

Constitutional Law

**A CONTEXT AND PRACTICE CASEBOOK
SECOND EDITION**

2020 SUPPLEMENT

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TABLE OF CONTENTS

Chapter 1: Legislative Power	1
Case Note: <i>Murphy v. NCAA</i>	1
Case Note: <i>Allen v. Cooper</i>	2
<i>Franchise Tax Board of California v. Hyatt</i>	4
 Chapter 3: Executive Power	 11
<i>Trump v. Hawaii</i>	11
<i>Trump v. Mazars</i>	31
<i>Trump v. Vance</i>	42
<i>Selia Law LLC v. Consumer Financial Protection Bureau</i>	51
<i>Chiafalo v. Washington</i>	80
 Chapter 6: Justiciability	 93
Case Note: <i>Department of Commerce v. New York</i>	93
<i>Rucho v. Common Cause</i>	95
 Chapter 7: Substantive Due Process	 107
<i>June Medical Services v. Russo</i>	108
 Chapter 8: Equal Protection	 116
<i>Manhattan Community Access Corp. v. Halleck</i>	116
 Chapter 9: Freedom of Speech	 122
<i>Reed v. Town of Gilbert</i>	122
 Chapter 10: Religious Freedom	 132
<i>McCreary County, Kentucky v. American Civil Liberties</i> <i>Union of Kentucky</i>	132
<i>American Legion v. American Humanist Ass'n</i>	140
<i>Masterpiece Cakeshop v. Colorado Civil Rights</i> <i>Commission</i>	153
<i>Espinoza v. Montana Dept. of Rev</i>	170

2020 SUPPLEMENT – 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. 195 before section 2.

1. Sovereign Immunity in other contexts

CASE NOTE. In *Allen v. Cooper*, 598 U.S. ___ (2020) Justice Kagan explained the congruence and proportionality test as applied in a copyright case. She explained it, and its relationship to the congressional record, as follows (internal citations omitted): “For an abrogation statute to be “appropriate” under Section 5, it must be tailored to “remedy or prevent” conduct infringing the Fourteenth Amendment’s substantive prohibitions. Congress can permit suits against States for actual violations of the rights guaranteed in Section 1. And to deter those violations, it can allow suits against States for “a somewhat broader swath of conduct,” including acts constitutional in themselves. But Congress cannot use its “power to enforce” the Fourteenth Amendment to alter what that Amendment bars. That means a congressional abrogation is valid under Section 5 only if it sufficiently connects to conduct courts have held Section 1 to proscribe. To decide whether a law passes muster, this Court has framed a type of means-end test. For Congress’s action to fall within its Section 5 authority, we have said, “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” On the one hand, courts are to consider the constitutional problem Congress faced—both the

nature and the extent of state conduct violating the Fourteenth Amendment. That assessment usually (though not inevitably) focuses on the legislative record, which shows the evidence Congress had before it of a constitutional wrong. On the other hand, courts are to examine the scope of the response Congress chose to address that injury. Here, a critical question is how far, and for what reasons, Congress has gone beyond redressing actual constitutional violations. Hard problems often require forceful responses and, as noted above, Section 5 allows Congress to “enact[] reasonably prophylactic legislation” to deter constitutional harm. But “[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one.” *Boerne*, 521 U. S., at 530. Always, what Congress has done must be in keeping with the Fourteenth Amendment rules it has the power to “enforce.”

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?

2020 SUPPLEMENT – 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. . . .

IV

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?

* * *

E. Executive Privileges and Immunities

For insertion at p. 440 before section F.

Guided Reading Questions: *Trump v. Mazars* and *Trump v. Vance*

1. Both of these cases involve efforts to obtain information about President Trump's personal finances. Until 2016, all major party candidates for the presidency since 1976 had released their tax returns before or during the presidential campaign. They also had used blind trusts or divested themselves of financial assets that could create the actuality or appearance of a conflict of interest between their personal finances and their duties as President (President Carter famously sold his Georgia peanut farm upon assuming office). Candidate Trump declined to do either of those things. The following two cases involve efforts to obtain his tax documents and financial data through other means, specifically, subpoenas issued by various House Committees (*Mazars*) and a state grand jury investigation (*Vance*). When reading the facts of these cases, take the time to understand how they differ from each other, and also from *United States v. Nixon*, *Nixon v. Fitzgerald* and *Clinton v. Jones*.

2. In each case, what did President Trump ask for: unqualified executive privilege, qualified executive privilege, unqualified executive immunity, qualified executive immunity, or something else? What did he get?

3. In each case, Chief Justice Roberts remands the case for further consideration consistent with the opinion of the Court. Identify the standard or test the lower court is to apply in each case. Are they different? In what way?

4. In *Mazars*, Justice Kavanaugh, in a concurring opinion not reprinted below, argued that *United States v. Nixon* applied a different standard than that adopted by Chief Justice Roberts. Review *Nixon*. Did Roberts change the standard, and if so, in what way?

5. *Vance* involved federalism concerns not at issue in the earlier cases. What unique issues may be raised by subpoenas issued by state rather than federal entities?

Trump v. Mazars

__ S.Ct. __ (2020)

Majority: *Roberts* (CJ), Ginsburg, Breyer, Sotomayor, Kagan

Concurrence in the Judgment: *Kavanaugh*, Gorsuch

Dissent: *Thomas*, Alito

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Over the course of five days in April 2019, three committees of the U. S. House of Representatives issued four subpoenas seeking information about the finances of President Donald J. Trump, his children, and affiliated businesses. We have held that the House has authority under the Constitution to issue subpoenas to assist it in carrying out its legislative responsibilities. The House asserts that the financial information sought here—encompassing a decade's worth of transactions by the President and his family—will help guide legislative reform in areas ranging from money laundering and terrorism to foreign involvement in U. S. elections. The President contends that the House lacked a valid legislative aim and instead sought these records to harass him, expose personal matters, and conduct law enforcement activities beyond its authority. The question presented is whether the subpoenas exceed the authority of the House under the Constitution.

We have never addressed a congressional subpoena for the President's information. Two hundred years ago, it was established that Presidents may be subpoenaed during a federal criminal proceeding, *United States v. Burr*, 25 F. Cas. 30 (No. 14,692d). Nearly fifty years ago, we held that a federal prosecutor could obtain information from a President despite assertions of executive privilege, *United States v. Nixon*, 418 U. S. 683 (1974), and more recently we ruled that a private litigant could subject a President to a damages suit and appropriate discovery obligations in federal court, *Clinton v. Jones*, 520 U. S. 681 (1997).

This case is different. Here the President's information is sought not by prosecutors or private parties in connection with a particular judicial proceeding, but by committees of Congress that have set forth broad legislative objectives. Congress and the President—the two political branches established by the Constitution—have an ongoing relationship that the Framers intended to feature both rivalry and reciprocity. See *The Federalist* No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring). That distinctive aspect necessarily informs our analysis of the question before us.

Each of the three committees sought overlapping sets of financial documents, but each supplied different justifications for the requests.

The House Committee on Financial Services issued two subpoenas, both on April 11, 2019. App. 128, 154, 226. The first, issued to Deutsche Bank, seeks the financial information of the President, his children, their immediate family members, and several affiliated business entities. Specifically, the subpoena seeks any document related to account activity, due diligence, foreign transactions, business statements, debt schedules, statements of net worth, tax returns, and suspicious activity identified by Deutsche Bank. The second, issued to Capital One, demands similar financial information with respect to more than a dozen business entities associated with the President. The Deutsche Bank subpoena requests materials from "2010 through the present," and the Capital One subpoena covers "2016 through the present," but both subpoenas impose no time limitations for certain documents, such as those connected to account openings and due diligence. *Id.*, at 128, 155.

