several grounds. As relevant here, they argued that the Proclamation contravenes provisions in the Immigration and Nationality Act (INA), 66 Stat. 187, as amended. Plaintiffs further claimed that the Proclamation violates the Establishment Clause of the First Amendment, because it was motivated not by concerns pertaining to national security but by animus toward Islam.

The District Court granted a nationwide preliminary injunction barring enforcement of the entry restrictions.... The Court of Appeals affirmed....

III

The INA establishes numerous grounds on which an alien abroad may be inadmissible to the United States and ineligible for a visa. ... By its plain language, §1182(f) grants the President broad discretion to suspend the entry of aliens into the United States. The President lawfully exercised that discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest. ...

The text of §1182(f) states:

“Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, [***24] 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.”

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

in the INA.

The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in §1182(f) is that the President “find[]” that the entry of the covered aliens “would be detrimental to the interests of the United States.” The President has undoubtedly fulfilled that requirement here. He first ordered DHS and other agencies to conduct a comprehensive evaluation of every single country’s compliance with the information and risk assessment baseline. The President then issued a Proclamation setting forth extensive findings describing how deficiencies in the practices of select foreign governments—several of which are state sponsors of terrorism—deprive the Government of “sufficient information to assess the risks [those countries’ nationals] pose to the United States.” Proclamation §1(h)(i). Based on that review, the President found that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information—both to protect national security and public safety, and to induce improvement by their home countries. . . .

Plaintiffs believe that these findings are insufficient. They argue, as an initial matter, that the Proclamation fails to provide a persuasive rationale for why nationality alone renders the covered foreign nationals a security risk. And they further discount the President’s stated concern about deficient vetting because the Proclamation allows many aliens from the designated countries to enter on nonimmigrant visas. . . .

[P]laintiffs’ request for a searching inquiry into the persuasiveness of the President’s justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere. . . .

The Proclamation also comports with the remaining textual limits in §1182(f). We agree with plaintiffs that the word “suspend” often connotes a “defer[ral] till later,” Webster’s Third New International Dictionary 2303 (1966). But that does not mean that the President is required to prescribe in advance a fixed end date for the entry restrictions. . . . Like its predecessors, the Proclamation makes clear that its “conditional restrictions” will remain in force only so long as necessary to “address” the identified “inadequacies and risks” within the covered nations. . . .

Finally, the Proclamation properly identifies a “class of aliens”—nationals of select countries—whose entry is suspended. Plaintiffs argue that “class” must refer to a well-defined group of individuals who share a common “characteristic” apart from nationality. But the text of §1182(f), of course, does not say that, and the word “class” comfortably encompasses a group of people linked by nationality. Plaintiffs also contend that the class cannot be “overbroad.” But that simply amounts to an unspoken tailoring requirement found nowhere in Congress’s grant of authority to suspend entry of not only “any class of aliens” but “all aliens.”. . . .

The Proclamation is squarely within the scope of Presidential authority under the INA. Indeed, neither dissent even attempts any serious argument to the contrary, despite the fact that plaintiffs’ primary contention below and in their briefing before this Court was that the Proclamation violated the statute. . . .

A

We now turn to plaintiffs’ claim that the Proclamation was issued for the unconstitutional purpose of excluding Muslims. Because we have an obligation to assure ourselves of jurisdiction under Article III, we begin by addressing the question whether plaintiffs have standing to bring their constitutional challenge. . . .

Plaintiffs first argue that they have standing on the ground that the Proclamation “establishes a disfavored faith” and violates “their own right to be free from federal [religious] establishments.” They describe such injury as “spiritual and dignitary.”

We need not decide whether the claimed dignitary interest establishes an adequate ground for standing. The three individual plaintiffs assert another, more concrete injury: the alleged real-world effect that the Proclamation has had in keeping them separated from certain relatives who seek to enter the country. We agree that a person’s interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact. . . .

B

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.” 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.”

The President of the United States possesses an extraordinary power to speak to his fellow citizens and on their behalf. Our Presidents have frequently used that power to espouse the principles of religious freedom and tolerance on which this Nation was founded. In 1790 George Washington reassured the Hebrew Congregation of Newport, Rhode Island that “happily the Government of the United States . . . gives to bigotry no sanction, to persecution no assistance [and] requires only that they who live under its protection should demean themselves as good citizens.” 6 Papers of George Washington 285 (D. Twohig ed. 1996). President Eisenhower, at the opening of the Islamic Center of Washington, similarly pledged to a Muslim audience that “America would fight with her whole strength for your right to have here your own church,” declaring that “[t]his concept is indeed a part of America.” Public Papers of the Presidents, Dwight D. Eisenhower, June 28, 1957, p. 509 (1957). And just days after the attacks of September 11, 2001, President George W. Bush returned to the same Islamic Center to implore his fellow Americans—Muslims and non-Muslims alike—to remember during their time of grief that “[t]he face of terror is not the true faith of Islam,” and that America is “a great country because we share the same values of respect and dignity and human worth.” Public Papers of the Presidents, George W. Bush, Vol. 2, Sept. 17, 2001, p. 1121 (2001). Yet it cannot be denied that the Federal Government and the Presidents who have carried its laws into effect have—from the Nation’s earliest days—performed unevenly in living up to those inspiring words.

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.

C

For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a “fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” *Fiallo v. Bell*, 430 U. S. 787, 792 (1977); see *Harisiades v. Shaughnessy*, 342 U. S. 580, 588-589 (1952) (“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power.”). Because decisions in these matters may implicate “relations with foreign powers,” or involve “classifications defined in the light of changing political and economic circumstances,” such judgments “are frequently of a character more appropriate to either the Legislature or the Executive.” *Mathews v. Diaz*, 426 U. S. 67, 81, (1976).

Nonetheless, although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen. In *Kleindienst v. Mandel*, the Attorney General denied admission to a Belgian journalist and self-described “revolutionary Marxist,” Ernest Mandel, who had been invited to speak at a conference at Stanford University. 408 U. S., at 756-757, 92 S. Ct. 2576, 33 L. Ed. 2d 683. The professors who wished to hear Mandel speak challenged that decision under the First Amendment, and we acknowledged that their constitutional “right to receive information” was implicated. But we limited our review to whether the Executive gave a “facially legitimate and bona fide” reason for its action. Given the authority of the political branches over admission, we held that “when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification” against the asserted constitutional interests of U. S. citizens. *Id.*, at 770....

Mandel’s narrow standard of review “has particular force” in admission and immigration cases that overlap with “the area of national security.” For one, “[j]udicial inquiry into the national-security realm raises concerns for the separation of powers” by intruding on the President’s constitutional responsibilities in the area of foreign affairs. For another, “when it comes to collecting evidence and drawing inferences” on questions of national security, “the lack of competence on the part of the courts is marked.”

The upshot of our cases in this context is clear: “Any rule of constitutional law that would inhibit the flexibility” of the President “to respond to changing world conditions should be adopted only with the greatest caution,” and our inquiry into matters of entry and national security is highly constrained. ... For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review.

That standard of review considers whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes. As a result, we may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.

D

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). In one case, we invalidated a local zoning ordinance that required a special permit for group homes for the intellectually disabled, but not for other facilities such as fraternity houses or hospitals. We did so on the ground that the city's stated concerns about (among other things) "legal responsibility" and "crowded conditions" rested on "an irrational prejudice" against the intellectually disabled. *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 448-450 (1985) (internal quotation marks omitted). And in another case, this Court overturned a state constitutional amendment that denied gays and lesbians access to the protection of antidiscrimination laws. The amendment, we held, was "divorced from any factual context from which we could discern a relationship to legitimate state interests," and "its sheer breadth [was] so discontinuous with the reasons offered for it" that the initiative seemed "inexplicable by anything but animus." *Romer v. Evans*, 517 U. S. 620, 632, 635 (1996).

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....

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.”

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 Proclamation emphasizes that its “conditional restrictions” will remain in force only so long as necessary to “address” the identified “inadequacies and risks,” and §1(h), and establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be terminated.... Second, for those countries that remain subject to entry restrictions, the Proclamation includes significant exceptions for various categories of foreign nationals. ... 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. ...

Finally, the dissent invokes *Korematsu v. United States*, 323 U. S. 214 (1944). Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case. The forcible relocation of U. S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. The entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.

The dissent’s reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—“has no place in law under the Constitution.” 323 U. S., at 248, 65 S. Ct. 193, 89 L. Ed. 194 (Jackson, J., dissenting).

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....

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

It is so ordered.

THOMAS, J., concurring.

Merits aside, I write separately to address the remedy that the plaintiffs sought and obtained in this case.... I am skeptical that district courts have the authority to enter universal injunctions. These injunctions did not emerge until a century and a half after the founding. And they appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts. If their popularity continues, this Court must address their legality.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

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 façade 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. [***91] 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.

I

Plaintiffs challenge the Proclamation on various grounds, both statutory and constitutional. Ordinarily, when a case can be decided on purely statutory grounds, we strive to follow a “prudential rule of avoiding constitutional questions.” But that rule of thumb is far from categorical, and it has limited application where, as here, the constitutional question proves far simpler than the statutory one. Whatever the merits of plaintiffs’ complex statutory claims, the Proclamation must be enjoined for a more fundamental reason: It runs afoul of the Establishment Clause’s guarantee of religious neutrality.

A

The Establishment Clause forbids government policies “respecting an establishment of religion.” U. S. Const., Amdt. 1. 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 “inevitabl[y]” foster “the hatred, disrespect and even contempt of those who [hold] contrary beliefs.” *Engel v. Vitale*, 370 U. S. 421, 431, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962). 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.” *Santa Fe Independent School Dist. v. Doe*, 530 U. S. 290, 309 (2000). To guard against this serious harm, the Framers mandated a strict “principle of denominational 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. ACLU*, 545 U. S. 844, 860 (2005). 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.*, at 862, 866; accord, *Town of Greece v. Galloway*, 572 U. S. 565, 589 (2014) (plurality opinion).

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. *Lukumi*, 508 U. S., at 540 (opinion of Kennedy, J.); *McCreary*, 545 U. S., at 862 (courts must evaluate “text, legislative history, and implementation . . . , or comparable official act” (internal quotation marks omitted)). At the same time, however, courts must take care not to engage in “any judicial psychoanalysis of a drafter’s heart of hearts.” *Id.*, at 862.

B

1

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. . . . During his Presidential campaign, then-candidate Donald Trump pledged that, if elected, he would ban Muslims from entering the United States. Specifically, on December 7, 2015, he issued a formal statement “calling for a total and complete shutdown of Muslims entering the United States.” That statement, which remained on his campaign website until May 2017 (several months into his Presidency), read in full:

“Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on. According to Pew Research, among others, there is great hatred towards Americans by large segments of the Muslim population. Most recently, a poll from the Center for Security Policy released data showing ‘25% of those polled agreed that violence against Americans here in the United States is justified as a part of the global jihad’ and 51% of those polled ‘agreed that Muslims in America should have the choice of being governed according to Shariah.’ Shariah authorizes such atrocities as murder against nonbelievers who won’t convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women.

“Mr. Trum[p] stated, ‘Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension. Where this hatred comes from and why we will have to determine. Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of the horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect of human life. If I win the election for President, we are going to Make America Great

Again.’—Donald J. Trump.” *Id.*, at 158; see also *id.*, at 130-131.

On December 8, 2015, Trump justified his proposal during a television interview by noting that President Franklin D. Roosevelt “did the same thing” with respect to the internment of Japanese Americans during World War II. In January 2016, during a Republican primary debate, Trump was asked whether he wanted to “rethink [his] position” on “banning Muslims from entering the country.” He answered, “No.” A month later, at a rally in South Carolina, Trump told an apocryphal story about United States General John J. Pershing killing a large group of Muslim insurgents in the Philippines with bullets dipped in pigs’ blood in the early 1900’s. In March 2016, he expressed his belief that “Islam hates us. . . . [W]e can’t allow people coming into this country who have this hatred of the United States . . . [a]nd of people that are not Muslim.” That same month, Trump asserted that “[w]e’re having problems with the Muslims, and we’re having problems with Muslims coming into the country.” He therefore called for surveillance of mosques in the United States, blaming terrorist attacks on Muslims’ lack of “assimilation” and their commitment to “sharia law.” A day later, he opined that Muslims “do not respect us at all” and “don’t respect a lot of the things that are happening throughout not only our country, but they don’t respect other things.”

As Trump’s presidential campaign progressed, he began to describe his policy proposal in slightly different terms. In June 2016, for instance, he characterized the policy proposal as a suspension of immigration from countries “where there’s a proven history of terrorism.” He also described the proposal as rooted in the need to stop “importing radical Islamic terrorism to the West through a failed immigration system.” Asked in July 2016 whether he was “pull[ing] back from” his pledged Muslim ban, Trump responded, “I actually don’t think it’s a rollback. In fact, you could say it’s an expansion.” He then explained that he used different terminology because “[p]eople were so upset when [he] used the word Muslim.”

A month before the 2016 election, Trump reiterated that his proposed “Muslim ban” had “morphed into a[n] extreme vetting from certain areas of the world.” Then, on December 21, 2016, President-elect Trump was asked whether he would “rethink” his previous “plans to create a Muslim registry or ban Muslim immigration.” He replied: “You know my plans. All along, I’ve proven to be right.”

On January 27, 2017, one week after taking office, President Trump signed Executive Order No. 13769, 82 Fed. Reg. 8977 (2017) (EO-1), entitled “Protecting the Nation From Foreign Terrorist Entry Into the United States.” As he signed it, President Trump read the title, looked up, and said “We all know what that means.” App. 124. That same day, President Trump explained to the media that, under EO-1, Christians would be given priority for entry as refugees into the United States. In particular, he bemoaned the fact that in the past, “[i]f you were a Muslim [refugee from Syria] you could come in, but if you were a Christian, it was almost impossible.” Considering that past policy “very unfair,” President Trump explained that EO-1 was designed “to help” the Christians in Syria. The following day, one of President Trump’s key advisers candidly drew the connection between EO-1 and the “Muslim ban” that the President had pledged to implement if elected. *Ibid.* According to that adviser, “[W]hen [Donald Trump] 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.’”

On February 3, 2017, the United States District Court for the Western District of Washington enjoined the enforcement of EO-1. The Ninth Circuit denied the Government’s request to stay that injunction. *Washington v. Trump*, 847 F. 3d 1151, 1169 (2017) (*per curiam*). Rather than appeal the Ninth Circuit’s decision, the Government declined to continue defending EO-1 in court and instead announced that the President intended to issue a new executive order to replace EO-1.

On March 6, 2017, President Trump issued that new executive order, which, like its predecessor, imposed temporary entry and refugee bans. See Exec. Order No. 13,780, 82 Fed. Reg. 13209 (EO-2). One of the President’s senior advisers publicly explained that EO-2 would “have the same basic policy outcome” as EO-1, and that any changes would address “very technical issues that were brought up by the court.” App. 127. After EO-2 was issued, the White House Press Secretary told reporters that, by issuing EO-2, President Trump “continue[d] to deliver on . . . his most significant campaign promises.” *Id.*, at 130. That statement was consistent with President Trump’s own declaration that “I keep my campaign promises, and our citizens will be very happy when they see the result.”

Before EO-2 took effect, federal District Courts in Hawaii and Maryland enjoined the order’s travel and refugee bans. See *Hawaii v. Trump*, 245 F. Supp. 3d 1227, 1239 (Haw. 2017); *International Refugee Assistance Project (IRAP) v. Trump*, 241 F. Supp. 3d 539, 566 (Md. 2017). The Fourth and Ninth Circuits upheld those injunctions in substantial part. *Int’l Refugee Assistance Project v. Trump*, 857 F. 3d 554, 606 (CA4 2017) (en banc); *Hawaii v. Trump*, 859 F. 3d 741, 789 (CA9 2017) (*per curiam*). In June 2017, this Court granted the Government’s petition for certiorari and issued a *per curiam* opinion partially staying the District Courts’ injunctions pending further review. In particular, the Court allowed EO-2’s travel ban to take effect except as to “foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States.”

While litigation over EO-2 was ongoing, President Trump repeatedly made statements alluding to a desire to keep Muslims out of the country. For instance, he said at a rally of his supporters that EO-2 was just a “watered down version of the first one” and had been “tailor[ed]” at the behest of “the lawyers.” He further added that he would prefer “to go back to the first [executive order] and go all the way” and reiterated his belief that it was “very hard” for Muslims to assimilate into Western culture. During a rally in April 2017, President Trump recited the lyrics to a song called “The Snake,” a song about a woman who nurses a sick snake back to health but then is attacked by the snake, as a warning about Syrian refugees entering the country. And in June 2017, the President stated on Twitter that the Justice Department had submitted a “watered down, politically correct version” of the “original Travel Ban” “to S[upreme] C[ourt].” The President went on to tweet: “People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!” He added: “That’s right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won’t help us protect our people!” Then, on August 17, 2017, President Trump issued yet another tweet about Islam, once more referencing the story about General Pershing’s massacre of Muslims in the Philippines: “Study what General Pershing . . . did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!”

In September 2017, President Trump tweeted that “[t]he travel ban into the United States should be far larger, tougher and more specific—but stupidly, that would not be politically correct!” Later that month, on September 24, 2017, President Trump issued Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017) (Proclamation), which restricts entry of certain nationals from six Muslim-majority countries. On November 29, 2017, President Trump “retweeted” three anti-Muslim videos, entitled “Muslim Destroys a Statue of Virgin Mary!”, “Islamist mob pushes teenage boy off roof and beats him to death!”, and “Muslim migrant beats up Dutch boy on crutches!” Those videos were initially tweeted by a British political party whose mission is to oppose “all alien and destructive politic[al] or religious doctrines, including . . . Islam.” When asked about these videos, the White House Deputy Press Secretary connected them to the Proclamation, responding 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.” *Ibid.*

2

.... [T]he 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. See *McCreary*, 545 U. S., at 862-863. 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 “[w]e’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 “lega[l]” way to enact a Muslim ban. The President continued to make similar statements well after his inauguration, as detailed above, see *supra*, at 6-10.

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*, 138 S. Ct. 1719 (2018) (“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.

II

Rather than defend the President’s problematic statements, the Government urges this Court to set them aside and defer to the President on issues related to immigration and national security. The majority accepts that invitation and incorrectly applies a watered-down legal standard in an effort to short circuit plaintiffs’ Establishment Clause claim.

The majority begins its constitutional analysis by noting that this Court, at times, “has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen.” *Ante*, (citing *Kleindienst v. Mandel*, 408 U. S. 753 (1972)). As the majority notes, *Mandel* held that when the Executive Branch provides “a facially legitimate and bona fide reason” for denying a visa, “courts will neither look behind the exercise of that discretion, nor test it by balancing its justification.” In his controlling concurrence in *Kerry v. Din*, 576 U. S. ___, 135 S. Ct. 2128 (2015), Justice Kennedy applied *Mandel*’s holding and elaborated that courts can “‘look behind’ the Government’s exclusion of” a foreign national if there is “an affirmative showing of bad faith on the part of the consular officer who denied [the] visa.” *Din*, 135 S. Ct. 2128 (opinion concurring in judgment). The extent to which *Mandel* and *Din* apply at all to this case is unsettled, and there is good reason to think they do not. Indeed, even the Government agreed at oral argument that where the Court confronts a situation involving “all kinds of denigrating comments about” a particular religion In light of the Government’s suggestion “that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order,” the majority rightly ... “assume[s] that we may look behind the face of the Proclamation.” In doing so, however, the Court, without explanation or precedential support, limits its review of the Proclamation to rational-basis scrutiny. That approach is perplexing, given that in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review. See, e.g., *McCreary*, 545 U. S., at 860-863. As explained above, the Proclamation is plainly unconstitutional under that heightened standard.

But even under rational-basis review, the Proclamation must fall. That is so because the Proclamation is “‘divorced from any factual context from which we could discern a relationship to legitimate state interests,’ and ‘its sheer breadth [is] so discontinuous with the reasons offered for it’” that the policy is “‘inexplicable by anything but animus.’” *Ante*, (quoting *Romer v. Evans*, 517 U. S. 620, 632 (1996)). The President’s statements, which the majority utterly fails to address in its legal analysis, strongly support the conclusion that the Proclamation was issued to express hostility toward Muslims and exclude them from the country. Given the overwhelming record evidence of anti-Muslim animus, it simply cannot be said that the Proclamation has a legitimate basis.

The majority insists that the Proclamation furthers two interrelated national-security

interests: “preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices.” But ... even a cursory review of the Government’s asserted national-security rationale reveals that the Proclamation is nothing more than a “religious gerrymander.”

The majority first emphasizes that the Proclamation “says nothing about religion.” Even so, the Proclamation, just like its predecessors, overwhelmingly targets Muslim-majority nations. Given the record here, ... it is of no moment that the Proclamation also includes minor restrictions on two non-Muslim majority countries, North Korea and Venezuela, or that the Government has removed a few Muslim-majority countries from the list of covered countries since EO-1 was issued. ...

The majority next contends that the Proclamation “reflects the results of a worldwide review process undertaken by multiple Cabinet officials.” ... But, ... the worldwide review does little to break the clear connection between the Proclamation and the President’s anti-Muslim statements. For “[n]o matter how many officials affix their names to it, the Proclamation rests on a rotten foundation.” Brief for Constitutional Law Scholars as *Amici Curiae* 7 (filed Apr. 2, 2018). The President campaigned on a promise to implement a “total and complete shutdown of Muslims” entering the country, translated that campaign promise into a concrete policy, and made several statements linking that policy (in its various forms) to anti-Muslim animus.

Ignoring all this, the majority empowers the President to hide behind an administrative review process that the Government refuses to disclose to the public. Furthermore, evidence of which we can take judicial notice indicates that the multiagency review process could not have been very thorough. Ongoing litigation under the Freedom of Information Act shows that the September 2017 report the Government produced after its review process was a mere 17 pages. That the Government’s analysis of the vetting practices of hundreds of countries boiled down to such a short document raises serious questions about the legitimacy of the President’s proclaimed national-security rationale.

Beyond that, Congress has already addressed the national-security concerns supposedly undergirding the Proclamation through an “extensive and complex” framework governing “immigration and alien status.” *Arizona v. United States*, 567 U. S. 387, 395 (2012). The Immigration and Nationality Act sets forth, in painstaking detail, a reticulated scheme regulating the admission of individuals to the United States. Generally, admission to the United States requires a valid visa or other travel document. To obtain a visa, an applicant must produce “certified cop[ies]” of documents proving her identity, background, and criminal history. An applicant also must undergo an in-person interview with a State Department consular officer. “Any alien who . . . has engaged in a terrorist activity,” “incited terrorist activity,” or been a representative, member, or endorser of a terrorist organization, or who “is likely to engage after entry in any terrorist activity,” §1182(a)(3)(B), or who has committed one or more of the many crimes enumerated in the statute is inadmissible and therefore ineligible to receive a visa.

In addition to vetting rigorously any individuals seeking admission to the United States, the Government also rigorously vets the information-sharing and identity-management systems of other countries, as evidenced by the Visa Waiver Program, which permits

certain nationals from a select group of countries to skip the ordinary visa-application process. ... As a result of a recent review, for example, the Executive decided in 2016 to remove from the program dual nationals of Iraq, Syria, Iran, and Sudan.

Put simply, Congress has already erected a statutory scheme that fulfills the putative national-security interests the Government now puts forth to justify the Proclamation. Tellingly, the Government remains wholly unable to articulate any credible national-security interest that would go unaddressed by the current statutory scheme absent the Proclamation. ...

For many of these reasons, several former national-security officials from both political parties—including former Secretary of State Madeleine Albright, former State Department Legal Adviser John Bellinger III, former Central Intelligence Agency Director John Brennan, and former Director of National Intelligence James Clapper—have advised that the Proclamation and its predecessor orders “do not advance the national-security or foreign policy interests of the United States, and in fact do serious harm to those interests.” Brief for Former National Security Officials as *Amici Curiae* 15....

Equally unavailing is the majority’s reliance on the Proclamation’s waiver program. As several *amici* thoroughly explain, there is reason to suspect that the Proclamation’s waiver program is nothing more than a sham. The remote possibility of obtaining a waiver pursuant to an ad hoc, discretionary, and seemingly arbitrary process scarcely demonstrates that the Proclamation is rooted in a genuine concern for national security.

In sum, 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 un rebutted 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....

IV

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, “[f]or 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*, 134 S. Ct. 1811 (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.

Just weeks ago, the Court rendered its decision in *Masterpiece Cakeshop*, 138 S. Ct. 1719 which applied the bedrock principles of religious neutrality and tolerance in considering a First Amendment challenge to government action. See *id.*, at ___, (“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.’” 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*, where a state civil rights commission was found to have acted without "the neutrality that the Free Exercise Clause requires," *id.*, at ____, the government actors in this case will not be held accountable for breaching the First Amendment's guarantee of religious neutrality and tolerance. Unlike in *Masterpiece*, 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."

Today's holding is all the more troubling given the stark parallels between the reasoning of this case and that of *Korematsu v. United States*, 323 U. S. 214 (1944). In *Korematsu*, the Court gave "a pass [to] an odious, gravely injurious racial classification" authorized by an executive order. As here, the Government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion. As here, the exclusion order was rooted in dangerous stereotypes about, *inter alia*, a particular group's supposed inability to assimilate and desire to harm the United States. See *Korematsu*, 323 U. S., at 236-240 (Murphy, J., dissenting). As here, the Government was unwilling to reveal its own intelligence agencies' views of the alleged security concerns to the very citizens it purported to protect. Compare *Korematsu v. United States*, 584 F. Supp. 1406, 1418-1419 (ND Cal. 1984) (discussing information the Government knowingly omitted from report presented to the courts justifying the executive order. And as here, there was strong evidence that impermissible hostility and animus motivated the Government's policy....

In the intervening years since *Korematsu*, our Nation has done much to leave its sordid legacy behind. See, e.g., Civil Liberties Act of 1988, 50 U. S. C. App. §4211 *et seq.* (setting forth remedies to individuals affected by the executive order at issue in *Korematsu*); Non-Detention Act of 1971, 18 U. S. C. §4001(a) (forbidding the imprisonment or detention by the United States of any citizen absent an Act of Congress). Today, the Court takes the important step of finally overruling *Korematsu*, denouncing it as "gravely wrong the day it was decided." This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority's decision here acceptable or right. By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one "gravely wrong" decision with another.

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

Review Questions and Explanations: *Trump v. Hawaii*

1. This case involves the interaction between presidential power over national security and the First Amendment Free Exercise clause. How if at all do national security concerns change the analysis of a claim of discrimination against a religious group?

2. The case also raises a question about the levels of scrutiny to be applied in cases involving a fundamental rights claim. What level of scrutiny should apply in this case? If rational basis is appropriate, does the majority apply it correctly?

3. In *Masterpiece Cakeshop*, the Court concluded that it could infer anti-religious bias underlying a purportedly neutral government action based on a tone of animus in the government's explanation. The dissent claims that the majority's decisions conflicts with *Masterpiece Cakeshop*. Is this contention valid?

4. The dissent claims that the *Trump* decision conflicts with the majority's own repudiation of *Korematsu*. What is the basis for this claim? Is it valid?

CHAPTER 6: JUSTICIABILITY

C. Standing

1. Basic Doctrine

[For inclusion following *Lujan v. Defenders of Wildlife*, p. 626.]

CASE NOTE: Department of Commerce v. New York, 139 S. Ct. 2551 (2019)

In March 2018, the Secretary of Commerce announced a decision to reinstate a question about citizenship on the 2020 decennial census questionnaire. Although the Secretary stated that he was acting at the request of the Department of Justice (DOJ), which claimed a need for improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act, there was widespread belief that the real reason was political. New York and other state and local governments, together with immigrants' rights groups, challenged the citizenship question, arguing that it would produce inaccurate census results, as households with Latino immigrants would not respond. That in turn would cause Democratic-leaning states with large immigrant populations to lose billions in federal funding and possibly seats in the U.S. House of Representatives. On the merits, the Court decided 5-4 (*Roberts* (C.J.), Ginsburg, Breyer, Kagan, Sotomayor), that the Voting Rights Act rationale was a mere pretext and that the question could not be reinstated unless and until the government produced a proper justification supported by the evidence.

Prior to reaching the merits, the Court issued this ruling on the plaintiffs' standing. This part of the opinion was unanimous.

Article III of the Constitution limits federal courts to deciding “Cases” and “Controversies.” For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue. The doctrine of standing “limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong” and “confines the federal courts to a properly judicial role.” To have standing, a plaintiff must “present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant’s challenged behavior; and likely to be redressed by a favorable ruling.”

Respondents assert a number of injuries—diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources—all of which turn on their expectation that reinstating a citizenship question will depress the census response rate and lead to an inaccurate population count. Several States with a disproportionate share of noncitizens, for example, anticipate losing a seat in Congress or qualifying for less federal funding if their populations are undercounted. These are primarily future injuries, which “may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.”

The District Court concluded that the evidence at trial established a sufficient likelihood that the reinstatement of a citizenship question would result in noncitizen

households responding to the census at lower rates than other groups, which in turn would cause them to be undercounted and lead to many of respondents' asserted injuries. For purposes of standing, these findings of fact were not so suspect as to be clearly erroneous.

We therefore agree that at least some respondents have Article III standing. Several state respondents here have shown that if noncitizen households are undercounted by as little as 2%—lower than the District Court's 5.8% prediction—they will lose out on federal funds that are distributed on the basis of state population. That is a sufficiently concrete and imminent injury to satisfy Article III, and there is no dispute that a ruling in favor of respondents would redress that harm.

The Government contends, however, that any harm to respondents is not fairly traceable to the Secretary's decision, because such harm depends on the independent action of third parties choosing to violate their legal duty to respond to the census. The chain of causation is made even more tenuous, the Government argues, by the fact that such intervening, unlawful third-party action would be motivated by unfounded fears that the Federal Government will itself break the law by using noncitizens' answers against them for law enforcement purposes. The Government invokes our steady refusal to “endorse standing theories that rest on speculation about the decisions of independent actors,” *Clapper v. Amnesty Int'l USA*, 568 U. S. 398, 414 (2013), particularly speculation about future unlawful conduct, *Los Angeles v. Lyons*, 461 U. S. 95, 105 (1983).

But we are satisfied that, in these circumstances, respondents have met their burden of showing that third parties will likely react in predictable ways to the citizenship question, even if they do so unlawfully and despite the requirement that the Government keep individual answers confidential. The evidence at trial established that noncitizen households have historically responded to the census at lower rates than other groups, and the District Court did not clearly err in crediting the Census Bureau's theory that the discrepancy is likely attributable at least in part to noncitizens' reluctance to answer a citizenship question. Respondents' theory of standing thus does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action on the decisions of third parties. Because Article III “requires no more than de facto causality,” *Block v. Meese*, 793 F. 2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.), traceability is satisfied here. We may therefore consider the merits of respondents' claims....

* * *

G. Political Question

For insertion at p. 648 after Nixon v. United States

Guided Reading Questions: *Rucho v. Common Cause*

1. What factor/s of the Political Questions doctrine does the majority rely on to declare partisan gerrymandering non-justiciable?
2. As you read *Rucho*, think of how many ways you can distinguish it from *Baker v. Carr* (discussed in the notes above) and *Nixon v. US*.

Rucho v. Common Cause

139 S. Ct. 2484 (2019)

Majority: *Roberts*, C.J., Thomas, Alito, Gorsuch, Kavanaugh

Dissent: *Kagan*, Ginsburg, Breyer, Sotomayor

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Voters and other plaintiffs in North Carolina and Maryland challenged their States' congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs complained that the State's districting plan discriminated against Democrats; the Maryland plaintiffs complained that their State's plan discriminated against Republicans. The plaintiffs alleged that the gerrymandering violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, § 2, of the Constitution. The District Courts in both cases ruled in favor of the plaintiffs, and the defendants appealed directly to this Court.

These cases require us to consider once again whether claims of excessive partisanship in districting are “justiciable”—that is, properly suited for resolution by the federal courts. This Court has not previously struck down a districting plan as an unconstitutional partisan gerrymander, and has struggled without success over the past several decades to discern judicially manageable standards for deciding such claims. The districting plans at issue here are highly partisan, by any measure. The question is whether the courts below appropriately exercised judicial power when they found them unconstitutional as well.

The first case involves a challenge to the congressional redistricting plan enacted by the Republican-controlled North Carolina General Assembly in 2016. The Republican legislators leading the redistricting effort instructed their mapmaker to use political data to draw a map that would produce a congressional delegation of ten Republicans and three Democrats. As one of the two Republicans chairing the redistricting committee stated, “I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country.” He further explained that the map was drawn with the aim of electing ten Republicans and three Democrats because he did “not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats.” One Democratic state senator objected that entrenching the 10–3 advantage for Republicans was not “fair, reasonable, [or] balanced” because, as recently as 2012, “Democratic congressional candidates had received more votes on a statewide basis than Republican candidates.” The General Assembly was not swayed by that objection and approved the 2016 Plan by a party-line vote. In November 2016, North Carolina conducted congressional elections using the 2016 Plan, and Republican candidates won 10 of the 13 congressional districts. In the 2018 elections, Republican candidates won nine congressional districts, while Democratic candidates won three. The Republican candidate narrowly prevailed in the remaining district, but the State Board of Elections called a new election after allegations of fraud.

This litigation began in August 2016, when the North Carolina Democratic Party, Common Cause (a nonprofit organization), and 14 individual North Carolina voters sued

the two lawmakers who had led the redistricting effort and other state defendants in Federal District Court. Shortly thereafter, the League of Women Voters of North Carolina and a dozen additional North Carolina voters filed a similar complaint. The two cases were consolidated. The plaintiffs challenged the 2016 Plan on multiple constitutional grounds. First, they alleged that the Plan violated the Equal Protection Clause of the Fourteenth Amendment by intentionally diluting the electoral strength of Democratic voters. Second, they claimed that the Plan violated their First Amendment rights by retaliating against supporters of Democratic candidates on the basis of their political beliefs. Third, they asserted that the Plan usurped the right of “the People” to elect their preferred candidates for Congress, in violation of the requirement in Article I, § 2, of the Constitution that Members of the House of Representatives be chosen “by the People of the several States.” Finally, they alleged that the Plan violated the Elections Clause by exceeding the State’s delegated authority to prescribe the “Times, Places and Manner of holding Elections” for Members of Congress. After a four-day trial, the three-judge District Court unanimously concluded that the 2016 Plan violated the Equal Protection Clause and Article I of the Constitution. The court further held, with Judge Osteen dissenting, that the Plan violated the First Amendment. The defendants appealed directly to this Court under 28 U.S.C. § 1253.

The second case before us is *Lamone v. Benisek*. In 2011, the Maryland Legislature—dominated by Democrats—undertook to redraw the lines of that State’s eight congressional districts. The Governor at the time, Democrat Martin O’Malley, led the process. He appointed a redistricting committee to help redraw the map, and asked Congressman Steny Hoyer, who has described himself as a “serial gerrymanderer,” to advise the committee. The Governor later testified that his aim was to “use the redistricting process to change the overall composition of Maryland’s congressional delegation to 7 Democrats and 1 Republican by flipping” one district. “[A] decision was made to go for the Sixth,” which had been held by a Republican for nearly two decades. To achieve the required equal population among districts, only about 10,000 residents needed to be removed from that district. The 2011 Plan accomplished that by moving roughly 360,000 voters out of the Sixth District and moving 350,000 new voters in. Overall, the Plan reduced the number of registered Republicans in the Sixth District by about 66,000 and increased the number of registered Democrats by about 24,000. The map was adopted by a party-line vote. It was used in the 2012 election and succeeded in flipping the Sixth District. A Democrat has held the seat ever since. In November 2013, three Maryland voters filed this lawsuit. They alleged that the 2011 Plan violated the First Amendment, the Elections Clause, and Article I, § 2, of the Constitution. After considerable procedural skirmishing and litigation over preliminary relief, the District Court entered summary judgment for It concluded that the plaintiffs’ claims were justiciable, and that the Plan violated the First Amendment by diminishing their “ability to elect their candidate of choice” because of their party affiliation and voting history, and by burdening their associational rights. On the latter point, the court relied upon findings that Republicans in the Sixth District “were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting in an atmosphere of general confusion and apathy.”

Article III of the Constitution limits federal courts to deciding “Cases” and “Controversies.” We have understood that limitation to mean that federal courts can address only questions “historically viewed as capable of resolution through the judicial

process.” *Flast v. Cohen*, (1968). In these cases we are asked to decide an important question of constitutional law. “But before we do so, we must find that the question is presented in a ‘case’ or ‘controversy’ that is, in James Madison’s words, ‘of a Judiciary Nature.’ ” [Citation omitted]. Chief Justice Marshall famously wrote that it is “the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, (1803). Sometimes, however, “the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights.” *Vieth v. Jubelirer*, (2004) (plurality opinion). In such a case the claim is said to present a “political question” and to be nonjusticiable—outside the courts’ competence and therefore beyond the courts’ jurisdiction. *Baker v. Carr*, 3 (1962). Among the political question cases the Court has identified are those that lack “judicially discoverable and manageable standards for resolving [them].” *Ibid.* ...

The Framers addressed the election of Representatives to Congress in the Elections Clause. Art. I, § 4, cl. 1. That provision assigns to state legislatures the power to prescribe the “Times, Places and Manner of holding Elections” for Members of Congress, while giving Congress the power to “make or alter” any such regulations. Whether to give that supervisory authority to the National Government was debated at the Constitutional Convention. When those opposed to such congressional oversight moved to strike the relevant language, Madison came to its defense: “[T]he State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices.... Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed.” 2 Records of the Federal Convention of 1787, at 240–241.