According to the House, the Financial Services Committee issued these subpoenas pursuant to House Resolution 206, which called for "efforts to close loopholes that allow corruption, terrorism, and money laundering to infiltrate our country's financial system." H. Res. 206, 116th Cong., 1st Sess., 5 (Mar. 13, 2019). Such loopholes, the resolution explained, had allowed "illicit money, including from Russian oligarchs," to flow into the United States through "anonymous shell companies" using investments such as "luxury high-end real estate." *Id.*, at 3. The House also invokes the oversight plan of the Financial Services Committee, which stated that the Committee intends to review banking regulation and "examine the implementation, effectiveness, and enforcement" of laws designed to prevent money laundering and the financing of terrorism. H. R. Rep. No. 116-40, p. 84 (2019). The plan further provided that the Committee would "consider proposals to prevent the abuse of the financial system" and "address any vulnerabilities identified" in the real estate market. *Id.*, at 85.

On the same day as the Financial Services Committee, the Permanent Select Committee on Intelligence issued an identical subpoena to Deutsche Bank—albeit for different reasons. According to the House, the Intelligence Committee subpoenaed Deutsche Bank as part of an investigation into foreign efforts to undermine the U. S. political process. Committee Chairman Adam Schiff had described that investigation in a previous statement, explaining that the Committee was examining alleged attempts by Russia to influence the 2016 election; potential links between Russia and the President's campaign; and whether the President and his associates had been compromised by foreign actors or interests. Press Release, House Permanent Select Committee on Intelligence, Chairman Schiff Statement on House Intelligence Committee Investigation (Feb. 6, 2019). Chairman Schiff added that the Committee planned "to develop legislation and policy reforms to ensure the U. S. government is better positioned to counter future efforts to undermine our political process and national security." *Ibid.*

Four days after the Financial Services and Intelligence Committees, the House Committee on Oversight and Reform issued another subpoena, this time to the President's

personal accounting firm, Mazars USA, LLP. The subpoena demanded information related to the President and several affiliated business entities from 2011 through 2018, including statements of financial condition, independent auditors' reports, financial reports, underlying source documents, and communications between Mazars and the President or his businesses. The subpoena also requested all engagement agreements and contracts "[w]ithout regard to time." App. to Pet. for Cert. in 19-715, p. 230.

Chairman Elijah Cummings explained the basis for the subpoena in a memorandum to the Oversight Committee. According to the chairman, recent testimony by the President's former personal attorney Michael Cohen, along with several documents prepared by Mazars and supplied by Cohen, raised questions about whether the President had accurately represented his financial affairs. Chairman Cummings asserted that the Committee had "full authority to investigate" whether the President: (1) "may have engaged in illegal conduct before and during his tenure in office," (2) "has undisclosed conflicts of interest that may impair his ability to make impartial policy decisions," (3) "is complying with the Emoluments Clauses of the Constitution," and (4) "has accurately reported his finances to the Office of Government Ethics and other federal entities." App. in No. 19-5142 (CADDC), p. 107. "The Committee's interest in these matters," Chairman Cummings concluded, "informs its review of multiple laws and legislative proposals under our jurisdiction." *Ibid.*

Petitioners—the President in his personal capacity, along with his children and affiliated businesses—filed two suits challenging the subpoenas. They contested the subpoena issued by the Oversight Committee in the District Court for the District of Columbia (*Mazars*, No. 19-715), and the subpoenas issued by the Financial Services and Intelligence Committees in the Southern District of New York (*Deutsche Bank*, No. 19-760). In both cases, petitioners contended that the subpoenas lacked a legitimate legislative purpose and violated the separation of powers. The President did not, however, resist the subpoenas by arguing that any of the requested records were protected by executive privilege.

[T]he Court of Appeals found that the subpoena served a "valid legislative purpose" because the requested information was relevant to reforming financial disclosure requirements for Presidents and presidential candidates. *Id.*, at 726-742 (internal quotation marks omitted). Judge Rao dissented. As she saw it, the "gravamen" of the subpoena was investigating alleged illegal conduct by the President, and the House must pursue such wrongdoing through its impeachment powers, not its legislative powers. *Id.*, at 773-774. Otherwise, the House could become a "roving inquisition over a co-equal branch of government." *Id.*, at 748. The D. C. Circuit denied rehearing en banc over several more dissents.

In *Deutsche Bank*, the District Court denied a preliminary injunction, 2019 WL 2204898 (SDNY, May 22, 2019), and the Second Circuit affirmed "in substantial part." While acknowledging that the subpoenas are "surely broad in scope," the Court of Appeals held that the Intelligence Committee properly issued its subpoena to Deutsche Bank as part of an investigation into alleged foreign influence over petitioners and Russian interference with the U. S. political process. *Id.*, at 650, 658-659. That investigation, the court

concluded, could inform legislation to combat foreign meddling and strengthen national security. *Id.*, at 658-659, and n. 59.

As to the subpoenas issued by the Financial Services Committee to Deutsche Bank and Capital One, the Court of Appeals concluded that they were adequately related to potential legislation on money laundering, terrorist financing, and the global movement of illicit funds through the real estate market. *Id.*, at 656-659. Rejecting the contention that the subpoenas improperly targeted the President, the court explained in part that the President's financial dealings with Deutsche Bank made it "appropriate" for the House to use him as a "case study" to determine "whether new legislation is needed." *Id.*

The question presented is whether the subpoenas exceed the authority of the House under the Constitution. Historically, disputes over congressional demands for presidential documents have not ended up in court. Instead, they have been hashed out in the "hurly-burly, the give-and-take of the political process between the legislative and the executive." Hearings on S. 2170 et al. before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess., 87 (1975) (A. Scalia, Assistant Attorney General, Office of Legal Counsel).

That practice began with George Washington and the early Congress. In 1792, a House committee requested Executive Branch documents pertaining to General St. Clair's campaign against the Indians in the Northwest Territory, which had concluded in an utter rout of federal forces when they were caught by surprise near the present-day border between Ohio and Indiana. See T. Taylor, *Grand Inquest: The Story of Congressional Investigations 19-23* (1955). Since this was the first such request from Congress, President Washington called a Cabinet meeting, wishing to take care that his response "be rightly conducted" because it could "become a precedent." 1 Writings of Thomas Jefferson 189 (P. Ford ed. 1892).

The meeting, attended by the likes of Alexander Hamilton, Thomas Jefferson, Edmund Randolph, and Henry Knox, ended with the Cabinet of "one mind": The House had authority to "institute inquiries" and "call for papers" but the President could "exercise a discretion" over disclosures, "communicat[ing] such papers as the public good would permit" and "refus[ing]" the rest. *Id.*, at 189-190. President Washington then dispatched Jefferson to speak to individual congressmen and "bring them by persuasion into the right channel." *Id.*, at 190. The discussions were apparently fruitful, as the House later narrowed its request and the documents were supplied without recourse to the courts. See 3 Annals of Cong. 536 (1792); Taylor, *supra*, at 24.

Jefferson, once he became President, followed Washington's precedent. In early 1807, after Jefferson had disclosed that "sundry persons" were conspiring to invade Spanish territory in North America with a private army, 16 Annals of Cong. 686-687, the House requested that the President produce any information in his possession touching on the conspiracy (except for information that would harm the public interest), *id.* Jefferson chose not to divulge the entire "voluminous" correspondence on the subject, explaining that much of it was "private" or mere "rumors" and "neither safety nor justice" permitted

him to "expos[e] names" apart from identifying the conspiracy's "principal actor": Aaron Burr. *Id.*, at 39-40. Instead of the entire correspondence, Jefferson sent Congress particular documents and a special message summarizing the conspiracy. *Id.* Neither Congress nor the President asked the Judiciary to intervene.

FN: By contrast, later that summer, the Judiciary *was* called on to resolve whether President Jefferson could be issued a subpoena *duces tecum* arising from Burr's criminal trial. See *United States v. Burr*, 25 F. Cas. 30 (No. 14,692d) (CC Va. 1807); see also *Trump v. Vance*, *ante*, at 5-7.

Ever since, congressional demands for the President's information have been resolved by the political branches without involving this Court. The Reagan and Clinton presidencies provide two modern examples:

During the Reagan administration, a House subcommittee subpoenaed all documents related to the Department of the Interior's decision whether to designate Canada a reciprocal country for purposes of the Mineral Lands Leasing Act. President Reagan directed that certain documents be withheld because they implicated his confidential relationship with subordinates. While withholding those documents, the administration made "repeated efforts" at accommodation through limited disclosures and testimony over a period of several months. 6 Op. of Office of Legal Counsel 751, 780 (1982). Unsatisfied, the subcommittee and its parent committee eventually voted to hold the Secretary of the Interior in contempt, and an innovative compromise soon followed: All documents were made available, but only for one day with no photocopying, minimal notetaking, and no participation by non-Members of Congress.

In 1995, a Senate committee subpoenaed notes taken by a White House attorney at a meeting with President Clinton's personal lawyers concerning the Whitewater controversy. The President resisted the subpoena on the ground that the notes were protected by attorney-client privilege, leading to "long and protracted" negotiations and a Senate threat to seek judicial enforcement of the subpoena. S. Rep. No. 104-204, pp. 16-17 (1996). Eventually the parties reached an agreement, whereby President Clinton avoided the threatened suit, agreed to turn over the notes, and obtained the Senate's concession that he had not waived any privileges. *Ibid.*

Congress and the President maintained this tradition of negotiation and compromise—without the involvement of this Court—until the present dispute. Indeed, from President Washington until now, we have never considered a dispute over a congressional subpoena for the President's records. And, according to the parties, the appellate courts have addressed such a subpoena only once, when a Senate committee subpoenaed President Nixon during the Watergate scandal. In that case, the court refused to enforce the subpoena, and the Senate did not seek review by this Court.

This dispute therefore represents a significant departure from historical practice. Although the parties agree that this particular controversy is justiciable, we recognize that it is the first of its kind to reach this Court; that disputes of this sort can raise important issues concerning relations between the branches; that related disputes involving congressional efforts to seek official Executive Branch information recur on a regular basis, including in the context of deeply partisan controversy; and that Congress and the Executive have nonetheless managed for over two centuries to resolve such disputes among themselves without the benefit of guidance from us. Such longstanding practice "is a consideration of great weight" in cases concerning "the allocation of power between [the] two elected branches of Government," and it imposes on us a duty of care to ensure that we not needlessly disturb "the compromises and working arrangements that [those] branches . . . themselves have reached." (Citations omitted). With that in mind, we turn to the question presented.

Congress has no enumerated constitutional power to conduct investigations or issue subpoenas, but we have held that each House has power "to secure needed information" in order to legislate. *McGrain v. Daugherty*, 273 U. S. 135, 161 (1927). This "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *Id.*, at 174. Without information, Congress would be shooting in the dark, unable to legislate "wisely or effectively." *Id.*, at 175. The congressional power to obtain information is "broad" and "indispensable." *Watkins v. United States*, 354 U. S. 178, 187, 215 (1957). It encompasses inquiries into the administration of existing laws, studies of proposed laws, and "surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them." *Id.*, at 187.

Because this power is "justified solely as an adjunct to the legislative process," it is subject to several limitations. *Id.*, at 197. Most importantly, a congressional subpoena is valid only if it is "related to, and in furtherance of, a legitimate task of the Congress." *Id.*, at 187. The subpoena must serve a "valid legislative purpose," *Quinn v. United States*, 349 U. S. 155, 161 (1955); it must "concern[] a subject on which legislation 'could be had,'" (citations omitted).

Furthermore, Congress may not issue a subpoena for the purpose of "law enforcement," because "those powers are assigned under our Constitution to the Executive and the Judiciary." *Quinn*, 349 U. S., at 161. Thus Congress may not use subpoenas to "try" someone "before [a] committee for any crime or wrongdoing." *McGrain*, [273 U. S., at 179](#). Congress has no "'general' power to inquire into private affairs and compel disclosures," and "there is no congressional power to expose for the sake of exposure," *Watkins*, 354 U. S., at 200. "Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Id.*, at 187.

Finally, recipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation. See *id.*, at 188, 198. And recipients have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege. See, e.g., Congressional Research Service, *supra*, at 16-

18 (attorney-client privilege); *Senate Select Committee*, 498 F. 2d, at 727, 730-731 (executive privilege). ...

The President contends, as does the Solicitor General appearing on behalf of the United States, that the usual rules for congressional subpoenas do not govern here because the President's papers are at issue. They argue for a more demanding standard based in large part on cases involving the Nixon tapes—recordings of conversations between President Nixon and close advisers discussing the break-in at the Democratic National Committee's headquarters at the Watergate complex. The tapes were subpoenaed by a Senate committee and the Special Prosecutor investigating the break-in, prompting President Nixon to invoke executive privilege and leading to two cases addressing the showing necessary to require the President to comply with the subpoenas. See *Nixon*, 418 U. S. 683; *Senate Select Committee*, 498 F. 2d 725.

Those cases, the President and the Solicitor General now contend, establish the standard that should govern the House subpoenas here. Quoting *Nixon*, the President asserts that the House must establish a "demonstrated, specific need" for the financial information, just as the Watergate special prosecutor was required to do in order to obtain the tapes. 418 U. S., at 713. And drawing on *Senate Select Committee*—the D. C. Circuit case refusing to enforce the Senate subpoena for the tapes—the President and the Solicitor General argue that the House must show that the financial information is "demonstrably critical" to its legislative purpose. 498 F. 2d, at 731.

We disagree that these demanding standards apply here. Unlike the cases before us, *Nixon* and *Senate Select Committee* involved Oval Office communications over which the President asserted executive privilege. That privilege safeguards the public interest in candid, confidential deliberations within the Executive Branch; it is "fundamental to the operation of Government." *Nixon*, 418 U. S., at 708. As a result, information subject to executive privilege deserves "the greatest protection consistent with the fair administration of justice." *Id.*, at 715. We decline to transplant that protection root and branch to cases involving nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations.

The standards proposed by the President and the Solicitor General—if applied outside the context of privileged information—would risk seriously impeding Congress in carrying out its responsibilities. The President and the Solicitor General would apply the same exacting standards to *all* subpoenas for the President's information, without recognizing distinctions between privileged and nonprivileged information, between official and personal information, or between various legislative objectives. Such a categorical approach would represent a significant departure from the longstanding way of doing business between the branches, giving short shrift to Congress's important interests in conducting inquiries to obtain the information it needs to legislate effectively. Confounding the legislature in that effort would be contrary to the principle that:

"It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice,

and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served." (citations omitted).

Legislative inquiries might involve the President in appropriate cases; as noted, Congress's responsibilities extend to "every affair of government." *Ibid.* (internal quotation marks omitted). Because the President's approach does not take adequate account of these significant congressional interests, we do not adopt it. ...

The House meanwhile would have us ignore that these suits involve the President. Invoking our precedents concerning investigations that did not target the President's papers, the House urges us to uphold its subpoenas because they "relate[] to a valid legislative purpose" or "concern[] a subject on which legislation could be had." Brief for Respondent 46. That approach is appropriate, the House argues, because the cases before us are not "momentous separation-of-powers disputes." Brief for Respondent 1.

Largely following the House's lead, the courts below treated these cases much like any other, applying precedents that do not involve the President's papers. The Second Circuit concluded that "this case does not concern separation of powers" because the House seeks personal documents and the President sued in his personal capacity. The D. C. Circuit, for its part, recognized that "separation-of-powers concerns still linger in the air," and therefore it did not afford deference to the House. But, because the House sought only personal documents, the court concluded that the case "present[ed] no direct interbranch dispute." *Ibid.*

The House's approach fails to take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President's information. Congress and the President have an ongoing institutional relationship as the "opposite and rival" political branches established by the Constitution. The Federalist No. 51, at 349. As a result, congressional subpoenas directed at the President differ markedly from congressional subpoenas we have previously reviewed, (citations omitted), and they bear little resemblance to criminal subpoenas issued to the President in the course of a specific investigation, *Nixon*, 418 U. S. 683. Unlike those subpoenas, congressional subpoenas for the President's information unavoidably pit the political branches against one another.

Far from accounting for separation of powers concerns, the House's approach aggravates them by leaving essentially no limits on the congressional power to subpoena the President's personal records. Any personal paper possessed by a President could potentially "relate to" a conceivable subject of legislation, for Congress has broad legislative powers that touch a vast number of subjects. Brief for Respondent 46. The President's financial records could relate to economic reform, medical records to health reform, school transcripts to education reform, and so on. Indeed, at argument, the House was unable to identify *any* type of information that lacks some relation to potential legislation.