During the subsequent fight for ratification, the provision remained a subject of debate. Antifederalists predicted that Congress’s power under the Elections Clause would allow Congress to make itself “omnipotent,” setting the “time” of elections as never or the “place” in difficult to reach corners of the State. Federalists responded that, among other justifications, the revisionary power was necessary to counter state legislatures set on undermining fair representation, including through malapportionment. M. Klarman, *The Framers’ Coup: The Making of the United States Constitution* 340–342 (2016). The Federalists were, for example, concerned that newly developing population centers would be deprived of their proper electoral weight, as some cities had been in Great Britain. See 6 *The Documentary History of the Ratification of the Constitution: Massachusetts* 1278–1279 (J. Kaminski & G. Saladino eds. 2000).

Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. See *Baker*. We do not agree. In two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State’s drawing of congressional districts. See *Wesberry v. Sanders*, (1964); *Shaw v. Reno*, 509 U.S. 630, (1993) (*Shaw I*). But the history is not irrelevant. The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress. ...

In the leading case of *Baker v. Carr*, voters in Tennessee complained that the State's districting plan for state representatives "debase[d]" their votes, because the plan was predicated on a 60-year-old census that no longer reflected the distribution of population in the State. The plaintiffs argued that votes of people in overpopulated districts held less value than those of people in less-populated districts, and that this inequality violated the Equal Protection Clause of the Fourteenth Amendment. The District Court dismissed the action on the ground that the claim was not justiciable, relying on this Court's precedents. This Court reversed. It identified various considerations relevant to determining whether a claim is a nonjusticiable political question, including whether there is "a lack of judicially discoverable and manageable standards for resolving it." The Court concluded that the claim of population inequality among districts did not fall into that category, because such a claim could be decided under basic equal protection principles. In *Wesberry v. Sanders*, the Court extended its ruling to malapportionment of congressional districts, holding that Article I, § 2, required that "one man's vote in a congressional election is to be worth as much as another's." Another line of challenges to districting plans has focused on race. Laws that explicitly discriminate on the basis of race, as well as those that are race neutral on their face but are unexplainable on grounds other than race, are of course presumptively invalid. The Court applied those principles to electoral boundaries in *Gomillion v. Lightfoot*, concluding that a challenge to an "uncouth twenty-eight sided" municipal boundary line that excluded black voters from city elections stated a constitutional claim. In *Wright v. Rockefeller*, (1964), the Court extended the reasoning of *Gomillion* to congressional districting. See *Shaw I*.

Partisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, "a jurisdiction may engage in constitutional political gerrymandering." *Hunt v. Cromartie*, (1999) (citing *Bush v. Vera*, (1996); *Shaw v. Hunt*, (1996) (*Shaw II*); *Miller v. Johnson*, (1995)). See also *Gaffney v. Cummings*, (1973) (recognizing that "[p]olitics and political considerations are inseparable from districting and apportionment").

To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is "determining when political gerrymandering has gone too far." *Vieth*, 541 U.S. at 296, 124 S.Ct. 1769 (plurality opinion). . . .

Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature. But such a claim is based on a "norm that does not exist" in our electoral system—"statewide elections for representatives along party lines." *Bandemer*, 478 U.S. at 159, (opinion of O'Connor, J.). Partisan gerrymandering claims invariably sound in a desire for proportional representation. As Justice O'Connor put it, such claims are based on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." *Ibid*. "Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district

lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.” *Id.*, at 130, 106 S.Ct. 2797 (plurality opinion). See *Mobile v. Bolden*, (1980) (plurality opinion) (“The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization.”).

Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties deserve—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so. As Justice Scalia put it for the plurality in *Vieth*: “‘Fairness’ does not seem to us a judicially manageable standard.... Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts’ intrusion into a process that is the very foundation of democratic decisionmaking.” The initial difficulty in settling on a “clear, manageable and politically neutral” test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of “unfairness” in any winner-take-all system. Fairness may mean a greater number of competitive districts. Such a claim seeks to undo packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. As Justice White has pointed out, “[i]f all or most of the districts are competitive ... even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature.” *Bandemer*, 478 U.S. at 130 (plurality opinion). On the other hand, perhaps the ultimate objective of a “fairer” share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its “appropriate” share of “safe” seats. See *id.*, at 130–131 (“To draw district lines to maximize the representation of each major party would require creating as many safe seats for each party as the demographic and predicted political characteristics of the State would permit.”). Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party.

Or perhaps fairness should be measured by adherence to “traditional” districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents. [Citations omitted]. But protecting incumbents, for example, enshrines a particular partisan distribution. And the “natural political geography” of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts. As Justice Kennedy has explained, traditional criteria such as compactness and contiguity “cannot promise political neutrality when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not.” *Vieth*, 541 U.S. at 308–309 (opinion concurring in judgment). (“[P]acking and cracking, whether intentional or no, are quite consistent with adherence to compactness and respect for political subdivision lines”).

Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is “fair” in this context would be an “unmoored determination” of the sort characteristic of a political question beyond the competence of the federal courts. *Zivotofsky v. Clinton*, (2012). And it is only after determining how to define fairness that you can even begin to answer the determinative question: “How much is too much?” At what point does permissible partisanship become unconstitutional? If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria? Should a court “reverse gerrymander” other parts of a State to counteract “natural” gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow. . . .

Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly. It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support. More fundamentally, “vote dilution” in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents. That requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters. As we stated unanimously in *Gill*, “this Court is not responsible for vindicating generalized partisan preferences. The Court’s constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.” Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. “[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country’s long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion.” [Citation omitted]. Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship. Appellees and the dissent propose a number of “tests” for evaluating partisan gerrymandering claims, but none meets the need for a limited and precise standard that is judicially discernible and manageable. And none provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties.

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

For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities. And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters' preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.

And checking them is not beyond the courts. The majority's abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims. Those standards satisfy the majority's own benchmarks. They do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process. But yes, the standards used here do allow—as well they should—judicial intervention in the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms. In other words, they allow courts to undo partisan gerrymanders of the kind we face today from North Carolina and Maryland. In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong.

Maybe the majority errs in these cases because it pays so little attention to the constitutional harms at their core. After dutifully reciting each case's facts, the majority leaves them forever behind, instead immersing itself in everything that could conceivably go amiss if courts became involved. So it is necessary to fill in the gaps. To recount exactly what politicians in North Carolina and Maryland did to entrench their parties in political office, whatever the electorate might think. And to elaborate on the constitutional injury those politicians wreaked, to our democratic system and to individuals' rights. All that will help in considering whether courts confronting partisan gerrymandering claims are really so hamstrung—so unable to carry out their constitutional duties—as the majority thinks.

The plaintiffs here challenge two congressional districting plans—one adopted by Republicans in North Carolina and the other by Democrats in Maryland—as unconstitutional partisan gerrymanders. As I relate what happened in those two States, ask yourself: Is this how American democracy is supposed to work? Start with North Carolina. After the 2010 census, the North Carolina General Assembly, with Republican majorities in both its House and its Senate, enacted a new congressional districting plan. That plan governed the two next national elections. In 2012, Republican candidates won 9 of the State's 13 seats in the U.S. House of Representatives, although they received only 49% of the statewide vote. In 2014, Republican candidates increased their total to 10 of the 13 seats, this time based on 55% of the vote. Soon afterward, a District Court struck down two districts in the plan as unconstitutional racial gerrymanders. Events in Maryland make

for a similarly grisly tale. For 50 years, Maryland's 8-person congressional delegation typically consisted of 2 or 3 Republicans and 5 or 6 Democrats. After the 2000 districting, for example, the First and Sixth Districts reliably elected Republicans, and the other districts as reliably elected Democrats. See R. Cohen & J. Barnes, *Almanac of American Politics* 2016, p. 836 (2015). But in the 2010 districting cycle, the State's Democratic leaders, who controlled the governorship and both houses of the General Assembly, decided to press their advantage.

Maryland's Democrats proved no less successful than North Carolina's Republicans in devising a voter-proof map. In the four elections that followed (from 2012 through 2018), Democrats have never received more than 65% of the statewide congressional vote. Yet in each of those elections, Democrats have won (you guessed it) 7 of 8 House seats—including the once-reliably-Republican Sixth District.

Now back to the question I asked before: Is that how American democracy is supposed to work? I have yet to meet the person who thinks so.

"Governments," the Declaration of Independence states, "deriv[e] their just Powers from the Consent of the Governed." The Constitution begins: "We the People of the United States." The Gettysburg Address (almost) ends: "[G]overnment of the people, by the people, for the people." If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign. The "power," James Madison wrote, "is in the people over the Government, and not in the Government over the people." 4 *Annals of Cong.* 934 (1794). Free and fair and periodic elections are the key to that vision. The people get to choose their representatives. And then they get to decide, at regular intervals, whether to keep them. Madison again: "[R]epublican liberty" demands "not only, that all power should be derived from the people; but that those entrusted with it should be kept in dependence on the people." 2 *The Federalist No. 37*, p. 4 (J. & A. McLean eds. 1788). Members of the House of Representatives, in particular, are supposed to "recollect[] [that] dependence" every day. *Id.*, No. 57, at 155. To retain an "intimate sympathy with the people," they must be "compelled to anticipate the moment" when their "exercise of [power] is to be reviewed." *Id.*, Nos. 52, 57, at 124, 155. Election day—next year, and two years later, and two years after that—is what links the people to their representatives, and gives the people their sovereign power. That day is the foundation of democratic governance. And partisan gerrymandering can make it meaningless. At its most extreme—as in North Carolina and Maryland—the practice amounts to "rigging elections." *Vieth v. Jubelirer*, (2004) (Kennedy, J., concurring in judgment) (internal quotation marks omitted). By drawing districts to maximize the power of some voters and minimize the power of others, a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer. Just ask the people of North Carolina and Maryland. The "core principle of republican government," this Court has recognized, is "that the voters should choose their representatives, not the other way around." *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. —, —, (2015). Partisan gerrymandering turns it the other way around. By that mechanism, politicians can cherry-pick voters to ensure their reelection. And the power becomes, as Madison put it, "in the Government over the people." 4 *Annals of Cong.* 934.

The majority disputes none of this. I think it important to underscore that fact: The majority disputes none of what I have said (or will say) about how gerrymanders undermine

democracy. Indeed, the majority concedes (really, how could it not?) that gerrymandering is “incompatible with democratic principles.” Ante, at 2506. And therefore what? That recognition would seem to demand a response. The majority offers two ideas that might qualify as such. One is that the political process can deal with the problem—a proposition so dubious on its face that I feel secure in delaying my answer for some time. See ante, at 2524 – 2525. The other is that political gerrymanders have always been with us. See ante, at 2494 – 2495, 2503. To its credit, the majority does not frame that point as an originalist constitutional argument. After all (as the majority rightly notes), racial and residential gerrymanders were also once with us, but the Court has done something about that fact. See ante, at 2495 – 2496.¹ The majority’s idea instead seems to be that if we have lived with partisan gerrymanders so long, we will survive.

That complacency has no cause. Yes, partisan gerrymandering goes back to the Republic’s earliest days. (As does vociferous opposition to it.) But big data and modern technology—of just the kind that the mapmakers in North Carolina and Maryland used—make today’s gerrymandering altogether different from the crude linedrawing of the past. Old-time efforts, based on little more than guesses, sometimes led to so-called dummymanders—gerrymanders that went spectacularly wrong. Not likely in today’s world. Mapmakers now have access to more granular data about party preference and voting behavior than ever before. County-level voting data has given way to precinct-level or city-block-level data; and increasingly, mapmakers avail themselves of data sets providing wide-ranging information about even individual voters. See Brief for Political Science Professors as Amici Curiae 20–22. Just as important, advancements in computing technology have enabled mapmakers to put that information to use with unprecedented efficiency and precision. See *id.* While bygone mapmakers may have drafted three or four alternative districting plans, today’s mapmakers can generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum advantage (usually while still meeting traditional districting requirements). The effect is to make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides. These are not your grandfather’s—let alone the Framers’—gerrymanders. . . .

Partisan gerrymandering operates through vote dilution—the devaluation of one citizen’s vote as compared to others. A mapmaker draws district lines to “pack” and “crack” voters likely to support the disfavored party. He packs supermajorities of those voters into a relatively few districts, in numbers far greater than needed for their preferred candidates to prevail. Then he cracks the rest across many more districts, spreading them so thin that their candidates will not be able to win. Whether the person is packed or cracked, his vote carries less weight—has less consequence—than it would under a neutrally drawn (non-partisan) map. In short, the mapmaker has made some votes count for less, because they are likely to go for the other party.

That practice implicates the Fourteenth Amendment’s Equal Protection Clause. The Fourteenth Amendment, we long ago recognized, “guarantees the opportunity for equal participation by all voters in the election” of legislators. *Reynolds v. Sims*, (1964). And that opportunity “can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Id.* Based on that principle, this Court in its one-person-one-vote decisions prohibited creating

districts with significantly different populations. A State could not, we explained, thus “dilut[e] the weight of votes because of place of residence.” *Id.* The constitutional injury in a partisan gerrymandering case is much the same, except that the dilution is based on party affiliation. In such a case, too, the districters have set out to reduce the weight of certain citizens’ votes, and thereby deprive them of their capacity to “full[y] and effective[ly] participat[e] in the political process[.]” *Id.* As Justice Kennedy (in a controlling opinion) once hypothesized: If districters declared that they were drawing a map “so as most to burden [the votes of] Party X’s” supporters, it would violate the Equal Protection Clause. *Vieth*, 541 U.S. at 312. For (in the language of the one-person-one-vote decisions) it would infringe those voters’ rights to “equal [electoral] participation.” *Reynolds*²; see *Gray v. Sanders*, (1963) (“The concept of ‘we the people’ under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications”).

And partisan gerrymandering implicates the First Amendment too. That Amendment gives its greatest protection to political beliefs, speech, and association. Yet partisan gerrymanders subject certain voters to “disfavored treatment”—again, counting their votes for less—precisely because of “their voting history [and] their expression of political views.” *Vieth*. And added to that strictly personal harm is an associational one. Representative democracy is “unimaginable without the ability of citizens to band together in [support of] candidates who espouse their political views.” *California Democratic Party v. Jones* (2000). By diluting the votes of certain citizens, the State frustrates their efforts to translate those affiliations into political effectiveness. See *Gill*, 585 U.S., at — (KAGAN, J., concurring) (“Members of the disfavored party[,] deprived of their natural political strength[,] may face difficulties fundraising, registering voters, [and] eventually accomplishing their policy objectives”). In both those ways, partisan gerrymanders of the kind we confront here undermine the protections of “democracy embodied in the First Amendment.” *Elrod v. Burns* (1976). Though different Justices have described the constitutional harm in diverse ways, nearly all have agreed on this much: Extreme partisan gerrymandering (as happened in North Carolina and Maryland) violates the Constitution. See, e.g., *Vieth*, 541 U.S. at 293, 124 S.Ct. 1769 (plurality opinion) (“[A]n excessive injection of politics [in districting] is unlawful” (emphasis deleted)); *id.*, at 316, 124 S.Ct. 1769 (opinion of Kennedy, J.) (“[P]artisan gerrymandering that disfavors one party is [im]permissible [citations omitted]. Once again, the majority never disagrees; it appears to accept the “principle that each person must have an equal say in the election of representatives.” *Ante*, at 2501. And indeed, without this settled and shared understanding that cases like these inflict constitutional injury, the question of whether there are judicially manageable standards for resolving them would never come up.

So the only way to understand the majority’s opinion is as follows: In the face of grievous harm to democratic governance and flagrant infringements on individuals’ rights—in the face of escalating partisan manipulation whose compatibility with this Nation’s values and law no one defends—the majority declines to provide any remedy. For the first time in this Nation’s history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply.

The majority gives two reasons for thinking that the adjudication of partisan gerrymandering claims is beyond judicial capabilities. First and foremost, the majority says, it cannot find a neutral baseline—one not based on contestable notions of political fairness—from which to measure injury. According to the majority, “[p]artisan gerrymandering claims invariably sound in a desire for proportional representation.” But the Constitution does not mandate proportional representation. So, the majority contends, resolving those claims “inevitably” would require courts to decide what is “fair” in the context of districting. They would have “to make their own political judgment about how much representation particular political parties deserve” and “to rearrange the challenged districts to achieve that end.” (emphasis in original). And second, the majority argues that even after establishing a baseline, a court would have no way to answer “the determinative question: ‘How much is too much?’”. No “discernible and manageable” standard is available, the majority claims—and so courts could willy-nilly become embroiled in fixing every districting plan.

I’ll give the majority this one—and important—thing: It identifies some dangers everyone should want to avoid. Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other. And judges should not be striking down maps left, right, and center, on the view that every smidgen of politics is a smidgen too much. Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases.

But in throwing up its hands, the majority misses something under its nose: What it says can’t be done has been done. Over the past several years, federal courts across the country—including, but not exclusively, in the decisions below—have largely converged on a standard for adjudicating partisan gerrymandering claims (striking down both Democratic and Republican districting plans in the process). And that standard does what the majority says is impossible. The standard does not use any judge-made conception of electoral fairness—either proportional representation or any other; instead, it takes as its baseline a State’s own criteria of fairness, apart from partisan gain. And by requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard invalidates the most extreme, but only the most extreme, partisan gerrymanders.

Below, I first explain the framework courts have developed [...]. Start with the standard the lower courts used. The majority disaggregates the opinions below, distinguishing the one from the other and then chopping up each into “a number of ‘tests.’” But in doing so, it fails to convey the decisions’ most significant—and common—features. Both courts focused on the harm of vote dilution, though the North Carolina court mostly grounded its analysis in the Fourteenth Amendment and the Maryland court in the First. And both courts (like others around the country) used basically the same three-part test to decide whether the plaintiffs had made out a vote dilution claim. As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials’ “predominant purpose” in drawing a district’s lines was to “entrench [their party] in power” by diluting the votes of citizens favoring its rival. Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by “substantially” diluting their votes. And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its

map. If you are a lawyer, you know that this test looks utterly ordinary. It is the sort of thing courts work with every day. ...

Of all times to abandon the Court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.

Review Questions and Explanations: *Rucho v. Common Cause*

1. Chief Justice Roberts distinguishes one-person-one-vote and racial gerrymandering cases (which are justiciable) from partisan gerrymandering cases (which are not). What does he ground this distinction in? Are you convinced?

2. The majority states that “to hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers’ decision to entrust districting to political entities.” Consider whether this statement proves too much: *all* lawmaking is left to legislative bodies. Does this mean it is constitutional for lawmakers to enact legislation supported by *no* rational basis other than a desire to harm their political opponents? If not, how is partisan gerrymandering different?

3. Justice Kagan’s dissent argues that the Court does not need to have a theory of political fairness in order to determine when the use of partisanship in districting has gone “too far”. What is her argument?

4. The dissent cites Justice Kennedy’s hypothetical asking whether it would violate the Equal Protection Clause for districters to declare (or even write into law) that they were drawing a map “so as most to burden [the votes of] Party X’s” supporters. Under the majority opinion, would this scenario present a Political Question?