Without limits on its subpoena powers, Congress could "exert an imperious controul" over the Executive Branch and aggrandize itself at the President's expense, just as the Framers feared. The Federalist No. 71, at 484 (A. Hamilton). And a limitless subpoena power would transform the "established practice" of the political branches. *Noel Canning*, 573 U. S., at 524 (internal quotation marks omitted). Instead of negotiating over information requests, Congress could simply walk away from the bargaining table and compel compliance in court.

The House and the courts below suggest that these separation of powers concerns are not fully implicated by the particular subpoenas here, but we disagree. We would have to be "blind" not to see what "[a]ll others can see and understand": that the subpoenas do not represent a run-of-the-mill legislative effort but rather a clash between rival branches of government over records of intense political interest for all involved. (Citations omitted).

The interbranch conflict here does not vanish simply because the subpoenas seek personal papers or because the President sued in his personal capacity. The President is the only person who alone composes a branch of government. As a result, there is not always a clear line between his personal and official affairs. "The interest of the man" is often "connected with the constitutional rights of the place." The Federalist No. 51, at 349. Given the close connection between the Office of the President and its occupant, congressional demands for the President's papers can implicate the relationship between the branches regardless whether those papers are personal or official. Either way, a demand may aim to harass the President or render him "complaisan[t] to the humors of the Legislature." *Id.*, No. 71, at 483. In fact, a subpoena for personal papers may pose a heightened risk of such impermissible purposes, precisely because of the documents' personal nature and their less evident connection to a legislative task. No one can say that the controversy here is less significant to the relationship between the branches simply because it involves personal papers. Quite the opposite. That appears to be what makes the matter of such great consequence to the President and Congress.

In addition, separation of powers concerns are no less palpable here simply because the subpoenas were issued to third parties. Congressional demands for the President's information present an interbranch conflict no matter where the information is held—it is, after all, the President's information. Were it otherwise, Congress could sidestep constitutional requirements any time a President's information is entrusted to a third party—as occurs with rapidly increasing frequency. Indeed, Congress could declare open season on the President's information held by schools, archives, internet service providers, e-mail clients, and financial institutions. The Constitution does not tolerate such ready evasion; it "deals with substance, not shadows." *Cummings v. Missouri*, 4 Wall. 277, 325 (1867). ...

Congressional subpoenas for the President's personal information implicate weighty concerns regarding the separation of powers. Neither side, however, identifies an approach that accounts for these concerns. For more than two centuries, the political branches have resolved information disputes using the wide variety of means that the Constitution puts at their disposal. The nature of such interactions would be transformed

by judicial enforcement of either of the approaches suggested by the parties, eroding a "[d]eeply embedded traditional way[] of conducting government." *Youngstown Sheet & Tube Co.*, 343 U. S., at 610 (Frankfurter, J., concurring).

A balanced approach is necessary, one that takes a "considerable impression" from "the practice of the government," *McCulloch v. Maryland*, 4 Wheat. 316, 401 (1819) (additional citations omitted). We therefore conclude that, in assessing whether a subpoena directed at the President's personal information is "related to, and in furtherance of, a legitimate task of the Congress," *Watkins*, 354 U. S., at 187, courts must perform a careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the "unique position" of the President, *Clinton*, 520 U. S., at 698 (internal quotation marks omitted). Several special considerations inform this analysis.

First, courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers. "[O]ccasion[s] for constitutional confrontation between the two branches' should be avoided whenever possible." *Cheney v. United States Dist. Court for D. C.*, 542 U. S. 367, 389-390 (2004) (quoting *Nixon*). Congress may not rely on the President's information if other sources could reasonably provide Congress the information it needs in light of its particular legislative objective. The President's unique constitutional position means that Congress may not look to him as a "case study" for general legislation.

Unlike in criminal proceedings, where "[t]he very integrity of the judicial system" would be undermined without "full disclosure of all the facts," *Nixon*, 418 U. S., at 709, efforts to craft legislation involve predictive policy judgments that are "not hamper[ed] . . . in quite the same way" when every scrap of potentially relevant evidence is not available, *Cheney*, 542 U. S., at 384. While we certainly recognize Congress's important interests in obtaining information through appropriate inquiries, those interests are not sufficiently powerful to justify access to the President's personal papers when other sources could provide Congress the information it needs.

Second, to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective. The specificity of the subpoena's request "serves as an important safeguard against unnecessary intrusion into the operation of the Office of the President." *Cheney*, 542 U. S., at 387.

Third, courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose. The more detailed and substantial the evidence of Congress's legislative purpose, the better. (Citation omitted). That is particularly true when Congress contemplates legislation that raises sensitive constitutional issues, such as legislation concerning the Presidency. In such cases, it is "impossible" to conclude that a subpoena is designed to advance a valid legislative purpose unless Congress adequately identifies its aims and explains why the President's information will advance its consideration of the possible legislation. *Id.*,

Fourth, courts should be careful to assess the burdens imposed on the President by a subpoena. We have held that burdens on the President's time and attention stemming from judicial process and litigation, without more, generally do not cross constitutional lines. See *Vance, ante*, at 12-14; *Clinton*. But burdens imposed by a congressional subpoena should be carefully scrutinized, for they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage.

Other considerations may be pertinent as well; one case every two centuries does not afford enough experience for an exhaustive list.

When Congress seeks information "needed for intelligent legislative action," it "unquestionably" remains "the duty of *all* citizens to cooperate." (citation omitted). Congressional subpoenas for information from the President, however, implicate special concerns regarding the separation of powers. The courts below did not take adequate account of those concerns. The judgments of the Courts of Appeals for the D. C. Circuit and the Second Circuit are vacated, and the cases are remanded for further proceedings consistent with this opinion.

The judgment of the Courts of Appeals for the D.C. Circuit and the Second Circuit are vacated, and the cases are remanded for further proceedings consistent with this opinion.

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

Three Committees of the U. S. House of Representatives issued subpoenas to several accounting and financial firms to obtain the personal financial records of the President, his family, and several of his business entities. The Committees do not argue that these subpoenas were issued pursuant to the House's impeachment power. Instead, they argue that the subpoenas are a valid exercise of their legislative powers.

Petitioners challenge the validity of these subpoenas. In doing so, they call into question our precedents to the extent that they allow Congress to issue legislative subpoenas for the President's private, nonofficial documents. I would hold that Congress has no power to issue a legislative subpoena for private, nonofficial documents—whether they belong to the President or not. Congress may be able to obtain these documents as part of an investigation of the President, but to do so, it must proceed under the impeachment power. Accordingly, I would reverse the judgments of the Courts of Appeals.

I begin with the Committees' claim that the House's legislative powers include the implied power to issue legislative subpoenas. Although the Founders understood that the enumerated powers in the Constitution included implied powers, the Committees' test for the scope of those powers is too broad.

"The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch 137, 176 (1803). The structure of limited and enumerated powers in our Constitution denotes that "[o]ur system of government rests on one overriding principle: All power stems from the consent of the people." *U. S. Term Limits, Inc. v. Thornton*, 514 U. S. 779, 846 (1995)

(THOMAS, J., dissenting). As a result, Congress may exercise only those powers given by the people of the States through the Constitution.

The Founders nevertheless understood that an enumerated power could necessarily bring with it implied powers. The idea of implied powers usually arises in the context of the Necessary and Proper Clause, which gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, §8, cl. 18. As I have previously explained, the Necessary and Proper Clause simply "made explicit what was already implicit in the grant of each enumerated power." (Citation omitted). That is, "the grant of a general power includes the grant of incidental powers for carrying it out." Bray, "Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution, 102 Va. L. Rev. 687, 741 (2016).

The scope of these implied powers is very limited. The Constitution does not sweep in powers "of inferior importance, merely because they are inferior." *McCulloch v. Maryland*, 4 Wheat. 316, 408 (1819). Instead, Congress "can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326 (1816). In sum, while the Committees' theory of an implied power is not categorically wrong, that power must be necessarily implied from an enumerated power.