5. Is extreme partisan gerrymandering unconstitutional?

CHAPTER 8: EQUAL PROTECTION

C. Strict Scrutiny and Race Discrimination

* * *

2. Affirmative Action

[Insert at p. 858 after “Recap: Affirmative Action”]

For insertion in Chapter 8 after **Brentwood Academy**

Guided Reading Questions: *Manhattan Community Access Corp. v. Halleck*

1. Justice Kavanaugh (writing for the majority) and Justice Sotomayor (writing in dissent) view this case in fundamentally different ways. When reading the opinions, consider what each justice considers the key facts driving the constitutional analysis.

2. What are the practical consequences of the majority opinion? What would they be if the dissenters had prevailed?

Manhattan Community Access Corp. v. Halleck

139 S. Ct. 1921 (2019)

Majority: *Kavanaugh*, Roberts C.J., Thomas, Alito, Gorsuch

Dissent: *Sotomayor*, Ginsburg, Breyer, Kagan

JUSTICE KAVANAUGH delivered the opinion of the Court.

The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors. To draw the line between governmental and private, this Court applies what is known as the state-action doctrine. Under that doctrine, as relevant here, a private entity may be considered a state actor when it exercises a function “traditionally exclusively reserved to the State.” *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974). This state-action case concerns the public access channels on Time Warner’s cable system in Manhattan. Public access channels are available for private citizens to use. The public access channels on Time Warner’s cable system in Manhattan are operated by a private nonprofit corporation known as MNN. The question here is whether MNN—even though it is a private entity—nonetheless is a state actor when it operates the public access channels. In other words, is operation of public access channels on a cable system a traditional, exclusive public function? If so, then the First Amendment would restrict MNN’s exercise of editorial discretion over the speech and speakers on the public access

channels. Under the state-action doctrine as it has been articulated and applied by our precedents, we conclude that operation of public access channels on a cable system is not a traditional, exclusive public function. Moreover, a private entity such as MNN who opens its property for speech by others is not transformed by that fact alone into a state actor. In operating the public access channels, MNN is a private actor, not a state actor, and MNN therefore is not subject to First Amendment constraints on its editorial discretion. We reverse in relevant part the judgment of the Second Circuit, and we remand the case for further proceedings consistent with this opinion.

Since the 1970s, public access channels have been a regular feature on cable television systems throughout the United States. In the 1970s, Federal Communications Commission regulations required certain cable operators to set aside channels on their cable systems for public access. In 1979, however, this Court ruled that the FCC lacked statutory authority to impose that mandate. A few years later, Congress passed and President Reagan signed the Cable Communications Policy Act of 1984. The Act authorized state and local governments to require cable operators to set aside channels on their cable systems for public access. The New York State Public Service Commission regulates cable franchising in New York State and requires cable operators in the State to set aside channels on their cable systems for public access. State law requires that use of the public access channels be free of charge and first-come, first-served. Under state law, the cable operator operates the public access channels unless the local government in the area chooses to itself operate the channels or designates a private entity to operate the channels. Time Warner (now known as Charter) operates a cable system in Manhattan. Under state law, Time Warner must set aside some channels on its cable system for public access. New York City (the City) has designated a private nonprofit corporation named Manhattan Neighborhood Network, commonly referred to as MNN, to operate Time Warner's public access channels in Manhattan. This case involves a complaint against MNN regarding its management of the public access channels. We granted certiorari to resolve disagreement among the Courts of Appeals on the question whether private operators of public access cable channels are state actors subject to the First Amendment.

Here, the producers claim that MNN, a private entity, restricted their access to MNN's public access channels because of the content of the producers' film. The producers have advanced a First Amendment claim against MNN. The threshold problem with that First Amendment claim is a fundamental one: MNN is a private entity. Relying on this Court's state-action precedents, the producers assert that MNN is nonetheless a state actor subject to First Amendment constraints on its editorial discretion. Under this Court's cases, a private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function, see, e.g., *Jackson*; (ii) when the government compels the private entity to take a particular action, see, e.g., *Blum v. Yaretsky*, (1982); or (iii) when the government acts jointly with the private entity, see, e.g., *Lugar v. Edmondson Oil Co.* (1982). The producers' primary argument here falls into the first category: The producers contend that MNN exercises a traditional, exclusive public function when it operates the public access channels on Time Warner's cable system in Manhattan. We disagree.

Under the Court's cases, a private entity may qualify as a state actor when it exercises “powers traditionally exclusively reserved to the State.” *Jackson*. It is not enough that the

federal, state, or local government exercised the function in the past, or still does. And it is not enough that the function serves the public good or the public interest in some way. Rather, to qualify as a traditional, exclusive public function within the meaning of our state-action precedents, the government must have traditionally and exclusively performed the function. [Citations omitted]. The Court has stressed that “very few” functions fall into that category. Under the Court's cases, those functions include, for example, running elections and operating a company town. See *Terry v. Adams*, (1953) (elections); *Marsh v. Alabama*, (1946) (company town); *Smith v. Allwright*, (1944) (elections); *Nixon v. Condon*, (1932) (elections). The Court has ruled that a variety of functions do not fall into that category, including, for example: running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, and supplying electricity. [Citations omitted].

The relevant function in this case is operation of public access channels on a cable system. That function has not traditionally and exclusively been performed by government. Since the 1970s, when public access channels became a regular feature on cable systems, a variety of private and public actors have operated public access channels, including: private cable operators; private nonprofit organizations; municipalities; and other public and private community organizations such as churches, schools, and libraries. The history of public access channels in Manhattan further illustrates the point. In 1971, public access channels first started operating in Manhattan. [Citation omitted]. Those early Manhattan public access channels were operated in large part by private cable operators, with some help from private nonprofit organizations. [Citation omitted]. Those private cable operators continued to operate the public access channels until the early 1990s, when MNN (also a private entity) began to operate the public access channels. ... In short, operating public access channels on a cable system is not a traditional, exclusive public function within the meaning of this Court's cases.

In *Jackson v. Metropolitan Edison Co.*, the leading case on point, the Court stated that the “fact that a business is subject to state regulation does not by itself convert its action into that of the State.” In that case, the Court held that “a heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory,” was not a state actor. The Court explained that the “mere existence” of a “regulatory scheme”—even if “extensive and detailed”—did not render the utility a state actor. Nor did it matter whether the State had authorized the utility to provide electric service to the community, or whether the utility was the only entity providing electric service to much of that community.

This case closely parallels *Jackson*. Like the electric utility in *Jackson*, MNN is “a heavily regulated, privately owned” entity. As in *Jackson*, the regulations do not transform the regulated private entity into a state actor. As the Court's cases have explained, the “being heavily regulated makes you a state actor” theory of state action is entirely circular and would significantly endanger individual liberty and private enterprise. The theory would be especially problematic in the speech context, because it could eviscerate certain private entities' rights to exercise editorial control over speech and speakers on their properties or platforms. Not surprisingly, as Justice THOMAS has pointed out, this Court has “never even hinted that regulatory control, and particularly direct regulatory control

over a private entity's First Amendment speech rights,” could justify subjecting the regulated private entity to the constraints of the First Amendment. *Denver Area*, 518 U.S. at 829, 116 S.Ct. 2374 (opinion concurring in judgment in part and dissenting in part).

In sum, we conclude that MNN is not subject to First Amendment constraints on how it exercises its editorial discretion with respect to the public access channels. To be sure, MNN is subject to state-law constraints on its editorial discretion (assuming those state laws do not violate a federal statute or the Constitution). If MNN violates those state laws, or violates any applicable contracts, MNN could perhaps face state-law sanctions or liability of some kind. We of course take no position on any potential state-law questions. We simply conclude that MNN, as a private actor, is not subject to First Amendment constraints on how it exercises editorial discretion over the speech and speakers on its public access channels.

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

The Court tells a very reasonable story about a case that is not before us. I write to address the one that is. This is a case about an organization appointed by the government to administer a constitutional public forum. (It is not, as the Court suggests, about a private property owner that simply opened up its property to others.) New York City (the City) secured a property interest in public-access television channels when it granted a cable franchise to a cable company. State regulations require those public-access channels to be made open to the public on terms that render them a public forum. The City contracted out the administration of that forum to a private organization, petitioner Manhattan Community Access Corporation (MNN). By accepting that agency relationship, MNN stepped into the City's shoes and thus qualifies as a state actor, subject to the First Amendment like any other.

A cable-television franchise is, essentially, a license to create a system for distributing cable TV in a certain area. It is a valuable right, usually conferred on a private company by a local government. A private company cannot enter a local cable market without one. Cable companies transmit content through wires that stretch “between a transmission facility and the television sets of individual subscribers.” [Citation omitted]. Creating this network of wires is a disruptive undertaking that “entails the use of public rights-of-way and easements.” *Id.* New York State authorizes municipalities to grant cable franchises to cable companies of a certain size only if those companies agree to set aside at least one public access channel. New York then requires that those public-access channels be open to all comers on “a first-come, first-served, nondiscriminatory basis.” Likewise, the State prohibits both cable franchisees and local governments from “exercis[ing] any editorial control” over the channels, aside from regulating obscenity and other unprotected content.

Years ago, New York City (no longer a party to this suit) and Time Warner Entertainment Company (never a party to this suit) entered into a cable-franchise agreement. Time Warner received a cable franchise; the City received public-access channels. The agreement also provided that the public-access channels would be operated by an independent, nonprofit corporation chosen by the Manhattan borough president. But the City, as the practice of other New York municipalities confirms, could have instead

chosen to run the channels itself.

MNN is the independent nonprofit that the borough president appointed to run the channels; indeed, MNN appears to have been incorporated in 1991 for that precise purpose, with seven initial board members selected by the borough president (though only two thus selected today). The City arranged for MNN to receive startup capital from Time Warner and to be funded through franchise fees from Time Warner and other Manhattan cable franchisees. As the borough president announced upon MNN's formation in 1991, MNN's "central charge is to administer and manage all the public access channels of the cable television systems in Manhattan." App. to Brief for NYCLA as Amicus Curiae 1.

As relevant here, respondents DeeDee Halleck and Jesus Papoieto Melendez sued MNN in U.S. District Court for the Southern District of New York under 42 U.S.C. § 1983. They alleged that the public-access channels, "[r]equired by state regulation and [the] local franchise agreements," are "a designated public forum of unlimited character"; that the City had "delegated control of that public forum to MNN"; and that MNN had, in turn, engaged in viewpoint discrimination in violation of respondents' First Amendment rights. App. 39.

The District Court dismissed respondents' First Amendment claim against MNN. The U.S. Court of Appeals for the Second Circuit reversed that dismissal, concluding that the public-access channels "are public forums and that [MNN's] employees were sufficiently alleged to be state actors taking action barred by the First Amendment." Because the case before us arises from a motion to dismiss, respondents' factual allegations must be accepted as true.

I would affirm the judgment below. The channels are clearly a public forum: The City has a property interest in them, and New York regulations require that access to those channels be kept open to all. And because the City (1) had a duty to provide that public forum once it granted a cable franchise and (2) had a duty to abide by the First Amendment once it provided that forum, those obligations did not evaporate when the City delegated the administration of that forum to a private entity. Just as the City would have been subject to the First Amendment had it chosen to run the forum itself, MNN assumed the same responsibility when it accepted the delegation.

Review Questions and Explanations: *Manhattan Community Access Corp.*

1. Is Justice Kavanaugh's opinion constituent with Jackson? Is Justice Sotomayor's?
2. Most of the "public function" cases cited by Justice Kavanaugh involve the running of elections. Is there a reason this category of cases may be treated differently by the Court?
3. One of the public function cases, however, is not an election law case. *Marsh v. Alabama* involved a "company town." "Company towns" were towns essentially constructed by private companies when they needed workers to relocate to remote areas. They included all the indicia of "regular" towns – lodging, grocery stores, entertainment facilities, sometimes even schools – except everything in them was owned by the company. *Marsh* arose when a company town refused to allow the distribution within the town (which

consisted entirely of its privately owned property) of political literature with which it disagreed. Applying the public functions test, the Supreme Court held the company was a state actor and was subject to the First Amendment. Is the company in Marsh more like the “private” political parties in the election law cases, or the cable company in the case presented here?

CHAPTER 9: FREEDOM OF SPEECH

C. Content-Based and Content-Neutral Regulation

[For inclusion at p. 1023, after *City of Ladue* case.]

Guided Reading Questions: *Reed v. Town of Gilbert*

1. The regulation at issue purports to be a “time, place, or manner” regulation of signage. Does the Court treat it as such? Why or why not?
2. What level of scrutiny does the Court apply to the sign ordinance, and why?
3. The Court insists that “Our decision today will not prevent governments from enacting effective sign laws.” Is that an accurate assessment?

Reed v. Town of Gilbert

135 S. Ct. 2218 (2015)

Majority: *Thomas*, Roberts (CJ), Scalia, Kennedy, Alito, Sotomayor

Concurrence: *Alito*, Kennedy, Sotomayor

Concurrence in the judgment: *Breyer*, *Kagan*, Ginsburg

JUSTICE THOMAS delivered the opinion of the Court.

The town of Gilbert, Arizona (or Town), has adopted a comprehensive code governing the manner in which people may display outdoor signs. [<http://www.gilbertaz.gov/departments/development-service/planning-development/land-development-code>] The Sign Code identifies various categories of signs based on the type of information they convey, then subjects each category to different restrictions. One of the categories is “Temporary Directional Signs Relating to a Qualifying Event,” loosely defined as signs directing the public to a meeting of a nonprofit group. §4.402(P). The Code imposes more stringent restrictions on these signs than it does on signs conveying other messages. We hold that these provisions are content-based regulations of speech that cannot survive strict scrutiny.

I

The Sign Code prohibits the display of outdoor signs anywhere within the Town without a permit, but it then exempts 23 categories of signs from that requirement. These exemptions include everything from bazaar signs to flying banners. Three categories of exempt signs are particularly relevant here.

The first is “Ideological Sign[s].” This category includes any “sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional

Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency.” Of the three categories discussed here, the Code treats ideological signs most favorably, allowing them to be up to 20 square feet in area and to be placed in all “zoning districts” without time limits. §4.402(J).

The second category is “Political Sign[s].” This includes any “temporary sign designed to influence the outcome of an election called by a public body.”

FN 1. A “Temporary Sign” is a “sign not permanently attached to the ground, a wall or a building, and not designed or intended for permanent display.”

The Code treats these signs less favorably than ideological signs. The Code allows the placement of political signs up to 16 square feet on residential property and up to 32 square feet on nonresidential property, undeveloped municipal property, and [publicly owned] “rights-of-way.” §4.402(I). These signs may be displayed up to 60 days before a primary election and up to 15 days following a general election.

The third category is “Temporary Directional Signs Relating to a Qualifying Event.” This includes any “Temporary Sign intended to direct pedestrians, motorists, and other passersby to a ‘qualifying event.’” A “qualifying event” is defined as any “assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.” The Code treats temporary directional signs even less favorably than political signs. Temporary directional signs may be no larger than six square feet. §4.402(P). They may be placed on private property or on a public right-of-way, but no more than four signs may be placed on a single property at any time. And, they may be displayed no more than 12 hours before the “qualifying event” and no more than 1 hour afterward.

Petitioners Good News Community Church (Church) and its pastor, Clyde Reed, wish to advertise the time and location of their Sunday church services. The Church is a small, cash-strapped entity that owns no building, so it holds its services at elementary schools or other locations in or near the Town. In order to inform the public about its services, which are held in a variety of different locations, the Church began placing 15 to 20 temporary signs around the Town, frequently in the public right-of-way abutting the street. The signs typically displayed the Church’s name, along with the time and location of the upcoming service. Church members would post the signs early in the day on Saturday and then remove them around midday on Sunday. ...

This practice caught the attention of the Town’s Sign Code compliance manager, who twice cited the Church for violating the Code. The first citation noted that the Church exceeded the time limits for displaying its temporary directional signs. The second citation referred to the same problem, along with the Church’s failure to include the date of the event on the signs. Town officials even confiscated one of the Church’s signs, which Reed had to retrieve from the municipal offices.... The Town’s Code compliance manager informed the Church that there would be “no leniency under the Code” and promised to punish any future violations.

[The District Court and Ninth Circuit denied the Church’s complaint for injunctive relief, holding that the ordinance met the Supreme Court’s test for content-neutral “time, place, or manner” regulation.]

II

[Under the First Amendment,] [c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase “content based” requires a court to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.... [Additionally] laws that cannot be “justified without reference to the content of the regulated speech,” or that were adopted by the government “because of disagreement with the message [the speech] conveys,” *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989), ... are content based on their face....

The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. ... [T]he Church’s signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government’s justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

C

The Court of Appeals first determined that the Sign Code was content neutral because the Town “did not adopt its regulation of speech [based on] disagree[ment] with the message conveyed,” and its justifications for regulating temporary directional signs were “unrelated to the content of the sign.” ... But [a] law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of “animus toward the ideas contained” in the regulated speech. ... [A]n innocuous justification cannot transform a facially content-based law into one that is content neutral....

Ward had nothing to say about facially content-based restrictions because it involved a facially content-*neutral* ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city. In that context, we looked to governmental motive.... But *Ward*’s framework “applies only if a statute is content neutral.” Its rules thus operate “to protect speech,” not “to restrict it.” ...

Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech.... “The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.” ... [O]ne could easily imagine a Sign Code compliance manager who disliked the Church’s substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services. Accordingly, we have repeatedly “rejected the argument that ‘discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.’”

The Court of Appeals next reasoned that the Sign Code was content neutral because it “does not mention any idea or viewpoint, let alone single one out for differential treatment.” ... But it is well established that “[t]he First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.”

Finally, the Court of Appeals characterized the Sign Code’s distinctions as turning on “the content-neutral elements of who is speaking through the sign and whether and when an event is occurring.” That analysis is mistaken Because “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content,” *Citizens United v. Federal Election Comm’n*, 558 U. S. 310, 340 (2010), we have insisted that “laws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference.” Thus, a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based. Likewise, a content-based law that restricted the political speech of all corporations would not become content neutral just because it singled out corporations as a class of speakers. Characterizing a distinction as speaker based is only the beginning—not the end—of the inquiry.

Nor do the Sign Code’s distinctions hinge on “whether and when an event is occurring.” The Code does not permit citizens to post signs on any topic whatsoever within a set period leading up to an election, for example. Instead, come election time, it requires Town officials to determine whether a sign is “designed to influence the outcome of an election” (and thus “political”) or merely “communicating a message or ideas for noncommercial purposes” (and thus “ideological”). That obvious content-based inquiry does not evade strict scrutiny review simply because an event (*i.e.*, an election) is involved.

And, just as with speaker-based laws, the fact that a distinction is event based does not render it content neutral. ... A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea. Here, the Code singles out signs bearing a particular message: the time and location of a specific event. ...

III

Because the Town’s Sign Code imposes content-based restrictions on speech, it is the Town’s burden to demonstrate that the Code’s differentiation between temporary directional signs and other types of signs, such as political signs and ideological signs, furthers a compelling governmental interest and is narrowly tailored to that end.

The Town cannot do so. It has offered only two governmental interests in support of the distinctions the Sign Code draws: preserving the Town’s aesthetic appeal and traffic safety. Assuming for the sake of argument that those are compelling governmental interests, the Code’s distinctions fail as hopelessly underinclusive.

Starting with the preservation of aesthetics, temporary directional signs are “no greater an eyesore,” than ideological or political ones. Yet the Code allows unlimited proliferation of larger ideological signs while strictly limiting the number, size, and duration of smaller directional ones. The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers

of other types of signs that create the same problem.

The Town similarly has not shown that limiting temporary directional signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not. The Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting.

In light of this underinclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest. Because a “law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited,” the Sign Code fails strict scrutiny.

IV

Our decision today will not prevent governments from enacting effective sign laws. ... The Town has ample content-neutral options available to resolve problems with safety and aesthetics. For example, its current Code regulates many aspects of signs that have nothing to do with a sign’s message: size, building materials, lighting, moving parts, and portability. See, *e.g.*, §4.402(R). And on public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner.

We acknowledge that a city might reasonably view the general regulation of signs as necessary because signs “take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation.” *City of Ladue*, 512 U. S., at 48. At the same time, the presence of certain signs may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety. A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny. The signs at issue in this case, including political and ideological signs and signs for events, are far removed from those purposes. As discussed above, they are facially content based and are neither justified by traditional safety concerns nor narrowly tailored.

We reverse the judgment of the Court of Appeals and remand the case for proceedings consistent with this opinion.

JUSTICE ALITO, with whom JUSTICE KENNEDY and JUSTICE SOTOMAYOR join, concurring.

.... As the Court shows, the regulations at issue in this case are replete with content-based distinctions, and as a result they must satisfy strict scrutiny. This does not mean, however, that municipalities are powerless to enact and enforce reasonable sign regulations. I will not attempt to provide anything like a comprehensive list, but here are some rules that would not be content based:

Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below.

Rules regulating the locations in which signs may be placed. These rules may distinguish between free-standing signs and those attached to buildings.

Rules distinguishing between lighted and unlighted signs.

Rules distinguishing between signs with fixed messages and electronic signs with messages that change.

Rules that distinguish between the placement of signs on private and public property.

Rules distinguishing between the placement of signs on commercial and residential property.

Rules distinguishing between on-premises and off-premises signs.

Rules restricting the total number of signs allowed per mile of roadway.

Rules imposing time restrictions on signs advertising a one-time event. Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed. ...

Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.

JUSTICE BREYER, concurring in the judgment.

I join Justice Kagan's separate opinion. Like Justice Kagan I believe that categories alone cannot satisfactorily resolve the legal problem before us. The First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories, such as "content discrimination" and "strict scrutiny," would permit. In my view, the category "content discrimination" is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic "strict scrutiny" trigger, leading to almost certain legal condemnation.

To use content discrimination to trigger strict scrutiny sometimes makes perfect sense. There are cases in which the Court has found content discrimination an unconstitutional method for suppressing a viewpoint. And there are cases where the Court has found content discrimination to reveal that rules governing a traditional public forum are, in fact, not a neutral way of fairly managing the forum in the interest of all speakers. In these types of cases, strict scrutiny is often appropriate, and content discrimination has thus served a useful purpose....

Nonetheless, ... to use the presence of content discrimination automatically to trigger strict scrutiny and thereby call into play a strong presumption against constitutionality goes too far. That is because virtually all government activities involve speech, many of which involve the regulation of speech. Regulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity.

Consider a few examples of speech regulated by government that inevitably

involve content discrimination, but where a strong presumption against constitutionality has no place. Consider governmental regulation of securities, *e.g.*, 15 U. S. C. §78f (requirements for content that must be included in a registration statement); of energy conservation labeling-practices, *e.g.*, 42 U. S. C. §6294 (requirements for content that must be included on labels of certain consumer electronics); of prescription drugs, *e.g.*, 21 U. S. C. §353(b)(4)(A) (requiring a prescription drug label to bear the symbol “Rx only”); of doctor-patient confidentiality, *e.g.*, 38 U. S. C. §7332 (requiring confidentiality of certain medical records, but allowing a physician to disclose that the patient has [***36] HIV to the patient’s spouse or sexual partner); of income tax statements, *e.g.*, 26 U. S. C. §6039F (requiring taxpayers to furnish information about foreign gifts received if the aggregate amount exceeds \$10,000); of commercial airplane briefings, *e.g.*, 14 CFR §136.7 (2015) (requiring pilots to ensure that each passenger has been briefed on flight procedures, such as seatbelt fastening); of signs at petting zoos, *e.g.*, N. Y. Gen. Bus. Law Ann. §399-ff(3) (West Cum. Supp. 2015) (requiring petting zoos to post a sign at every exit “‘strongly recommend[ing] that persons wash their hands upon exiting the petting zoo area’”); and so on.

Nor can the majority avoid the application of strict scrutiny to all sorts of justifiable governmental regulations by relying on this Court’s many subcategories and exceptions to the rule. . . .

I recognize that the Court could escape the problem by watering down the force of the presumption against constitutionality that “strict scrutiny” normally carries with it. But, in my view, doing so will weaken the First Amendment’s protection in instances where “strict scrutiny” should apply in full force.

The better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it a helpful, but not determinative legal tool, in an appropriate case, to determine the strength of a justification. I would use content discrimination as a supplement to a more basic analysis, which, tracking most of our First Amendment cases, asks whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives. Answering this question requires examining the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so. Admittedly, this approach does not have the simplicity of a mechanical use of categories. But it does permit the government to regulate speech in numerous instances where the voters have authorized the government to regulate and where courts should hesitate to substitute judicial judgment for that of administrators.

Here, regulation of signage along the roadside, for purposes of safety and beautification is at issue. There is no traditional public forum nor do I find any general effort to censor a particular viewpoint. Consequently, the specific regulation at issue does not warrant “strict scrutiny.” Nonetheless, for the reasons that Justice Kagan sets forth, I believe that the Town of Gilbert’s regulatory rules violate the First Amendment. I consequently concur in the Court’s judgment only.

JUSTICE KAGAN, with whom JUSTICE GINSBURG and JUSTICE BREYER join,

concurring in the judgment.

Countless cities and towns across America have adopted ordinances regulating the posting of signs, while exempting certain categories of signs based on their subject matter. For example, some municipalities generally prohibit illuminated signs in residential neighborhoods, but lift that ban for signs that identify the address of a home or the name of its owner or occupant. See, *e.g.*, City of Truth or Consequences, N. M., Code of Ordinances, ch. 16, Art. XIII, §§11-13-2.3, 11-13-2.9(H)(4) (2014). In other municipalities, safety signs such as “Blind Pedestrian Crossing” and “Hidden Driveway” can be posted without a permit, even as other permanent signs require one. See, *e.g.*, Code of Athens-Clarke County, Ga., Pt. III, §7-4-7(1) (1993). Elsewhere, historic site markers—for example, “George Washington Slept Here”—are also exempt from general regulations. See, *e.g.*, Dover, Del., Code of Ordinances, Pt. II, App. B, Art. 5, §4.5(F) (2012). And similarly, the federal Highway Beautification Act limits signs along interstate highways unless, for instance, they direct travelers to “scenic and historical attractions” or advertise free coffee. See 23 U. S. C. §§131(b), (c)(1), (c)(5).

Given the Court’s analysis, many sign ordinances of that kind are now in jeopardy. Says the majority: When laws “single[] out specific subject matter,” they are “facially content based”; and when they are facially content based, they are automatically subject to strict scrutiny. And although the majority holds out hope that some sign laws with subject-matter exemptions “might survive” that stringent review, the likelihood is that most will be struck down. After all, it is the “rare case[] in which a speech restriction withstands strict scrutiny.” To clear that high bar, the government must show that a content-based distinction “is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.” So on the majority’s view, courts would have to determine that a town has a compelling interest in informing passersby where George Washington slept. And likewise, courts would have to find that a town has no other way to prevent hidden-driveway mishaps than by specially treating hidden-driveway signs. (Well-placed speed bumps? Lower speed limits? Or how about just a ban on hidden driveways?) The consequence—unless courts water down strict scrutiny to something unrecognizable—is that our communities will find themselves in an unenviable bind: They will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter.

FN* Even in trying (commendably) to limit today’s decision, Justice Alito’s concurrence highlights its far-reaching effects. According to Justice Alito, the majority does not subject to strict scrutiny regulations of “signs advertising a one-time event.” But of course it does. On the majority’s view, a law with an exception for such signs “singles out specific subject matter for differential treatment” and “defin[es] regulated speech by particular subject matter.” Indeed, the precise reason the majority applies strict scrutiny here is that “the Code singles out signs bearing a particular message: the time and location of a specific event.”

Although the majority insists that applying strict scrutiny to all such ordinances is “essential” to protecting First Amendment freedoms, I find it challenging to understand why that is so. This Court’s decisions articulate two important and related reasons for subjecting content-based speech regulations to the most exacting standard of review. The first is “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.” *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (internal quotation marks

omitted). The second is to ensure that the government has not regulated speech “based on hostility—or favoritism—towards the underlying message expressed.” *R. A. V. v. St. Paul*, 505 U. S. 377, 386 (1992). Yet the subject-matter exemptions included in many sign ordinances do not implicate those concerns. Allowing residents, say, to install a light bulb over “name and address” signs but no others does not distort the marketplace of ideas. Nor does that different treatment give rise to an inference of impermissible government motive.

We apply strict scrutiny to facially content-based regulations of speech, in keeping with the rationales just described, when there is any “realistic possibility that official suppression of ideas is afoot.” That is always the case when the regulation facially differentiates on the basis of viewpoint. It is also the case (except in non-public or limited public forums) when a law restricts “discussion of an entire topic” in public debate. We have stated that “[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose which issues are worth discussing or debating.” And we have recognized that such subject-matter restrictions, even though viewpoint-neutral on their face, may “suggest[] an attempt to give one side of a debatable public question an advantage in expressing its views to the people.” Subject-matter regulation, in other words, may have the intent or effect of favoring some ideas over others. When that is realistically possible—when the restriction “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace”—we insist that the law pass the most demanding constitutional test.

But when that is not realistically possible, we may do well to relax our guard so that “entirely reasonable” laws imperiled by strict scrutiny can survive. This point is by no means new. Our concern with content-based regulation arises from the fear that the government will skew the public’s debate of ideas—so when “that risk is inconsequential, . . . strict scrutiny is unwarranted.” To do its intended work, of course, the category of content-based regulation triggering strict scrutiny must sweep more broadly than the actual harm; that category exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints. But that buffer zone need not extend forever. We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function.

And indeed we have done just that: Our cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws—including in cases just like this one. In *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789 (1984), the Court declined to apply strict scrutiny to a municipal ordinance that exempted address numbers and markers commemorating “historical, cultural, or artistic event[s]” from a generally applicable limit on sidewalk signs. After all, we explained, the law’s enactment and enforcement revealed “not even a hint of bias or censorship.” And . . . [in] *City of Ladue v. Gilleo*, 512 U. S. 43 (1994), the Court assumed *arguendo* that a sign ordinance’s exceptions for address signs, safety signs, and for-sale signs in residential areas did not trigger strict scrutiny. We did not need to, and so did not, decide the level-of-scrutiny question because the law’s breadth made it unconstitutional under any standard.

The majority could easily have taken *Ladue*’s tack here. The Town of Gilbert’s defense of its sign ordinance—most notably, the law’s distinctions between directional signs and others—does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test. The

Town, for example, provides no reason at all for prohibiting more than four directional signs on a property while placing no limits on the number of other types of signs. See §§4.402(J), (P)(2) (2014). Similarly, the Town offers no coherent justification for restricting the size of directional signs to 6 square feet while allowing other signs to reach 20 square feet. See §§4.402(J), (P)(1). The best the Town could come up with at oral argument was that directional signs “need to be smaller because they need to guide travelers along a route.” Tr. of Oral Arg. 40. Why exactly a smaller sign better helps travelers get to where they are going is left a mystery. The absence of any sensible basis for these and other distinctions dooms the Town’s ordinance under even the intermediate scrutiny that the Court typically applies to “time, place, or manner” speech regulations. Accordingly, there is no need to decide in this case whether strict scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption.

I suspect this Court and others will regret the majority’s insistence today on answering that question in the affirmative. As the years go by, courts will discover that thousands of towns have such ordinances, many of them “entirely reasonable.” And as the challenges to them mount, courts will have to invalidate one after the other. (This Court may soon find itself a veritable Supreme Board of Sign Review.) And courts will strike down those democratically enacted local laws even though no one—certainly not the majority—has ever explained why the vindication of First Amendment values requires that result. Because I see no reason why such an easy case calls for us to cast a constitutional pall on reasonable regulations quite unlike the law before us, I concur only in the judgment.

Review Questions and Explanations: *Reed v. Town of Gilbert*

1. The majority’s analysis categorizes the ordinance as content-based, triggering strict scrutiny, which will nearly always be fatal to ordinances of this type. How easy is it to regulate signage without regard to content?

2. The Breyer and Kagan concurrences suggest that the majority’s analysis is mechanical and unduly restrictive. Are they right? How does their point reflect on the utility of the levels of scrutiny?

CHAPTER 10: RELIGIOUS FREEDOM

B. Establishment Clause

[For inclusion before the Exercise, at p. 1137]

4. Religious Displays

Like the school prayer cases, the Court's cases involving religious displays on public property have been controversial. When reading the next case, think about the ways in which these displays are and are not like organized prayer in schools. Would you tend to find the displays more or less "coercive" than the middle school graduation ceremony prayers? Why? Also consider how the justices talk about the *Lemon* test in *McCreary County* and

Guided Reading Questions: *McCreary County v. ACLU* and *American Legion v. American Humanist Assn.*

1. Recall James Madison's Memorial and Remonstrance. Madison talked about equality of citizenship as one reason for avoiding governmental engagement with religion. Justice Souter's concern with religious neutrality in *McCreary County* echoes these concerns. Do you think Souter's reasoning is consistent with, an extension of, or distinct from, Madison's?

2. Justice Scalia, writing in dissent in *McCreary County*, also claims adherence to the founders' intentions. Is his position consistent with, an extension of, or distinct from, Madison's?

3. The majority in each of these cases sees the passage of time since the displays were erected as important to resolving the question presented. Why?

McCreary County, Kentucky v. American Civil Liberties Union of Kentucky

545 U.S. 844 (2005)

Majority: *Souter*, Stevens, O'Connor, Ginsburg, Breyer

Concurrence: *O'Connor*

Dissent: *Scalia*, Rehnquist (CJ), Thomas, Kennedy (concurring in Part and dissenting in Part)

JUSTICE SOUTER delivered the opinion of the Court.

In the summer of 1999, petitioners McCreary County and Pulaski County, Kentucky (hereinafter Counties), put up in their respective courthouses large, gold-framed copies of an abridged text of the King James version of the Ten Commandments, including a citation to the Book of Exodus. In McCreary County, the placement of the Commandments responded to an order of the county legislative body requiring "the display [to] be posted in 'a very high traffic area' of the courthouse." In Pulaski County, amidst reported controversy over the propriety of the display, the Commandments were hung in a ceremony presided over by the county Judge-Executive, who called them "good rules to live by" and who recounted the story of an astronaut who became convinced "there must be a divine God" after viewing the Earth from the moon. The Judge-Executive was accompanied by the pastor of his church, who called the Commandments "a creed of ethics" and told the press after the ceremony that displaying the Commandments was "one of the greatest things the judge could have done to close out the millennium."

In November 1999, respondents American Civil Liberties Union of Kentucky sued the Counties in Federal District Court . . . and sought a preliminary injunction against maintaining the displays, which the ACLU charged were violations of the prohibition of religious establishment included in the First Amendment of the Constitution. Within a month, and before the District Court had responded to the request for injunction, the legislative body of each County authorized a second, expanded display, by nearly identical resolutions reciting that the Ten Commandments are "the precedent legal code upon which the civil and criminal codes of . . . Kentucky are founded," and stating several grounds for taking that position: that "the Ten Commandments are codified in Kentucky's civil and criminal laws"; that the Kentucky House of Representatives had in 1993 "voted unanimously . . . to adjourn . . . 'in remembrance and honor of Jesus Christ, the Prince of Ethics'"; that the "County Judge and . . . magistrates agree with the arguments set out by Judge [Roy] Moore" in defense of his "display [of] the Ten Commandments in his courtroom"; and that the "Founding Father[s] [had an] explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America's strength and direction."

As directed by the resolutions, the Counties expanded the displays of the Ten Commandments in their locations, presumably along with copies of the resolution, which instructed that it, too, be posted. In addition to the first display's large framed copy of the edited King James version of the Commandments, the second included eight other documents in smaller frames, each either having a religious theme or excerpted to highlight a religious element. The documents were the "endowed by their Creator" passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, "In God We Trust"; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible," reading that "[t]he Bible is the best gift God has ever given to man"; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower Compact.

After argument, the District Court entered a preliminary injunction on May 5, 2000,

ordering that the "display . . . be removed from [each] County Courthouse." . . . The Counties filed a notice of appeal from the preliminary injunction but voluntarily dismissed it after hiring new lawyers. They then installed another display in each courthouse, the third within a year. No new resolution authorized this one, nor did the Counties repeal the resolutions that preceded the second. The posting consists of nine framed documents of equal size, one of them setting out the Ten Commandments explicitly identified as the "King James Version" at Exodus 20:3–17, and quoted at greater length than before. . . . Assembled with the Commandments are framed copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice. The collection is entitled "The Foundations of American Law and Government Display" and each document comes with a statement about its historical and legal significance. The comment on the Ten Commandments reads:

The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.' The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

Ever since *Lemon v. Kurtzman* summarized the three familiar considerations for evaluating Establishment Clause claims, looking to whether government action has "a secular legislative purpose" has been a common, albeit seldom dispositive, element of our cases. Though we have found government action motivated by an illegitimate purpose only four times since *Lemon*, and "the secular purpose requirement alone may rarely be determinative . . . , it nevertheless serves an important function." . . . The touchstone for our analysis is the principle that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." When the government acts with the ostensible and predominant purpose of advancing 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. Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the "understanding, reached . . . after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens. . . ." By showing a purpose to favor religion, the government "sends the . . . message to . . . nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members. . . .'"

Indeed, the purpose apparent from government action can have an impact more significant than the result expressly decreed: when the government maintains Sunday closing laws, it advances religion only minimally because many working people would take the day as one of rest regardless, but if the government justified its decision with a stated desire for all Americans to honor Christ, the divisive thrust of the official action would be inescapable. This is the teaching of *McGowan v. Maryland* (1961), which upheld Sunday closing statutes on practical, secular grounds after finding that the government had forsaken the religious purposes behind centuries-old predecessor laws.