At the time of the founding, the power to subpoena private, nonofficial documents was not included by necessary implication in any of Congress' legislative powers. This understanding persisted for decades and is consistent with the Court's first decision addressing legislative subpoenas, *Kilbourn v. Thompson*, 103 U. S. 168 (1881). The test that this Court created in *McGrain v. Daugherty*, 273 U. S. 135 (1927), and the majority's variation on that standard today, are without support as applied to private, nonofficial documents.

Trump v. Vance

__ S.Ct. __ (2020)

Majority: *Roberts* (CJ), Ginsburg, Breyer, Sotomayor, Kagan

Concurrence in the Judgment: Kavanaugh, Gorsuch

Dissent: *Thomas*, Alito

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In our judicial system, "the public has a right to every man's evidence." Since the earliest days of the Republic, "every man" has included the President of the United States. Beginning with Jefferson and carrying on through Clinton, Presidents have uniformly testified or produced documents in criminal proceedings when called upon by federal

courts. This case involves—so far as we and the parties can tell—the first *state* criminal subpoena directed to a President. The President contends that the subpoena is unenforceable. We granted certiorari to decide whether Article II and the Supremacy Clause categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President.

In the summer of 2018, the New York County District Attorney's Office opened an investigation into what it opaquely describes as "business transactions involving multiple individuals whose conduct may have violated state law." Brief for Respondent Vance 2. A year later, the office—acting on behalf of a grand jury—served a subpoena *duces tecum* (essentially a request to produce evidence) on Mazars USA, LLP, the personal accounting firm of President Donald J. Trump. The subpoena directed Mazars to produce financial records relating to the President and business organizations affiliated with him, including "[t]ax returns and related schedules," from "2011 to the present." App. to Pet. for Cert. 119a.

FN 2: The grand jury subpoena essentially copied a subpoena issued to Mazars in April 2019 by the Committee on Oversight and Reform of the U. S. House of Representatives, which is at issue in *Trump v. Mazars USA, LLP*, *post*, p. _____. The principal difference is that the instant subpoena expressly requests tax returns.

The President, acting in his personal capacity, sued the district attorney and Mazars in Federal District Court to enjoin enforcement of the subpoena. He argued that, under Article II and the Supremacy Clause, a sitting President enjoys absolute immunity from state criminal process. He asked the court to issue a "declaratory judgment that the subpoena is invalid and unenforceable while the President is in office" and to permanently enjoin the district attorney "from taking any action to enforce the subpoena." Amended Complaint in No. 1:19-cv-8694 (SDNY, Sept. 25, 2019), p. 19. Mazars, concluding that the dispute was between the President and the district attorney, took no position on the legal issues raised by the President.

In the summer of 1807, all eyes were on Richmond, Virginia. Aaron Burr, the former Vice President, was on trial for treason. Fallen from political grace after his fatal duel with Alexander Hamilton, and with a murder charge pending in New Jersey, Burr followed the path of many down-and-out Americans of his day—he headed West in search of new opportunity. But Burr was a man with outsized ambitions. Together with General James Wilkinson, the Governor of the Louisiana Territory, he hatched a plan to establish a new territory in Mexico, then controlled by Spain. Both men anticipated that war between the United States and Spain was imminent, and when it broke out they intended to invade Spanish territory at the head of a private army.

But while Burr was rallying allies to his cause, tensions with Spain eased and rumors began to swirl that Burr was conspiring to detach States by the Allegheny Mountains from the Union. Wary of being exposed as the principal co-conspirator, Wilkinson took steps to ensure that any blame would fall on Burr. He sent a series of letters to President Jefferson accusing Burr of plotting to attack New Orleans and revolutionize the Louisiana Territory.

Jefferson, who despised his former running mate Burr for trying to steal the 1800 presidential election from him, was predisposed to credit Wilkinson's version of events. The President sent a special message to Congress identifying Burr as the "prime mover" in a plot "against the peace and safety of the Union." 16 Annals of Cong. 39-40 (1807). According to Jefferson, Burr contemplated either the "severance of the Union" or an attack on Spanish territory. *Id.*, at 41. Jefferson acknowledged that his sources contained a "mixture of rumors, conjectures, and suspicions" but, citing Wilkinson's letters, he assured Congress that Burr's guilt was "beyond question." *Id.*, at 39-40. ...

In the lead-up to trial, Burr, taking aim at his accusers, moved for a subpoena *duces tecum* directed at Jefferson. The draft subpoena required the President to produce an October 21, 1806 letter from Wilkinson and accompanying documents, which Jefferson had referenced in his message to Congress. The prosecution opposed the request, arguing that a President could not be subjected to such a subpoena and that the letter might contain state secrets. Following four days of argument, Marshall announced his ruling to a packed chamber.

The President, Marshall declared, does not "stand exempt from the general provisions of the constitution" or, in particular, the Sixth Amendment's guarantee that those accused have compulsory process for obtaining witnesses for their defense. *United States v. Burr*, 25 F. Cas. 30, 33-34 (No. 14,692d) (CC Va. 1807). At common law the "single reservation" to the duty to testify in response to a subpoena was "the case of the king," whose "dignity" was seen as "incompatible" with appearing "under the process of the court." *Id.*, at 34. But, as Marshall explained, a king is born to power and can "do no wrong." *Ibid.* The President, by contrast, is "of the people" and subject to the law. *Ibid.* According to Marshall, the sole argument for exempting the President from testimonial obligations was that his "duties as chief magistrate demand his whole time for national objects." *Ibid.* But, in Marshall's assessment, those demands were "not unremitting." *Ibid.* And should the President's duties preclude his attendance at a particular time and place, a court could work that out upon return of the subpoena. *Ibid.*

Marshall also rejected the prosecution's argument that the President was immune from a subpoena *duces tecum* because executive papers might contain state secrets. "A subpoena *duces tecum*," he said, "may issue to any person to whom an ordinary subpoena may issue." *Ibid.* As he explained, no "fair construction" of the Constitution supported the conclusion that the right "to compel the attendance of witnesses[] does not extend" to requiring those witnesses to "bring[] with them such papers as may be material in the defence." *Id.*, at 35. And, as a matter of basic fairness, permitting such information to be withheld would "tarnish the reputation of the court." *Id.*, at 37. As for "the propriety of

introducing any papers," that would "depend on the character of the paper, not on the character of the person who holds it." *Id.*, at 34. Marshall acknowledged that the papers sought by Burr could contain information "the disclosure of which would endanger the public safety," but stated that, again, such concerns would have "due consideration" upon the return of the subpoena. *Id.*, at 37. In the two centuries since the Burr trial, successive Presidents have accepted Marshall's ruling that the Chief Executive is subject to subpoena. [Editors' note: Chief Justice Roberts goes on to give examples from the administrations of Presidents Monroe (1818); Grant (1875); Ford (1975, involving the President's testimony at the trial of his attempted assassin, which was given via videotape); Carter (1980); and Clinton (1998)].

The bookend to Marshall's ruling came in 1974 when the question he never had to decide—whether to compel the disclosure of official communications over the objection of the President—came to a head. That spring, the Special Prosecutor appointed to investigate the break-in of the Democratic National Committee Headquarters at the Watergate complex filed an indictment charging seven defendants associated with President Nixon and naming Nixon as an unindicted co-conspirator. As the case moved toward trial, the Special Prosecutor secured a subpoena *duces tecum* directing Nixon to produce, among other things, tape recordings of Oval Office meetings. Nixon moved to quash the subpoena, claiming that the Constitution provides an absolute privilege of confidentiality to all presidential communications. This Court rejected that argument in *United States v. Nixon*, 418 U. S. 683 (1974), a decision we later described as "unequivocally and emphatically endor[sing] Marshall's" holding that Presidents are subject to subpoena. *Clinton v. Jones*, 520 U. S. 681, 704 (1997).

The history surveyed above all involved *federal* criminal proceedings. Here we are confronted for the first time with a subpoena issued to the President by a local grand jury operating under the supervision of a *state* court.

FN3: While the subpoena was directed to the President's accounting firm, the parties agree that the papers at issue belong to the President and that Mazars is merely the custodian. Thus, for purposes of immunity, it is functionally a subpoena issued to the President.

In the President's view, that distinction makes all the difference. He argues that the Supremacy Clause gives a sitting President absolute immunity from state criminal subpoenas because compliance with those subpoenas would categorically impair a President's performance of his Article II functions. The Solicitor General, arguing on behalf of the United States, agrees with much of the President's reasoning but does not commit to his bottom line. Instead, the Solicitor General urges us to resolve this case by holding that a state grand jury subpoena for a sitting President's personal records must, at the very least, "satisfy a heightened standard of need," which the Solicitor General contends was not met here. Brief for United States as *Amicus Curiae* 26, 29. ...

We begin with the question of absolute immunity. No one doubts that Article II guarantees the independence of the Executive Branch. As the head of that branch, the President "occupies a unique position in the constitutional scheme." *Nixon v. Fitzgerald*, 457 U. S. 731, 749 (1982). His duties, which range from faithfully executing the laws to commanding the Armed Forces, are of unrivaled gravity and breadth. Quite appropriately, those duties come with protections that safeguard the President's ability to perform his vital functions. See, e.g., *ibid.* (concluding that the President enjoys "absolute immunity from damages liability predicated on his official acts"); *Nixon*, 418 U. S., at 708.

In addition, the Constitution guarantees "the entire independence of the General Government from any control by the respective States." (Citation omitted). As we have often repeated, "States have no power . . . to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress." *McCulloch v. Maryland*, 4 Wheat. 316, 436 (1819). It follows that States also lack the power to impede the President's execution of those laws.

Marshall's ruling in *Burr*, entrenched by 200 years of practice and our decision in *Nixon*, confirms that *federal* criminal subpoenas do not "rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Clinton*, 520 U. S., at 702-703. But the President, joined in part by the Solicitor General, argues that *state* criminal subpoenas pose a unique threat of impairment and thus demand greater protection. To be clear, the President does not contend here that *this* subpoena, in particular, is impermissibly burdensome. Instead he makes a *categorical* argument about the burdens generally associated with state criminal subpoenas, focusing on three: diversion, stigma, and harassment. We address each in turn. ...

The President's primary contention, which the Solicitor General supports, is that complying with state criminal subpoenas would necessarily divert the Chief Executive from his duties. He grounds that concern in *Nixon v. Fitzgerald*, which recognized a President's "absolute immunity from damages liability predicated on his official acts." 457 U. S., at 749. In explaining the basis for that immunity, this Court observed that the prospect of such liability could "distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Id.*, at 753. The President contends that the diversion occasioned by a state criminal subpoena imposes an equally intolerable burden on a President's ability to perform his Article II functions.

But *Fitzgerald* did not hold that distraction was sufficient to confer absolute immunity. We instead drew a careful analogy to the common law absolute immunity of judges and prosecutors, concluding that a President, like those officials, must "deal fearlessly and impartially with the duties of his office"—not be made "unduly cautious in the discharge of [those] duties" by the prospect of civil liability for official acts. *Id.*, at 751-752, and n. 32 (internal quotation marks omitted). Indeed, we expressly rejected immunity based on distraction alone 15 years later in *Clinton v. Jones*. There, President Clinton

argued that the risk of being "distracted by the need to participate in litigation" entitled a sitting President to absolute immunity from civil liability, not just for official acts, as in *Fitzgerald*, but for private conduct as well. 520 U. S., at 694, n. 19. We disagreed with that rationale, explaining that the "dominant concern" in *Fitzgerald* was not mere distraction but the distortion of the Executive's "decisionmaking process" with respect to official acts that would stem from "worry as to the possibility of damages." 520 U. S., at 694, n. 19. The Court recognized that Presidents constantly face myriad demands on their attention, "some private, some political, and some as a result of official duty." *Id.*, at 705, n. 40. But, the Court concluded, "[w]hile such distractions may be vexing to those subjected to them, they do not ordinarily implicate constitutional . . . concerns." *Ibid.*

The same is true of criminal subpoenas. Just as a "properly managed" civil suit is generally "unlikely to occupy any substantial amount of" a President's time or attention, *id.*, at 702, two centuries of experience confirm that a properly tailored criminal subpoena will not normally hamper the performance of the President's constitutional duties. If anything, we expect that in the mine run of cases, where a President is subpoenaed during a proceeding targeting someone else, as Jefferson was, the burden on a President will ordinarily be lighter than the burden of defending against a civil suit.

The President, however, believes the district attorney is investigating him and his businesses. In such a situation, he contends, the "toll that criminal process . . . exacts from the President is even heavier" than the distraction at issue in *Fitzgerald* and *Clinton*, because "criminal litigation" poses unique burdens on the President's time and will generate a "considerable if not overwhelming degree of mental preoccupation." Brief for Petitioner 16-18, 30 (internal quotation marks omitted).

But the President is not seeking immunity from the diversion occasioned by the prospect of future criminal *liability*. Instead he concedes—consistent with the position of the Department of Justice—that state grand juries are free to investigate a sitting President with an eye toward charging him after the completion of his term. The President's objection therefore must be limited to the *additional* distraction caused by the subpoena itself. But that argument runs up against the 200 years of precedent establishing that Presidents, and their official communications, are subject to judicial process, see *Burr*, 25 F. Cas., at 34, even when the President is under investigation, see *Nixon*, 418 U. S., at 706. ...

The President next claims that the stigma of being subpoenaed will undermine his leadership at home and abroad. Notably, the Solicitor General does not endorse this argument, perhaps because we have twice denied absolute immunity claims by Presidents in cases involving allegations of serious misconduct. See *Clinton*, 520 U. S., at 685; *Nixon*, 418 U. S., at 687. But even if a tarnished reputation were a cognizable impairment, there is nothing inherently stigmatizing about a President performing "the citizen's normal duty of . . . furnishing information relevant" to a criminal investigation. *Branzburg v. Hayes*, 408 U. S. 665, 691 (1972). Nor can we accept that the risk of association with persons or activities under criminal investigation can absolve a President of such an important public duty. Prior Presidents have weathered these

associations in federal cases, *supra*, at 6-10, and there is no reason to think any attendant notoriety is necessarily greater in state court proceedings.

To be sure, the consequences for a President's public standing will likely increase if he is the one under investigation. But, again, the President concedes that such investigations are permitted under Article II and the Supremacy Clause, and receipt of a subpoena would not seem to categorically magnify the harm to the President's reputation.

Additionally, while the current suit has cast the Mazars subpoena into the spotlight, longstanding rules of grand jury secrecy aim to prevent the very stigma the President anticipates. See S. Beale et al., *Grand Jury Law and Practice* §5:1, p. 5-3 (2d ed. 2018). Of course, disclosure restrictions are not perfect. See *Nixon*, 418 U. S., at 687, n. 4 (observing that news media reporting made the protective order shielding the fact that the President had been named as an unindicted co-conspirator "no longer meaningful"). But those who make unauthorized disclosures regarding a grand jury subpoena do so at their peril. ...

Finally, the President and the Solicitor General warn that subjecting Presidents to state criminal subpoenas will make them "easily identifiable target[s]" for harassment. *Fitzgerald*, 457 U. S., at 753. But we rejected a nearly identical argument in *Clinton*, where then-President Clinton argued that permitting civil liability for unofficial acts would "generate a large volume of politically motivated harassing and frivolous litigation." *Clinton*, 520 U. S., at 708. The President and the Solicitor General nevertheless argue that state criminal subpoenas pose a heightened risk and could undermine the President's ability to "deal fearlessly and impartially" with the States. *Fitzgerald*, 457 U. S., at 752 (internal quotation marks omitted). They caution that, while federal prosecutors are accountable to and removable by the President, the 2,300 district attorneys in this country are responsive to local constituencies, local interests, and local prejudices, and might "use criminal process to register their dissatisfaction with" the President. Brief for Petitioner 16. What is more, we are told, the state courts supervising local grand juries may not exhibit the same respect that federal courts show to the President as a coordinate branch of Government.