Despite the intuitive importance of official purpose to the realization of Establishment Clause values, the Counties ask us to abandon Lemon's purpose test, or at least to truncate any enquiry into purpose here. Their first argument is that the very consideration of purpose is deceptive: according to them, true "purpose" is unknowable, and its search merely an excuse for courts to act selectively and unpredictably in picking out evidence of subjective intent. The assertions are as seismic as they are unconvincing. Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country, and governmental purpose is a key element of a good deal of constitutional doctrine, e.g., *Washington v. Davis* (1976) (discriminatory purpose required for Equal Protection violation); *Hunt v. Washington State Apple Advertising Comm'n* (1977) (discriminatory purpose relevant to dormant Commerce Clause claim); *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993) (discriminatory purpose raises level of scrutiny required by free exercise claim). With enquiries into purpose this common, if they were nothing but hunts for mares' nests deflecting attention from bare judicial will, the whole notion of purpose in law would have dropped into disrepute long ago. . . .

After declining the invitation to abandon concern with purpose wholesale, we also have to avoid the Counties' alternative tack of trivializing the enquiry into it. The Counties would read the cases as if the purpose enquiry were so naive that any transparent claim to secularity would satisfy it, and they would cut context out of the enquiry, to the point of ignoring history, no matter what bearing it actually had on the significance of current circumstances. There is no precedent for the Counties' arguments, or reason supporting them.

Lemon said that government action must have "a secular . . . purpose," and after a host of cases it is fair to add that although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective. . . . As we said, the Court often does accept governmental statements of purpose, in keeping with the respect owed in the first instance to such official claims. But in those unusual cases where the claim was an apparent sham, or the secular purpose secondary, the unsurprising results have been findings of no adequate secular object, as against a predominantly religious one.

The Counties' second proffered limitation can be dispatched quickly. They argue that purpose in a case like this one should be inferred, if at all, only from the latest news about the last in a series of governmental actions, however close they may all be in time and subject. But the world is not made brand new every morning, and the Counties are simply asking us to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show. . . . The Counties' position just bucks common sense: reasonable observers have reasonable memories, and our precedents sensibly forbid an observer "to turn a blind eye to the context in which [the] policy arose."

. . . Once the Counties were sued, they modified the exhibits and invited additional insight into their purpose in a display that hung for about six months. . . . [T]he second version was required to include the statement of the government's purpose expressly set out in the county resolutions, and underscored it by juxtaposing the Commandments to other documents with highlighted references to God as their sole common element. The display's unstinting focus was on religious passages, showing that the Counties were

posting the Commandments precisely because of their sectarian content. That demonstration of the government's objective was enhanced by serial religious references and the accompanying resolution's claim about the embodiment of ethics in Christ. Together, the display and resolution presented an indisputable, and undisputed, showing of an impermissible purpose. Today, the Counties make no attempt to defend their undeniable objective, but instead hopefully describe version two as "dead and buried." Their refusal to defend the second display is understandable, but the reasonable observer could not forget it.

After the Counties changed lawyers, they mounted a third display, without a new resolution or repeal of the old one. The result was the "Foundations of American Law and Government" exhibit, which placed the Commandments in the company of other documents the Counties thought especially significant in the historical foundation of American government. In trying to persuade the District Court to lift the preliminary injunction, the Counties cited several new purposes for the third version, including a desire "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government." The Counties' claims did not, however, persuade the court, intimately familiar with the details of this litigation, or the Court of Appeals, neither of which found a legitimizing secular purpose in this third version of the display. "'When both courts [that have already passed on the case] are unable to discern an arguably valid secular purpose, this Court normally should hesitate to find one.'" The conclusions of the two courts preceding us in this case are well warranted.

These new statements of purpose were presented only as a litigating position, there being no further authorizing action by the Counties' governing boards. And although repeal of the earlier county authorizations would not have erased them from the record of evidence bearing on current purpose, the extraordinary resolutions for the second display passed just months earlier were not repealed or otherwise repudiated. . . . No reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays.

Nor did the selection of posted material suggest a clear theme that might prevail over evidence of the continuing religious object. In a collection of documents said to be "foundational" to American government, it is at least odd to include a patriotic anthem, but to omit the Fourteenth Amendment, the most significant structural provision adopted since the original Framing. And it is no less baffling to leave out the original Constitution of 1787 while quoting the 1215 Magna Carta even to the point of its declaration that "fish-weirs shall be removed from the Thames." If an observer found these choices and omissions perplexing in isolation, he would be puzzled for a different reason when he read the Declaration of Independence seeking confirmation for the Counties' posted explanation that the Ten Commandments' "influence is clearly seen in the Declaration"; in fact the observer would find that the Commandments are sanctioned as divine imperatives, while the Declaration of Independence holds that the authority of government to enforce the law derives "from the consent of the governed." If the observer had not thrown up his hands, he would probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality.

In holding the preliminary injunction adequately supported by evidence that the Counties' purpose had not changed at the third stage, we do not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter. We hold only that purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense. . . . Nor do we have occasion here to hold that a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history. We do not forget, and in this litigation have frequently been reminded, that our own courtroom frieze was deliberately designed in the exercise of governmental authority so as to include the figure of Moses holding tablets exhibiting a portion of the Hebrew text of the later, secularly phrased Commandments; in the company of 17 other lawgivers, most of them secular figures, there is no risk that Moses would strike an observer as evidence that the National Government was violating neutrality in religion. . . .

The importance of neutrality as an interpretive guide is no less true now than it was when the Court broached the principle in *Everson v. Board of Ed. of Ewing* (1947), and a word needs to be said about the different view taken in today's dissent. We all agree, of course, on the need for some interpretative help. The First Amendment contains no textual definition of "establishment," and the term is certainly not self-defining. No one contends that the prohibition of establishment stops at a designation of a national (or with Fourteenth Amendment incorporation, a state) church, but nothing in the text says just how much more it covers. There is no simple answer, for more than one reason.

The prohibition on establishment covers a variety of issues from prayer in widely varying government settings, to financial aid for religious individuals and institutions, to comment on religious questions. In these varied settings, issues of interpreting inexact Establishment Clause language, like difficult interpretative issues generally, arise from the tension of competing values, each constitutionally respectable, but none open to realization to the logical limit.

The First Amendment has not one but two clauses tied to "religion," the second forbidding any prohibition on "the free exercise thereof," and sometimes, the two clauses compete: spending government money on the clergy looks like establishing religion, but if the government cannot pay for military chaplains a good many soldiers and sailors would be kept from the opportunity to exercise their chosen religions. At other times, limits on governmental action that might make sense as a way to avoid establishment could arguably limit freedom of speech when the speaking is done under government auspices. The dissent, then, is wrong to read [some prior cases] as a rejection of neutrality on its own terms, for tradeoffs are inevitable, and an elegant interpretative rule to draw the line in all the multifarious situations is not to be had. Given the variety of interpretative problems, the principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause. The principle has been helpful simply because it responds to one of the major concerns that prompted adoption of the Religion Clauses. The Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters, but to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate;

nothing does a better job of roiling society, a point that needed no explanation to the descendants of English Puritans and Cavaliers (or Massachusetts Puritans and Baptists). A sense of the past thus points to governmental neutrality as an objective of the Establishment Clause, and a sensible standard for applying it. To be sure, given its generality as a principle, an appeal to neutrality alone cannot possibly lay every issue to rest, or tell us what issues on the margins are substantial enough for constitutional significance, a point that has been clear from the founding era to modern times. *E.g.*, Letter from J. Madison to R. Adams (1832), in 5 *The Founders' Constitution* 107 (P. Kurland & R. Lerner eds. 1987) ("[In calling for separation] I must admit moreover that it may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collisions & doubts on unessential points"). But invoking neutrality is a prudent way of keeping sight of something the Framers of the First Amendment thought important.

The dissent, however, puts forward a limitation on the application of the neutrality principle, with citations to historical evidence said to show that the Framers understood the ban on establishment of religion as sufficiently narrow to allow the government to espouse submission to the divine will. The dissent identifies God as the God of monotheism, all of whose three principal strains (Jewish, Christian, and Muslim) acknowledge the religious importance of the Ten Commandments. On the dissent's view, it apparently follows that even rigorous espousal of a common element of this common monotheism is consistent with the establishment ban. But the dissent's argument for the original understanding is flawed from the outset by its failure to consider the full range of evidence showing what the Framers believed. The dissent is certainly correct in putting forward evidence that some of the Framers thought some endorsement of religion was compatible with the establishment ban; the dissent quotes the first President as stating that "[n]ational morality [cannot] prevail in exclusion of religious principle," and it cites his first Thanksgiving proclamation giving thanks to God. Surely if expressions like these from Washington and his contemporaries were all we had to go on, there would be a good case that the neutrality principle has the effect of broadening the ban on establishment beyond the Framers' understanding of it (although there would, of course, still be the question of whether the historical case could overcome some 60 years of precedent taking neutrality as its guiding principle).

But the fact is that we do have more to go on, for there is also evidence supporting the proposition that the Framers intended the Establishment Clause to require governmental neutrality in matters of religion, including neutrality in statements acknowledging religion. The very language of the Establishment Clause represented a significant departure from early drafts that merely prohibited a single national religion, and the final language instead "extended [the] prohibition to state support for 'religion' in general." The historical record, moreover, is complicated beyond the dissent's account by the writings and practices of figures no less influential than Thomas Jefferson and James Madison. Jefferson, for example, refused to issue Thanksgiving Proclamations because he believed that they violated the Constitution. See Letter to S. Miller (Jan. 23, 1808), in 5 *The Founders' Constitution*, *supra*, at 98. And Madison, whom the dissent claims as supporting its thesis, *post*, at 2749–2750, criticized Virginia's general assessment tax not just because it required people to donate "three pence" to religion, but because "it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not

bend to those of the Legislative authority." [Citations omitted.]

The fair inference is that there was no common understanding about the limits of the establishment prohibition, and the dissent's conclusion that its narrower view was the original understanding, stretches the evidence beyond tensile capacity. What the evidence does show is a group of statesmen, like others before and after them, who proposed a guarantee with contours not wholly worked out, leaving the Establishment Clause with edges still to be determined. And none the worse for that. Indeterminate edges are the kind to have in a constitution meant to endure, and to meet "exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur." *McCulloch v. Maryland*.

While the dissent fails to show a consistent original understanding from which to argue that the neutrality principle should be rejected, it does manage to deliver a surprise. As mentioned, the dissent says that the deity the Framers had in mind was the God of monotheism, with the consequence that government may espouse a tenet of traditional monotheism. This is truly a remarkable view. Other Members of the Court have dissented on the ground that the Establishment Clause bars nothing more than governmental preference for one religion over another, but at least religion has previously been treated inclusively. Today's dissent, however, apparently means that government should be free to approve the core beliefs of a favored religion over the tenets of others, a view that should trouble anyone who prizes religious liberty. Certainly history cannot justify it; on the contrary, history shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular, a fact that no Member of this Court takes as a premise for construing the Religion Clauses. Justice Story probably reflected the thinking of the framing generation when he wrote in his Commentaries that the purpose of the Clause was "not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects." The Framers would, therefore, almost certainly object to the dissent's unstated reasoning that because Christianity was a monotheistic "religion," monotheism with Mosaic antecedents should be a touchstone of establishment interpretation. Even on originalist critiques of existing precedent there is, it seems, no escape from interpretative consequences that would surprise the Framers. Thus, it appears to be common ground in the interpretation of a Constitution "intended to endure for ages to come," *McCulloch v. Maryland*, that applications unanticipated by the Framers are inevitable. . . .

Given the ample support for the District Court's finding of a predominantly religious purpose behind the Counties' third display, we affirm the Sixth Circuit in upholding the preliminary injunction.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, and with whom JUSTICE KENNEDY joins as to Parts II and III, dissenting.

. . . Besides appealing to the demonstrably false principle that the government cannot favor religion over irreligion, today's opinion suggests that the posting of the Ten Commandments violates the principle that the government cannot favor one religion over another. That is indeed a valid principle where public aid or assistance to religion is concerned, or where the free exercise of religion is at issue, but it necessarily applies in a more limited sense to public acknowledgment of the Creator. If religion in the public forum

had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word "God," or "the Almighty," one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs. With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists. The Thanksgiving Proclamation issued by George Washington at the instance of the First Congress was scrupulously nondenominational — but it was monotheistic. In *Marsh v. Chambers*, *supra*, we said that the fact the particular prayers offered in the Nebraska Legislature were "in the Judeo-Christian tradition," posed no additional problem, because "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."

Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion. The former is, as *Marsh v. Chambers* put it, "a tolerable acknowledgment of beliefs widely held among the people of this country." The three most popular religions in the United States, Christianity, Judaism, and Islam — which combined account for 97.7% of all believers — are monotheistic. All of them, moreover (Islam included), believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life. Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God. Both practices are recognized across such a broad and diverse range of the population — from Christians to Muslims — that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint. . . .

American Legion v. American Humanist Ass'n

139 S. Ct. 2067 (2019)

Majority: *Alito*, Roberts (C.J.), Breyer, Kagan, Kavanaugh

Concurrence: *Breyer, Kagan, Kavanaugh, Thomas*

Dissent: *Ginsburg*, Sotomayor

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*, 545 U.S. 677, 704 (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.

The cross came into widespread use as a symbol of Christianity by the fourth century,¹ 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. The Swiss flag consists of a white cross on a red background. In an effort to invoke the message associated with that flag, the ICRC copied its design with the colors inverted. 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 cross—also took on new meaning after World War I. "During and immediately after the war, 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); App. 1146. 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. *Ibid.* 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* 10–16. ... 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. App. 1146. But the public outcry against that proposal was swift and fierce. Many organizations, including the American War Mothers, a nonsectarian group founded in 1917, urged the Department to retain the design of the temporary markers. *Id.*, at 1146–1147. 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. *Id.*, at 1144. A Member of Congress likewise introduced a resolution noting that “these wooden symbols have, during and since the World War, been regarded as emblematic of the great sacrifices which that war entailed, have been so treated by poets and artists and have become peculiarly and inseparably associated in the thought of surviving relatives and comrades and of the Nation with these World War graves.” H. Res. 15, 68th Cong., 1 (1924), App. 1163–1164. This national debate and its outcome confirmed the cross’s widespread resonance as a symbol of sacrifice in the war. ...

The completed monument is a 32-foot tall Latin cross that sits on a large pedestal. 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.” *Id.*, at 915 (capitalization omitted). 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.” *Ibid.* At the dedication ceremony, a local Catholic priest offered an invocation. *Id.*, at 217–218. United States Representative Stephen W. Gambrill delivered the keynote address, honoring the “ ‘men of Prince George’s County’ ” who “ ‘fought for the sacred right of all to live in peace and security.’ ” *Id.* He encouraged the community to look to the “ ‘token of this cross, symbolic of Calvary,’ ” to “ ‘keep fresh the memory of our boys who died for a righteous cause.’ ” *Ibid.* The ceremony closed with a benediction offered by a Baptist pastor. 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. *Id.*, at 182, 319–323. 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. *Id.*, at 891–903, 1530. 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. *Id.*, at 36, 44.

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. *Id.*, at 420–421, 1384–1387. The American Legion reserved the right to continue using the memorial to host a variety of ceremonies, including events in memory of departed veterans. *Id.*, at 1387. 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.

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. *Id.*, at 1443–1451. 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.

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 in *Lemon v. Kurtzman*. Under the *Lemon* test, a court must ask whether a challenged government action (1) has a secular purpose; (2) has a “principal or primary effect” that “neither advances nor inhibits religion”; and (3) does not foster “an excessive government entanglement with religion,” (internal quotation marks omitted). Applying that test, the District Court determined that the Commission had secular purposes for acquiring and maintaining the Cross—namely, to commemorate World War I and to ensure traffic safety. The court also found that a reasonable observer aware of the Cross’s history, setting, and secular elements “would not view the Monument as having the effect of impermissibly endorsing religion.” Nor, according to the court, did the Commission’s maintenance of the memorial create the kind of “continued and repeated government involvement with religion” that would constitute an excessive entanglement. Finally, in light of the factors that informed its analysis of *Lemon*’s “effects” prong, the court concluded that the Cross is constitutional under Justice BREYER’s approach in *Van Orden*. 147 F.Supp.3d at 388–390.

A divided panel of the Court of Appeals for the Fourth Circuit reversed. While recognizing that the Commission acted for a secular purpose, the court held that the Bladensburg Cross failed *Lemon*’s “effects” prong because a reasonable observer would view the Commission’s ownership and maintenance of the monument as an endorsement of Christianity. The court emphasized the cross’s “inherent religious meaning” as the “preeminent symbol of Christianity.” Although conceding that the monument had several “secular elements,” the court asserted that they were “overshadow[ed]” by the Cross’s size and Christian connection—especially because the Cross’s location and condition would make it difficult for “passers-by” to “read” or otherwise “examine” the plaque and American Legion emblem. The court rejected as “too simplistic” an argument defending the Cross’s constitutionality on the basis of its 90-year history, suggesting that “[p]erhaps the longer a violation persists, the greater the affront to those offended.” In the alternative,

the court concluded, the Commission had become excessively entangled with religion by keeping a display that “aggrandizes the Latin cross” and by spending more than de minimis public funds to maintain it.

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) 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, *Engel v. Vitale*, to Sunday closing laws, *McGowan v. Maryland*, to state subsidies for church-related schools or the parents of students attending those schools, *Board of Ed. of Central School Dist. No. 1 v. Allen*. 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. *Lemon*. 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* (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 [citations omitted].

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. It could not “explain the Establishment Clause’s tolerance, for example, of the prayers that open legislative meetings, ... certain references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving.” *Van Orden, supra*, (opinion of BREYER, J.). The test has been harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars.

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.

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. In *Salazar v. Buono* (2010), for example, we dealt with a cross that a small group of World War I veterans had put up at a remote spot in the Mojave Desert more than seven decades earlier. The record contained virtually no direct evidence regarding the specific motivations of these men. We knew that they had selected a plain white cross, and there was some evidence that the man who looked after the monument for many years—“a miner who had served as a medic and had thus presumably witnessed the carnage of the war firsthand”—was said not to have been “particularly religious.” *Id.* (ALITO, J., concurring in part and concurring in judgment). ...

Second, as time goes by, the purposes associated with an established monument, symbol, or practice often multiply. Take the example of Ten Commandments monuments, the subject we addressed in *Van Orden*, and *McCreary County*. For believing Jews and Christians, the Ten Commandments are the word of God handed down to Moses on Mount Sinai, but the image of the Ten Commandments has also been used to convey other meanings. They have historical significance as one of the foundations of our legal system, and for largely that reason, they are depicted in the marble frieze in our courtroom and in other prominent public buildings in our Nation’s capital. In *Van Orden* and *McCreary*, no Member of the Court thought that these depictions are unconstitutional. Just as depictions of the Ten Commandments in these public buildings were intended to serve secular purposes, the litigation in *Van Orden* and *McCreary* showed that secular motivations played a part in the proliferation of Ten Commandments monuments in the 1950s. ... 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. Cf. *Schempp*, (Brennan, J., concurring)

Third, just as the purpose for maintaining a monument, symbol, or practice may evolve, “[t]he ‘message’ conveyed ... may change over time.” *Sumnum*. Consider, for example, the message of the Statue of Liberty, which began as a monument to the solidarity and friendship between France and the United States and only decades later came to be seen “as a beacon welcoming immigrants to a land of freedom.” *Ibid.* 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. Cf. *Van Orden* (“[D]isputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation ... could thereby create the very kind of religiously based divisiveness that the

Establishment Clause seeks to avoid”).