We recognize, as does the district attorney, that harassing subpoenas could, under certain circumstances, threaten the independence or effectiveness of the Executive. See Tr. of Oral Arg. 73. Even so, in *Clinton* we found that the risk of harassment was not "serious" because federal courts have the tools to deter and, where necessary, dismiss vexatious civil suits. And, while we cannot ignore the possibility that state prosecutors may have political motivations, see *post*, at 15 (ALITO, J., dissenting), here again the law already seeks to protect against the predicted abuse. ...

We next consider whether a state grand jury subpoena seeking a President's private papers must satisfy a heightened need standard. The Solicitor General would require a threshold showing that the evidence sought is "critical" for "specific charging decisions" and that the subpoena is a "last resort," meaning the evidence is "not available from any other source" and is needed "now, rather than at the end of the President's term." Brief for

United States as *Amicus Curiae* 29, 32 (internal quotation marks and alteration omitted). JUSTICE ALITO, largely embracing those criteria, agrees that a state criminal subpoena to a President "should not be allowed unless a heightened standard is met." *Post*, at 16-18 (asking whether the information is "critical" and "necessary . . . now").

We disagree, for three reasons. First, such a heightened standard would extend protection designed for official documents to the President's private papers. As the Solicitor General and JUSTICE ALITO acknowledge, their proposed test is derived from executive privilege cases that trace back to *Burr*. Brief for United States as *Amicus Curiae* 26-28; *post*, at 17. There, Marshall explained that if Jefferson invoked presidential privilege over executive communications, the court would not "proceed against the president as against an ordinary individual" but would instead require an affidavit from the defense that "would clearly show the paper to be essential to the justice of the case." *Burr*, 25 F. Cas., at 192. The Solicitor General and JUSTICE ALITO would have us apply a similar standard to a President's personal papers. But this argument does not account for the relevant passage from *Burr*: "If there be a paper in the possession of the executive, which is *not of an official nature*, he must stand, as respects that paper, in nearly the same situation with any other individual." *Id.*, at 191 (emphasis added). And it is only "nearly"—and not "entirely"—because the President retains the right to assert privilege over documents that, while ostensibly private, "partake of the character of an official paper." *Id.*, at 191-192.

Second, neither the Solicitor General nor JUSTICE ALITO has established that heightened protection against state subpoenas is necessary for the Executive to fulfill his Article II functions. Beyond the risk of harassment, which we addressed above, the only justification they offer for the heightened standard is protecting Presidents from "unwarranted burdens." Brief for United States as *Amicus Curiae* 28; see *post*, at 16 (asking whether "there is an urgent and critical need for the subpoenaed information"). In effect, they argue that even if federal subpoenas to a President are warranted whenever evidence is material, state subpoenas are warranted "only when [the] evidence is essential." Brief for United States as *Amicus Curiae* 28; see *post*, at 16. But that double standard has no basis in law. For if the state subpoena is not issued to manipulate, *supra*, at 16-17, the documents themselves are not protected, *supra*, at 18, and the Executive is not impaired, *supra*, at 12-15, then nothing in Article II or the Supremacy Clause supports holding state subpoenas to a higher standard than their federal counterparts.

Finally, in the absence of a need to protect the Executive, the public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence. Requiring a state grand jury to meet a heightened standard of need would hobble the grand jury's ability to acquire "all information that might possibly bear on its investigation." *R. Enterprises, Inc.*, 498 U. S., at 297. And, even assuming the evidence withheld under that standard were preserved until the conclusion of a President's term, in the interim the State would be deprived of investigative leads that the evidence might yield, allowing memories to fade and documents to disappear. This could frustrate the identification, investigation, and indictment of third parties (for whom applicable statutes of limitations might lapse). More troubling, it could prejudice the innocent by depriving the grand jury of *exculpatory* evidence.

Rejecting a heightened need standard does not leave Presidents with "no real protection." *Post*, at 19 (opinion of ALITO, J.). To start, a President may avail himself of the same protections available to every other citizen. These include the right to challenge the subpoena on any grounds permitted by state law, which usually include bad faith and undue burden or breadth. (Citations omitted). And, as in federal court, "[t]he high respect that is owed to the office of the Chief Executive . . . should inform the conduct of the entire proceeding, including the timing and scope of discovery." *Clinton*, 520 U. S., at 707. See *id.*, at 724 (BREYER, J., concurring in judgment) (stressing the need for courts presiding over suits against the President to "schedule proceedings so as to avoid significant interference with the President's ongoing discharge of his official responsibilities"); *Nixon*, 418 U. S., at 702 ("[W]here a subpoena is directed to a President . . . appellate review . . . should be particularly meticulous.").

Furthermore, although the Constitution does not entitle the Executive to absolute immunity or a heightened standard, he is not "relegate[d]" only to the challenges available to private citizens. *Post*, at 17 (opinion of ALITO, J.). A President can raise subpoena-specific constitutional challenges, in either a state or federal forum. As previously noted, he can challenge the subpoena as an attempt to influence the performance of his official duties, in violation of the Supremacy Clause. This avenue protects against local political machinations "interposed as an obstacle to the effective operation of a federal constitutional power." *United States v. Belmont*, 301 U. S. 324, 332(1937).

In addition, the Executive can—as the district attorney concedes—argue that compliance with a particular subpoena would impede his constitutional duties. Brief for Respondent Vance 42. Incidental to the functions confided in Article II is "the power to perform them, without obstruction or impediment." 3 J. Story, *Commentaries on the Constitution of the United States* §1563, pp. 418-419 (1833). As a result, "once the President sets forth and explains a conflict between judicial proceeding and public duties," or shows that an order or subpoena would "significantly interfere with his efforts to carry out" those duties, "the matter changes." *Clinton*, 520 U. S., at 710, 714 (opinion of BREYER, J.). At that point, a court should use its inherent authority to quash or modify the subpoena, if necessary to ensure that such "interference with the President's duties would not occur." *Id.*, at 708 (opinion of the Court).

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

Review Questions and Explanations: *Trump v. Mazars* and *Trump v. Vance*

1. Imagine you are the lower court judge hearing *Mazars* and *Vance* on remand. How would you apply the tests set out by the Court in these opinions? Try writing out a sketch of your opinion in one or both of them.

2. Justice Thomas's test in *Mazars* would severely curtail the investigatory power of Congress. Identify the circumstances in which he *would* allow Congress to subpoena presidential information.

3. The subpoenas in *Mazars* and *Vance* were not actually directed to the President, but to his personal accounting firm. The Court treated this as irrelevant to the constitutional question presented. Do you agree?

4. Which of these cases do you think presents the more difficult question? Which do you think is more important?

5. Judging by his Twitter feed after these decisions were announced, President Trump felt like he lost these cases. Did he?

6. After *Mazars* and *Vance*, what is the black letter law of presidential privilege and presidential immunity? When preparing your answer, be sure to synthesize not just these two cases, but also *United States v. Nixon*, *Nixon v. Fitzgerald* and *Clinton v. Jones*.

* * *

H. Appointment and Removal of Executive Officers

For insertion at p. 477 before section I.

4. The Unitary Executive?

Guided Reading Questions: *Seila Law LLC v. CFPB*

1. The Court revises the doctrinal rule governing when and to what extent Congress can limit the president's power to remove officers of the United States. See if you can articulate the old and new doctrines.

2. What doctrinal rule is advocated in the Thomas concurrence? What doctrinal rule is advocated in the Kagan dissent?

3. What assumptions about Congress's power to structure governmental agencies underly the three opinions?

Seila Law LLC v. Consumer Financial Protection Bureau

140 S. Ct. 2183 (2020)

Majority: *Roberts* (CJ), Thomas, Alito, Gorsuch, Kavanaugh

Concurrence in part: *Thomas*, Gorsuch (as to Parts I-III)

Partial concurrence, partial dissent: *Kagan*, Ginsburg, Breyer, and Sotomayo

CHIEF JUSTICE Roberts delivered the opinion of the Court with respect to Parts I, II, and III.

In the wake of the 2008 financial crisis, Congress established the Consumer Financial Protection Bureau (CFPB), an independent regulatory agency tasked with ensuring that consumer debt products are safe and transparent. In organizing the CFPB, Congress deviated from the structure of nearly every other independent administrative agency in our history. Instead of placing the agency under the leadership of a board with multiple members, Congress provided that the CFPB would be led by a single Director, who serves for a longer term than the President and cannot be removed by the President except for inefficiency, neglect, or malfeasance. The CFPB Director has no boss, peers, or voters to report to. Yet the Director wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U. S. economy. The question before us is whether this arrangement violates the Constitution’s separation of powers.