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. ... [A]s 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. And an alteration like the one entertained by the Fourth Circuit—amputating the arms of the Cross —would be seen by many as profoundly disrespectful. One member of the majority below viewed this objection as inconsistent with the claim that the Bladensburg Cross serves secular purposes, see 891 F.3d at 121 (Wynn, J., concurring in denial of en banc), but this argument misunderstands the complexity of monuments. A monument may express many purposes and convey many different messages, both secular and religious. Cf. *Van Orden*, 545 U.S. at 690, 125 S.Ct. 2854 (plurality opinion) (describing simultaneous religious and secular meaning of the Ten Commandments display). 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. ...

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* (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. *Id.* We took a similar approach more recently in *Town of Greece*. We reached these results even though it was clear, as stressed by the *Marsh* dissent, that prayer is by definition religious. As the Court put it in *Town of Greece*: “*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation.” “The case teaches instead that the Establishment Clause must be interpreted ‘by reference to historical practices and understandings’ ” and that the decision of the First Congress to “provid[e] for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion’s role in society.”

... In *Town of Greece*, 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 “fi[t] within the tradition long followed in Congress and the state legislatures.” *Id.* (opinion of the Court)... The practice begun by the First Congress [in having rotating clergy conduct “inclusive” opening prayers] 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.

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

Justice BREYER, with whom Justice KAGAN joins, concurring.

I have long maintained that there is no single formula for resolving Establishment Clause challenges. The Court must instead consider each case in light of the basic purposes *2091 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 spher[e].” [Citations omitted]. 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 Latin cross is uniquely associated with the fallen soldiers of World War I; the organizers of the Peace Cross acted with the undeniably secular motive of commemorating local soldiers; no evidence suggests that they sought to disparage or exclude any religious group; the secular values inscribed on the Cross and its place among other memorials strengthen its message of patriotism and commemoration; and, finally, the Cross has stood on the same land for 94 years, generating no controversy in the community until this lawsuit was filed. Nothing in the record suggests that the lack of public outcry “was due to a climate of intimidation.” Van Orden (BREYER, J., concurring in judgment). In light of all these circumstances, the Peace Cross cannot reasonably be understood as “a government effort to favor a particular religious sect” or to “promote religion over nonreligion.” *Id.* And, as the Court explains, ordering its removal or alteration at this late date would signal “a hostility toward religion that has no place in our Establishment Clause traditions.” *Id.* 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. See post, at 2092, 2093 – 2094 (KAVANAUGH, J., concurring); cf. post, at 2101 – 2102 (GORSUCH, J., concurring in judgment). The Court appropriately “looks to history for guidance,” ante, at 2087 (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, see ante, at 2089 – 2090 (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.

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.

As this case again demonstrates, this Court no longer applies the old test articulated in *Lemon v. Kurtzman*. The *Lemon* test examined, among other things, whether the challenged government action had a primary effect of advancing or endorsing religion. If *Lemon* guided this Court’s understanding of the Establishment Clause, then many of the Court’s Establishment Clause cases over the last 48 years would have been decided differently, as I will explain.

The opinion identifies five relevant categories of Establishment Clause cases: (1) religious symbols on government property and religious speech at government events; (2) religious accommodations and exemptions from generally applicable laws; (3) government benefits and tax exemptions for religious organizations; (4) religious expression in public schools; and (5) regulation of private religious speech in public forums. The *Lemon* test does not explain the Court’s decisions in any of those five categories. In the first category of cases, the Court has relied on history and tradition and upheld various religious symbols on government property and religious speech at government events. See, e.g., *Marsh*, *Van Orden*, *Town of Greece*. The Court does so again today. *Lemon* does not account for the results in these cases.

In the second category of cases, this Court has allowed legislative accommodations for religious activity and upheld legislatively granted religious exemptions from generally applicable laws. But accommodations and exemptions “by definition” have the effect of advancing or endorsing religion to some extent (citation omitted). *Lemon*, fairly applied, does not justify those decisions.

In the third category of cases, the Court likewise has upheld government benefits and tax exemptions that go to religious organizations, even though those policies have the effect of advancing or endorsing religion. [Citations omitted]. Those outcomes are not easily reconciled with *Lemon*.

In the fourth category of cases, the Court has proscribed government-sponsored prayer in public schools. The Court has done so not because of *Lemon*, but because the Court concluded that government-sponsored prayer in public schools posed a risk of coercion of students. The Court’s most prominent modern case on that subject, *Lee v. Weisman* (1992), did not rely on *Lemon*. In short, *Lemon* was not necessary to the Court’s decisions holding government-sponsored school prayers unconstitutional.

In the fifth category, the Court has allowed private religious speech in public forums on an equal basis with secular speech. [Citations omitted]. That practice does not violate the Establishment Clause, the Court has ruled. *Lemon* does not explain those cases.

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 Establishment Clause cases in any of the five categories. 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 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. This Court fiercely protects the individual rights secured by the U. S. Constitution. See, e.g., (1943); *Wisconsin v. Yoder* (1972). But the Constitution sets a floor for the protection of individual rights. The constitutional floor is sturdy and often high, but it is a floor. 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. See generally J. Sutton, *51 Imperfect Solutions* (2018)

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,” ante, at 2087 (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—particularly, its emphasis on whether longstanding monuments, symbols, and practices reflect “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.” Ante, at 2089. 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 *2095 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.

As I have explained elsewhere, the Establishment Clause resists incorporation against the States. [Citations omitted]. In *Everson v. Board of Ed. of Ewing*, 3 (1947), the Court “casually” incorporated the Clause with a declaration that because the Free Exercise Clause had been incorporated, “ ‘[t]here is every reason to give the same application and broad interpretation to the “establishment of religion” clause.’ ” *Town of Greece*, (opinion of THOMAS, J.). The Court apparently did not consider that an incorporated Establishment Clause would prohibit exactly what the text of the Clause seeks to protect: state establishments of religion.

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. “[M]onumental, clear, and bold” by day, the cross looms even larger illuminated against the night-time sky. Known as the Peace Cross, the monument was erected by private citizens in 1925 to honor local soldiers who lost their lives in World War I. “[T]he town’s most prominent symbol” was rededicated in 1985 and is now said to honor “the sacrifices made [in] all wars,” *id.*, at 868 (internal quotation marks omitted), by “all veterans,” *id.*, at 195. 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. 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 liberty and civic harmony in favor of a “presumption of constitutionality for longstanding monuments, symbols, and practices.”

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 7 (Brief for Amici 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, as the Courts of Appeals have uniformly recognized. See *infra*, at 2108 – 2109, n. 10. 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 3 (Brief for Amicus Jewish War Veterans).

By maintaining the Peace Cross on a public highway, the Commission elevates Christianity over other faiths, and religion over nonreligion. Memorializing the service of American soldiers is an “admirable and unquestionably secular” objective. *Van Orden v. Perry* (Stevens, J., dissenting). But the Commission does not serve that objective by displaying a symbol that bears “a starkly sectarian message.” *Salazar v. Buono* (2010) (Stevens, J., dissenting). The First Amendment commands that the government “shall make no law” either “respecting an establishment of religion” or “prohibiting the free exercise thereof.” Adoption of these complementary provisions followed centuries of “turmoil, civil strife, and persecutio[n], generated in large part by established sects determined to maintain their absolute political and religious supremacy.” 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.” Draft Reply to the Danbury Baptist Association, in *36 Papers of Thomas Jefferson* 254, 255 (B. Oberg ed. 2009) (footnote omitted). This barrier “protect[s] the integrity of individual conscience in religious matters.” *McCreary County*. It guards against the “anguish, hardship and bitter strife,” *Engel v. Vitale* (1962), that can occur when “the government weighs in on one side of religious debate,” *McCreary County*. And while the “union of government and religion tends to destroy government and to degrade religion,” separating the two preserves the legitimacy of each. *Engel*.

The Establishment Clause essentially instructs: “[T]he government may not favor one religion over another, or religion over irreligion.” *McCreary County*. For, as James Madison observed, the government is not “a competent Judge of Religious Truth.” (*Memorial and Remonstrance*). When the government places its “power, prestige [or] financial support ... behind a particular religious belief,” *Engel*, the government’s imprimatur “mak[es] adherence to [that] religion relevant ... to a person’s standing in the political community,” *County of Allegheny v. American Civil Liberties Union* (1989) (internal quotation marks omitted). Correspondingly, “the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.” *Engel*. 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).

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. To make that determination, a court must consider “the pertinent facts and circumstances surrounding the symbol and its placement.” [Citations omitted].

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. “It certainly is not common for property owners to open up their property [to] monuments that convey a message with which they do not wish to be associated.” *Pleasant Grove City v. Summum*, (2009). To non-Christians, nearly 30% of the population of the United States, Pew Research Center, *America’s Changing Religious Landscape 4* (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*, (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*, (1984) (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.

Review Questions and Explanations: *McCreary County* and *American Legion*

1. What remains of the Lemon test after these two cases?
2. The attorneys for *McCreary County* made a point, as Justice Souter notes, of reminding the Court that the Supreme Court building, like the *McCreary County* courthouse, contains depictions of Moses as a law giver. Justice Souter distinguishes the two displays. Are you convinced by his reasoning?
3. The Supreme Court has declined to hear cases addressing the constitutionality of things like the stamping of "In God We Trust" on U.S. money and the addition of "Under God" to the Pledge of Allegiance. Under the tests set out in *McCreary County* and *American Legion*, what are the best arguments for and against the constitutionality of these things?
4. The majority in *American Legion* holds that the Latin Cross has become a secular symbol. Why is this important to the outcome? What is Justice Ginsburg’s objection to the majority’s reasoning on this point?
5. Do Justice Souter (in *McCreary County*) and Justice Thomas (in *American Humanist*) agree or disagree about the role of coercion in Establishment Clause cases?
6. In *American Legion*, Justice Alito writes: “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.” His concluding paragraph expresses a similar

thought. Does Justice Alito mean here that removing the monuments would itself be unconstitutional? Justice Kavanaugh seemed to think this was a possibility, and wrote separately in part to address this issue.

7. What does Justice Kavanaugh think the Establishment Clause protects? What about Justice Thomas? Justice Ginsburg?

Exercises

Try writing out the “black letter law” governing Establishment Clause cases after *McCreary County* and *American Legion*.

* * *

C. The Free Exercise Clause

for inclusion at p. 1170 after Burwell v. Hobby Lobby Stores.

Guided Reading Questions: *Masterpiece Cakeshop v. Colorado Civil Rights Commission*

1. What are the free speech and free exercise claims in this case? On what basis does the Court decide the case?
2. Try to articulate in one or two sentences the central conflict between the Colorado public accommodations/antidiscrimination law and the free exercise claim. How does the Court resolve this conflict? Does it hold that there is a religious exemption for public accommodations laws?
3. How does *Employment Division v. Smith* fit into this case? What level scrutiny does the Court apply?
4. What is the significance of the different results in Colorado’s handling of the Phillips (*Masterpiece Cakeshop*) case and the case involving the anti-gay bakery customer, Jack? How is this distinction explained in the majority opinion, the Gorsuch concurrence, and the Ginsburg dissent?

Masterpiece Cakeshop v. Colorado Civil Rights Commission

138 S. Ct. 1719 (2018)

Majority: *Kennedy*, Roberts (CJ), Breyer, Alito, Kagan, Gorsuch

Concurrences: *Kagan*, Breyer, *Gorsuch*, Alito, *Thomas*

Dissent: *Ginsburg*, Sotomayor

Justice KENNEDY delivered the opinion of the Court.

In 2012 a same-sex couple visited Masterpiece Cakeshop, a bakery in Colorado, to make inquiries about ordering a cake for their wedding reception. The shop's owner told the couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriages—marriages the State of Colorado itself did not recognize at that time. The couple filed a charge with the Colorado Civil Rights Commission alleging discrimination on the basis of sexual orientation in violation of the Colorado Anti-Discrimination Act.

The Commission determined that the shop's actions violated the Act and ruled in the couple's favor. The Colorado state courts affirmed the ruling and its enforcement order, and this Court now must decide whether the Commission's order violated the Constitution.

The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.

The freedoms asserted here are both the freedom of speech and the free exercise of religion. The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.

One of the difficulties in this case is that the parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference.

The same difficulties arise in determining whether a baker has a valid free exercise claim. A baker's refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it are just three examples of possibilities that seem all but endless.

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

to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.

Given all these considerations, it is proper to hold that whatever the outcome of some future controversy involving facts similar to these, the Commission’s actions here violated the Free Exercise Clause; and its order must be set aside.

I

A

Masterpiece Cakeshop, Ltd., is a bakery in Lakewood, Colorado, a suburb of Denver. The shop offers a variety of baked goods, ranging from everyday cookies and brownies to elaborate custom-designed cakes for birthday parties, weddings, and other events.

Jack Phillips is an expert baker who has owned and operated the shop for 24 years. Phillips is a devout Christian. He has explained that his “main goal in life is to be obedient to” Jesus Christ and Christ’s “teachings in all aspects of his life.” And he seeks to “honor God through his work at Masterpiece Cakeshop.” One of Phillips’ religious beliefs is that “God’s intention for marriage from the beginning of history is that it is and should be the union of one man and one woman.” To Phillips, creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs.

Phillips met Charlie Craig and Dave Mullins when they entered his shop in the summer of 2012. Craig and Mullins were planning to marry. At that time, Colorado did not recognize same-sex marriages, so the couple planned to wed legally in Massachusetts and afterwards to host a reception for their family and friends in Denver. To prepare for their celebration, Craig and Mullins visited the shop and told Phillips that they were interested in ordering a cake for “our wedding.” They did not mention the design of the cake they envisioned.

Phillips informed the couple that he does not “create” wedding cakes for same-sex weddings. He explained, “I’ll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don’t make cakes for same sex weddings.” The couple left the shop without further discussion....

B

For most of its history, Colorado has prohibited discrimination in places of public accommodation. In 1885, less than a decade after Colorado achieved statehood, the General Assembly passed “An Act to Protect All Citizens in Their Civil Rights,” which guaranteed “full and equal enjoyment” of certain public facilities to “all citizens,” “regardless of race, color or previous condition of servitude.” 1885 Colo. Sess. Laws pp. 132–133. A decade later, the General Assembly expanded the requirement to apply to “all other places of public accommodation.” 1895 Colo. Sess. Laws ch. 61, p. 139.

Today, the Colorado Anti-Discrimination Act (CADA) carries forward the state's tradition of prohibiting discrimination in places of public accommodation. Amended in 2007 and 2008 to prohibit discrimination on the basis of sexual orientation as well as other protected characteristics, CADA in relevant part provides as follows:

“It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.” Colo. Rev. Stat. § 24-34-601(2)(a) (2017).

The Act defines “public accommodation” broadly to include any “place of business engaged in any sales to the public and any place offering services ... to the public,” but excludes “a church, synagogue, mosque, or other place that is principally used for religious purposes.” § 24-34-601(1).

CADA establishes an administrative system for the resolution of discrimination claims. Complaints of discrimination in violation of CADA are addressed in the first instance by the Colorado Civil Rights Division. The Division investigates each claim; and if it finds probable cause that CADA has been violated, it will refer the matter to the Colorado Civil Rights Commission. The Commission, in turn, decides whether to initiate a formal hearing before a state Administrative Law Judge (ALJ), who will hear evidence and argument before issuing a written decision. See §§ 24-34-306, 24-4-105(14). The decision of the ALJ may be appealed to the full Commission, a seven-member appointed body. The Commission holds a public hearing and deliberative session before voting on the case. If the Commission determines that the evidence proves a CADA violation, it may impose remedial measures as provided by statute. See § 24-34-306(9). Available remedies include, among other things, orders to cease-and-desist a discriminatory policy, to file regular compliance reports with the Commission, and “to take affirmative action, including the posting of notices setting forth the substantive rights of the public.” § 24-34-605. Colorado law does not permit the Commission to assess money damages or fines. §§ 24-34-306(9), 24-34-605.

C

Craig and Mullins filed a discrimination complaint against Masterpiece Cakeshop and Phillips in September 2012, shortly after the couple's visit to the shop. App. 31. The complaint alleged that Craig and Mullins had been denied “full and equal service” at the bakery because of their sexual orientation, *id.*, at 35, 48, and that it was Phillips' “standard business practice” not to provide cakes for same-sex weddings, *id.*, at 43.

The Civil Rights Division opened an investigation. The investigator found that “on multiple occasions,” Phillips “turned away potential customers on the basis of their sexual orientation, stating that he could not create a cake for a same-sex wedding ceremony or reception” because his religious beliefs prohibited it and because the potential customers “were doing something illegal” at that time. The investigation found that Phillips had declined to sell custom wedding cakes to about six other same-sex couples on this basis. The investigator also recounted that, according to affidavits submitted by Craig and Mullins, Phillips' shop had refused to sell cupcakes to a lesbian couple for their

commitment celebration because the shop “had a policy of not selling baked goods to same-sex couples for this type of event.” Based on these findings, the Division found probable cause that Phillips violated CADA and referred the case to the Civil Rights Commission.

The Commission found it proper to conduct a formal hearing, and it sent the case to a State ALJ. Finding no dispute as to material facts, the ALJ entertained cross-motions for summary judgment and ruled in the couple’s favor. The ALJ first rejected Phillips’ argument that declining to make or create a wedding cake for Craig and Mullins did not violate Colorado law. It was undisputed that the shop is subject to state public accommodations laws. And the ALJ determined that Phillips’ actions constituted prohibited discrimination on the basis of sexual orientation, not simply opposition to same-sex marriage as Phillips contended. App. to Pet. for Cert. 68a–72a.

Phillips raised two constitutional claims before the ALJ. He first asserted that applying CADA in a way that would require him to create a cake for a same-sex wedding would violate his First Amendment right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed. The ALJ rejected the contention that preparing a wedding cake is a form of protected speech and did not agree that creating Craig and Mullins’ cake would force Phillips to adhere to “an ideological point of view.” Id., at 75a. Applying CADA to the facts at hand, in the ALJ’s view, did not interfere with Phillips’ freedom of speech.

Phillips also contended that requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion, also protected by the First Amendment. Citing this Court’s precedent in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the ALJ determined that CADA is a “valid and neutral law of general applicability” and therefore that applying it to Phillips in this case did not violate the Free Exercise Clause. Id., at 879, 110 S.Ct. 1595; App. to Pet. for Cert. 82a–83a. The ALJ thus ruled against Phillips and the cakeshop and in favor of Craig and Mullins on both constitutional claims.

The Commission affirmed the ALJ’s decision in full. Id., at 57a. The Commission ordered Phillips to “cease and desist from discriminating against ... same-sex couples by refusing to sell them wedding cakes or any product [they] would sell to heterosexual couples.” It also ordered additional remedial measures, including “comprehensive staff training on the Public Accommodations section” of CADA “and changes to any and all company policies to comply with ... this Order.” The Commission additionally required Phillips to prepare “quarterly compliance reports” for a period of two years documenting “the number of patrons denied service” and why, along with “a statement describing the remedial actions taken.”

Phillips appealed to the Colorado Court of Appeals, which affirmed the Commission’s legal determinations and remedial order. The court rejected the argument that the “Commission’s order unconstitutionally compels” Phillips and the shop “to convey a celebratory message about same sex marriage.” *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 283 (2015). The court also rejected the argument that the Commission’s order violated the Free Exercise Clause. Relying on this Court’s precedent in *Smith*, supra, at 879, 110 S.Ct. 1595, the court stated that the Free Exercise Clause “does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability”

on the ground that following the law would interfere with religious practice or belief. 370 P.3d, at 289. The court concluded that requiring Phillips to comply with the statute did not violate his free exercise rights. The Colorado Supreme Court declined to hear the case.

Phillips sought review here, and this Court granted certiorari. 582 U.S. —, 137 S.Ct. 2290, 198 L.Ed.2d 723 (2017). He now renews his claims under the Free Speech and Free Exercise Clauses of the First Amendment.

II

A

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), “[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.” 135 S.Ct., at 2607. Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment. Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case under this Court’s precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law. See Tr. of Oral Arg. 4–7, 10.

Phillips claims, however, that a narrower issue is presented. He argues that he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation. As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. In this context the baker likely found it difficult to find a line where the customers' rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.

Phillips' dilemma was particularly understandable given the background of legal principles and administration of the law in Colorado at that time. His decision and his actions leading to the refusal of service all occurred in the year 2012. At that point, Colorado did not recognize the validity of gay marriages performed in its own State. See Colo. Const., Art. II, § 31 (2012); 370 P.3d, at 277. At the time of the events in question, this Court had not issued its decisions either in *United States v. Windsor*, 570 U.S. 744 (2013), or *Obergefell*. Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State.

At the time, state law also afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive. Indeed, while enforcement proceedings against Phillips were ongoing, the Colorado Civil Rights Division itself endorsed this proposition in cases involving other bakers' creation of cakes, concluding on at least three occasions that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages.

There were, to be sure, responses to these arguments that the State could make when it contended for a different result in seeking the enforcement of its generally applicable state regulations of businesses that serve the public. And any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying "no goods or services will be sold if they will be used for gay marriages," something that would impose a serious stigma on gay persons. But, nonetheless, Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case.

B

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." Tr. 23. 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." Id., at 30. 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." Tr. 11–12.

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 against 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. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540–542 (1993); *id.*, at 558, (Scalia, J., concurring in part and concurring in judgment). 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.

As noted above, on at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the Division, the requested cake included "wording and images [the baker] deemed derogatory"; featured "language and images [the baker] deemed hateful"; or displayed a message the baker "deemed as discriminatory.

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....

A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness. Just as "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943), it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. 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....

C

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*, 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.*, at 534. 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.*, at 547.

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.*, at 540. 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,” *id.*, at 545 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.*, at 537. 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.

III

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

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

Justice KAGAN, with whom Justice BREYER joins, concurring.

....The Court partly relies on the “disparate consideration of Phillips’ case compared to the cases of [three] other bakers” who “objected to a requested cake on the basis of conscience.” In the latter cases, a customer named William Jack sought “cakes with images that conveyed disapproval of same-sex marriage, along with religious text”; the bakers whom he approached refused to make them. Those bakers prevailed before the Colorado Civil Rights Division and Commission, while Phillips—who objected for religious reasons to baking a wedding cake for a same-sex couple—did not. The Court finds that the legal reasoning of the state agencies differed in significant ways as between the Jack cases and the Phillips case....

What makes the state agencies’ consideration ... disquieting is that a proper basis for distinguishing the cases was available—in fact, was obvious. The Colorado Anti-Discrimination Act (CADA) makes it unlawful for a place of public accommodation to deny “the full and equal enjoyment” of goods and services to individuals based on certain characteristics, including sexual orientation and creed. Colo. Rev. Stat. § 24–34–601(2)(a) (2017). The three bakers in the Jack cases did not violate that law. Jack requested them to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. In refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires. By contrast, the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple. In refusing that request, Phillips contravened CADA’s demand that customers receive “the full and equal enjoyment” of public accommodations irrespective of their sexual orientation. The different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief.

FN* Justice GORSUCH disagrees. In his view, the Jack cases and the Phillips case must be treated the same because the bakers in all those cases “would not sell the requested cakes to anyone.” Post, at 1735. That description perfectly fits the Jack cases—and explains why the bakers there did not engage in unlawful discrimination. But it is a surprising characterization of the Phillips case, given that Phillips routinely sells wedding cakes to opposite-sex couples....

I read the Court’s opinion as fully consistent with that view.... Colorado can treat a baker who discriminates based on sexual orientation differently from a baker who does not discriminate on that or any other prohibited ground. But only, as the Court rightly says, if the State’s decisions are not infected by religious hostility or bias. I accordingly concur.

Justice GORSUCH, with whom Justice ALITO joins, concurring.

In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, this Court held that a neutral and generally applicable law will usually survive a constitutional free exercise challenge. 494 U.S. 872, 878–879 (1990). *Smith* remains controversial in many quarters. Compare McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990), with Hamburger, *A Constitutional Right of*

Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915 (1992). But we know this with certainty: when the government fails to act neutrally toward the free exercise of religion, it tends to run into trouble. Then the government can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993).

Today's decision respects these principles. As the Court explains, the Colorado Civil Rights Commission failed to act neutrally toward Jack Phillips's religious faith. Maybe most notably, the Commission allowed three other bakers to refuse a customer's request that would have required them to violate their secular commitments. Yet it denied the same accommodation to Mr. Phillips when he refused a customer's request that would have required him to violate his religious beliefs. As the Court also explains, the only reason the Commission seemed to supply for its discrimination was that it found Mr. Phillips's religious beliefs "offensive." That kind of judgmental dismissal of a sincerely held religious belief is, of course, antithetical to the First Amendment and cannot begin to satisfy strict scrutiny. The Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all. Because the Court documents each of these points carefully and thoroughly, I am pleased to join its opinion in full.

The only wrinkle is this.... [In William Jack's case,] the Division declined to find a violation, reasoning that the bakers didn't deny Mr. Jack service because of his religious faith but because the cakes he sought were offensive to their own moral convictions. ... [Here,] Mr. Phillips explained that he could not prepare a cake celebrating a same-sex wedding consistent with his religious faith. ... [T]he two cases share all legally salient features. In both cases, the effect on the customer was the same: bakers refused service to persons who bore a statutorily protected trait (religious faith or sexual orientation). But in both cases the bakers refused service intending only to honor a personal conviction. To be sure, the bakers knew their conduct promised the effect of leaving a customer in a protected class unserved. But there's no indication the bakers actually intended to refuse service because of a customer's protected characteristic. We know this because all of the bakers explained without contradiction that they would not sell the requested cakes to anyone, while they would sell other cakes to members of the protected class (as well as to anyone else). So, for example, the bakers in the first case would have refused to sell a cake denigrating same-sex marriage to an atheist customer, just as the baker in the second case would have refused to sell a cake celebrating same-sex marriage to a heterosexual customer. And the bakers in the first case were generally happy to sell to persons of faith, just as the baker in the second case was generally happy to sell to gay persons. In both cases, it was the kind of cake, not the kind of customer, that mattered to the bakers....

Nothing in the Commission's opinions suggests any neutral principle to reconcile these holdings. If Mr. Phillips's objection is "inextricably tied" to a protected class, then the bakers' objection in Mr. Jack's case must be "inextricably tied" to one as well. For just as cakes celebrating same-sex weddings are (usually) requested by persons of a particular sexual orientation, so too are cakes expressing religious opposition to same-sex weddings (usually) requested by persons of particular religious faiths. In both cases the bakers' objection would (usually) result in turning down customers who bear a protected characteristic....

Justice THOMAS, with whom Justice GORSUCH joins, concurring in part and concurring in the judgment.

.... While Phillips rightly prevails on his free-exercise claim, I write separately to address his free-speech claim. ... Phillips' creation of custom wedding cakes is expressive. The use of his artistic talents to create a well-recognized symbol that celebrates the beginning of a marriage clearly communicates a message.... Because Phillips' conduct ... was expressive, Colorado's public-accommodations law cannot penalize it unless the law withstands strict scrutiny....

The Court of Appeals did not address whether Colorado's law survives strict scrutiny, and I will not do so in the first instance. There is an obvious flaw, however, with one of the asserted justifications for Colorado's law. According to the individual respondents, Colorado can compel Phillips' speech to prevent him from " 'denigrat[ing] the dignity' " of same-sex couples, " 'assert[ing] [their] inferiority,' " and subjecting them to " 'humiliation, frustration, and embarrassment.' " These justifications are completely foreign to our free-speech jurisprudence.

States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." ...

In *Obergefell*, I warned that the Court's decision would "inevitabl [y] ... come into conflict" with religious liberty, "as individuals ... are confronted with demands to participate in and endorse civil marriages between same-sex couples." 135 S.Ct., at 2638 (dissenting opinion). This case proves that the conflict has already emerged. Because the Court's decision vindicates Phillips' right to free exercise, it seems that religious liberty has lived to fight another day. But, in future cases, the freedom of speech could be essential to preventing *Obergefell* from being used to "stamp out every vestige of dissent" and "vilify Americans who are unwilling to assent to the new orthodoxy." 135 S.Ct., at 2642 (ALITO, J., dissenting). If that freedom is to maintain its vitality, reasoning like the Colorado Court of Appeals' must be rejected.

Justice GINSBURG, with whom Justice SOTOMAYOR joins, dissenting.

There is much in the Court's opinion with which I agree. "[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." Ante, at 1727. "Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." Ante, at 1727 – 1728. "[P]urveyors of goods and services who object to gay marriages for moral and religious reasons [may not] put up signs saying 'no goods or services will be sold if they will be used for gay marriages.' " Ante, at 1728 – 1729. Gay persons may be spared from "indignities when they seek goods and services in an open market." Ante, at 1732.1 I strongly disagree, however, with the

Court's conclusion that Craig and Mullins should lose this case. All of the above-quoted statements point in the opposite direction.

As Justice THOMAS observes, the Court does not hold that wedding cakes are speech or expression entitled to First Amendment protection. Nor could it, consistent with our First Amendment precedents. Justice THOMAS acknowledges that for conduct to constitute protected expression, the conduct must be reasonably understood by an observer to be communicative. The record in this case is replete with Jack Phillips' own views on the messages he believes his cakes convey. But Phillips submitted no evidence showing that an objective observer understands a wedding cake to convey a message, much less that the observer understands the message to be the baker's, rather than the marrying couple's. Indeed, some in the wedding industry could not explain what message, or whose, a wedding cake conveys. And Phillips points to no case in which this Court has suggested the provision of a baked good might be expressive conduct.

The Court concludes that "Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires." ... Hostility is discernible, the Court maintains, from the asserted "disparate consideration of Phillips' case compared to the cases of" three other bakers who refused to make cakes requested by William Jack, an amicus here. ... The different outcomes the Court features do not evidence hostility to religion of the kind we have previously held to signal a free-exercise violation, nor do the comments by one or two members of one of the four decisionmaking entities considering this case justify reversing the judgment below.

I

On March 13, 2014—approximately three months after the ALJ ruled in favor of the same-sex couple, Craig and Mullins, and two months before the Commission heard Phillips' appeal from that decision—William Jack visited three Colorado bakeries. His visits followed a similar pattern. He requested two cakes

"made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. [He] requested that one of the cakes include an image of two groomsmen, holding hands, with a red 'X' over the image. On one cake, he requested [on] one side[,] ... 'God hates sin. Psalm 45:7' and on the opposite side of the cake 'Homosexuality is a detestable sin. Leviticus 18:2.' On the second cake, [the one] with the image of the two groomsmen covered by a red 'X' [Jack] requested [these words]: 'God loves sinners' and on the other side 'While we were yet sinners Christ died for us. Romans 5:8.'" App. to Pet. for Cert. 319a; see *id.*, at 300a, 310a.

In contrast to Jack, Craig and Mullins simply requested a wedding cake: They mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold.

One bakery told Jack it would make cakes in the shape of Bibles, but would not decorate them with the requested messages; the owner told Jack her bakery "does not discriminate" and "accept[s] all humans." The second bakery owner told Jack he "had done open Bibles and books many times and that they look amazing," but declined to make the specific cakes Jack described because the baker regarded the messages as "hateful." The

third bakery, according to Jack, said it would bake the cakes, but would not include the requested message.

Jack filed charges against each bakery with the Colorado Civil Rights Division (Division). The Division found no probable cause to support Jack's claims of unequal treatment and denial of goods or services based on his Christian religious beliefs. In this regard, the Division observed that the bakeries regularly produced cakes and other baked goods with Christian symbols and had denied other customer requests for designs demeaning people whose dignity the Colorado Antidiscrimination Act (CADA) protects. The Commission summarily affirmed the Division's no-probable-cause finding.

The Court concludes that "the Commission's consideration of Phillips' religious objection did not accord with its treatment of [the other bakers'] objections." But the cases the Court aligns are hardly comparable. The bakers would have refused to make a cake with Jack's requested message for any customer, regardless of his or her religion. And the bakers visited by Jack would have sold him any baked goods they would have sold anyone else. The bakeries' refusal to make Jack cakes of a kind they would not make for any customer scarcely resembles Phillips' refusal to serve Craig and Mullins: Phillips would not sell to Craig and Mullins, for no reason other than their sexual orientation, a cake of the kind he regularly sold to others. When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating their wedding—not a cake celebrating heterosexual weddings or same-sex weddings—and that is the service Craig and Mullins were denied. Colorado, the Court does not gainsay, prohibits precisely the discrimination Craig and Mullins encountered. Jack, on the other hand, suffered no service refusal on the basis of his religion or any other protected characteristic. He was treated as any other customer would have been treated—no better, no worse.

FN 3. Justice GORSUCH argues that the situations "share all legally salient features. But what critically differentiates them is the role the customer's "statutorily protected trait," played in the denial of service. Change Craig and Mullins' sexual orientation (or sex), and Phillips would have provided the cake. Change Jack's religion, and the bakers would have been no more willing to comply with his request. The bakers' objections to Jack's cakes had nothing to do with "religious opposition to same-sex weddings." Ante, at 1736 (GORSUCH, J., concurring). Instead, the bakers simply refused to make cakes bearing statements demeaning to people protected by CADA. With respect to Jack's second cake, in particular, where he requested an image of two groomsmen covered by a red "X" and the lines "God loves sinners" and "While we were yet sinners Christ died for us," the bakers gave not the slightest indication that religious words, rather than the demeaning image, prompted the objection. Phillips did, therefore, discriminate because of sexual orientation; the other bakers did not discriminate because of religious belief; and the Commission properly found discrimination in one case but not the other.

The fact that Phillips might sell other cakes and cookies to gay and lesbian customers was irrelevant to the issue Craig and Mullins' case presented. What matters is that Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple. In contrast, the other bakeries' sale of other goods to Christian customers was relevant: It shows that there were no goods the bakeries would sell to a non-Christian customer that they would refuse to sell to a Christian customer.

Nor was the Colorado Court of Appeals’ “difference in treatment of these two instances ... based on the government’s own assessment of offensiveness.” Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it. The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the requested product would literally display. As the Court recognizes, a refusal “to design a special cake with words or images ... might be different from a refusal to sell any cake at all.” The Colorado Court of Appeals did not distinguish Phillips and the other three bakeries based simply on its or the Division’s finding that messages in the cakes Jack requested were offensive while any message in a cake for Craig and Mullins was not. The Colorado court distinguished the cases on the ground that Craig and Mullins were denied service based on an aspect of their identity that the State chose to grant vigorous protection from discrimination. See App. to Pet. for Cert. 20a, n. 8 (“The Division found that the bakeries did not refuse [Jack’s] request because of his creed, but rather because of the offensive nature of the requested message.... [T]here was no evidence that the bakeries based their decisions on [Jack’s] religion ... [whereas Phillips] discriminat [ed] on the basis of sexual orientation.”). I do not read the Court to suggest that the Colorado Legislature’s decision to include certain protected characteristics in CADA is an impermissible government prescription of what is and is not offensive. To repeat, the Court affirms that “Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.”

FN 5. The Court undermines this observation when later asserting that the treatment of Phillips, as compared with the treatment of the other three bakeries, “could reasonably be interpreted as being inconsistent as to the question of whether speech is involved.” But recall that, while Jack requested cakes with particular text inscribed, Craig and Mullins were refused the sale of any wedding cake at all. They were turned away before any specific cake design could be discussed. (It appears that Phillips rarely, if ever, produces wedding cakes with words on them—or at least does not advertise such cakes. See Masterpiece Cakeshop, Wedding, <http://www.masterpiececakes.com/wedding-cakes> (as last visited June 1, 2018) (gallery with 31 wedding cake images, none of which exhibits words).) The Division and the Court of Appeals could rationally and lawfully distinguish between a case involving disparaging text and images and a case involving a wedding cake of unspecified design. The distinction is not between a cake with text and one without, see ante, at 1737 – 1738 (GORSUCH, J., concurring); it is between a cake with a particular design and one whose form was never even discussed.

II

Statements made at the Commission’s public hearings on Phillips’ case provide no firmer support for the Court’s holding today. Whatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips’ refusal to sell a wedding cake to Craig and Mullins. The proceedings involved several layers of independent decisionmaking, of which the Commission was but one. First, the Division had to find probable cause that Phillips violated CADA. Second, the ALJ entertained the parties’ cross-motions for summary judgment. Third, the Commission heard Phillips’ appeal. Fourth, after the Commission’s

ruling, the Colorado Court of Appeals considered the case de novo. What prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say. Phillips' case is thus far removed from the only precedent upon which the Court relies, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), where the government action that violated a principle of religious neutrality implicated a sole decisionmaking body, the city council, see *id.*, at 526–528.

* * *

For the reasons stated, sensible application of CADA to a refusal to sell any wedding cake to a gay couple should occasion affirmance of the Colorado Court of Appeals' judgment. I would so rule.

Review Questions and Explanations: *Masterpiece Cakeshop*

1. What is the holding of the case? Would the result have been different if the Colorado Civil Rights Commission had used more respectful language and refrained from imposing a heavy-handed remedy? (E.g., a fine rather than “re-education”?)

2. Many white supremacist groups claim to have a Christian foundation for their beliefs. Does Masterpiece Cakeshop permit a white supremacist business owner to post storefront signs announcing that ethnic and religious minorities will be refused service? Why or why not? Note that Masterpiece Cakeshop reaffirms the notion that courts will not examine the bona fides of claimed religious beliefs.

3. Justice Gorsuch joined by Alito and Thomas hint that *Employment Division v. Smith* should be reconsidered. Should it?

4. Justice Thomas argues that Phillips's cake-baking is expressive conduct whose regulation warrants strict scrutiny. Is this position viable across the run of potential applications? What would be the impact on antidiscrimination and public accommodations laws?