Under our Constitution, the “executive Power”—all of it—is “vested in a President,” who must “take Care that the Laws be faithfully executed.” Art. II, § 1, cl. 1; *id.*, § 3. Because no single person could fulfill that responsibility alone, the Framers expected that the President would rely on subordinate officers for assistance. Ten years ago, in *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477 (2010), we reiterated that, “as a general matter,” the Constitution gives the President “the authority to remove those who assist him in carrying out his duties,” *id.*, at 513–514. “Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.” *Id.*

The President’s power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers v. United States*, 272 U.S. 52, (1926). Our precedents have recognized only two exceptions to the President’s unrestricted removal power. In *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), we held that Congress could create expert agencies led by a group of principal officers removable by the President only for good cause. And in *United States v. Perkins*, 116 U.S. 483 (1886), and *Morrison v. Olson*, 487 U.S. 654 (1988), we held that Congress could provide tenure protections to certain inferior officers with narrowly defined duties.

We are now asked to extend these precedents to a new configuration: an independent agency that wields significant executive power and is run by a single individual who cannot be removed by the President unless certain statutory criteria are met. We decline to take that step. While we need not and do not revisit our prior decisions allowing certain limitations on the President’s removal power, there are compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director. Such an agency lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control.

We therefore hold that the structure of the CFPB violates the separation of powers. We go on to hold that the CFPB Director’s removal protection is severable from the other statutory provisions bearing on the CFPB’s authority. The agency may therefore continue

to operate, but its Director, in light of our decision, must be removable by the President at will.

I

A

In the summer of 2007, then-Professor Elizabeth Warren called for the creation of a new, independent federal agency focused on regulating consumer financial products. Warren, *Unsafe at Any Rate, Democracy* (Summer 2007). Professor Warren believed the financial products marketed to ordinary American households—credit cards, student loans, mortgages, and the like—had grown increasingly unsafe due to a “regulatory jumble” that paid too much attention to banks and too little to consumers. To remedy the lack of “coherent, consumer-oriented” financial regulation, she proposed “concentrat[ing] the review of financial products in a single location”—an independent agency modeled after the multimember Consumer Product Safety Commission.

That proposal soon met its moment. Within months of Professor Warren’s writing, the subprime mortgage market collapsed, precipitating a financial crisis that wiped out over \$10 trillion in American household wealth and cost millions of Americans their jobs, their retirements, and their homes. In the aftermath, the Obama administration embraced Professor Warren’s recommendation. Through the Treasury Department, the administration encouraged Congress to establish an agency with a mandate to ensure that “consumer protection regulations” in the financial sector “are written fairly and enforced vigorously.” Like Professor Warren, the administration envisioned a traditional independent agency, run by a multimember board with a “diverse set of viewpoints and experiences”.

In 2010, Congress acted on these proposals and created the Consumer Financial Protection Bureau (CFPB) as an independent financial regulator within the Federal Reserve System. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 124 Stat. 1376. Congress tasked the CFPB with “implement[ing]” and “enforc[ing]” a large body of financial consumer protection laws to “ensur[e] that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.” 12 U. S. C. § 5511(a). Congress transferred the administration of 18 existing federal statutes to the CFPB, including the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and the Truth in Lending Act. In addition, Congress enacted a new prohibition on “any unfair, deceptive, or abusive act or practice” by certain participants in the consumer-finance sector. Congress authorized the CFPB to implement that broad standard (and the 18 pre-existing statutes placed under the agency’s purview) through binding regulations.

Congress also vested the CFPB with potent enforcement powers. The agency has the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court. To remedy violations of federal consumer financial law, the CFPB may seek restitution, disgorgement, and injunctive relief, as well as civil penalties of up to \$1,000,000 (inflation adjusted) for each day that a violation occurs. Since its inception, the CFPB has obtained over \$11 billion in relief for over 25 million consumers, including a \$1 billion penalty against a single bank in 2018.

The CFPB’s rulemaking and enforcement powers are coupled with extensive adjudicatory authority. The agency may conduct administrative proceedings to “ensure or enforce compliance with” the statutes and regulations it administers. 12 U. S. C. § 5563(a). When the CFPB acts as an adjudicator, it has “jurisdiction to grant any appropriate legal or equitable relief.” The “hearing officer” who presides over the proceedings may issue subpoenas, order depositions, and resolve any motions filed by the parties. 12 CFR § 1081.104(b). At the close of the proceedings, the hearing officer issues a “recommended decision,” and the CFPB Director considers that recommendation and “issue[s] a final decision and order.” ...

Congress elected to place the CFPB under the leadership of a single Director.... appointed by the President with the advice and consent of the Senate. The Director serves for a term of five years, during which the President may remove the Director from office only for “inefficiency, neglect of duty, or malfeasance in office.” §§ 5491(c)(1), (3).

Unlike most other agencies, the CFPB does not rely on the annual appropriations process for funding. Instead, the CFPB receives funding directly from the Federal Reserve, which is itself funded outside the appropriations process through bank assessments. Each year, the CFPB requests an amount that the Director deems “reasonably necessary to carry out” the agency’s duties, and the Federal Reserve grants that request so long as it does not exceed 12% of the total operating expenses of the Federal Reserve (inflation adjusted). In recent years, the CFPB’s annual budget has exceeded half a billion dollars.

B

Seila Law LLC is a California-based law firm that provides debt-related legal services to clients. In 2017, the CFPB issued a civil investigative demand to Seila Law to determine whether the firm had “engag[ed] in unlawful acts or practices in the advertising, marketing, or sale of debt relief services.” The demand (essentially a subpoena) directed Seila Law to produce information and documents related to its business practices.

[Seila Law objected to the demand and argued that the agency’s leadership by a single Director removable only for cause violated the separation of powers. On a petition by the CFPB the District Court ordered Seila Law to comply with the demand and the Court of Appeals affirmed. Because the Trump administration agreed with Seila Law’s petition, the Supreme Court appointed Paul Clement to defend the judgment below as amicus curiae. Clement made three arguments to the effect that Seila Law lacked standing; the Court rejected these and proceeded to consider the merits.]

III

We hold that the CFPB’s leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers.

A

Article II provides that “[t]he executive Power shall be vested in a President,” who must “take Care that the Laws be faithfully executed.” Art. II, § 1, cl. 1; *id.*, § 3. The entire “executive Power” belongs to the President alone. But because it would be “impossib[le]” for “one man” to “perform all the great business of the State,” the Constitution assumes that lesser executive officers will “assist the supreme Magistrate in discharging the duties of his trust.” 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939).

These lesser officers must remain accountable to the President, whose authority they wield. As Madison explained, “[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.” 1 Annals of Cong. 463 (1789). That power, in turn, generally includes the ability to remove executive officials, for it is “only the authority that can remove” such officials that they “must fear and, in the performance of [their] functions, obey.” *Bowsher*, 478 U.S., at 726.

The President’s removal power has long been confirmed by history and precedent.... “The view that ‘prevailed, as most consonant to the text of the Constitution’ and ‘to the requisite responsibility and harmony in the Executive Department,’ was that the executive power included a power to oversee executive officers through removal.” The First Congress’s recognition of the President’s removal power in 1789 “provides contemporaneous and weighty evidence of the Constitution’s meaning,” *Bowsher*, 478 U.S., at 723, and has long been the “settled and well understood construction of the Constitution,” *Ex parte Hennen*, 13 Pet. 230, 259 (1839).

The Court recognized the President’s prerogative to remove executive officials in *Myers v. United States*, 272 U.S. 52. Chief Justice Taft, writing for the Court, conducted an exhaustive examination of the First Congress’s determination in 1789, the views of the Framers and their contemporaries, historical practice, and our precedents up until that point. He concluded that [j]ust as the President’s “selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.” “[T]o hold otherwise,” the Court reasoned, “would make it impossible for the President ... to take care that the laws be faithfully executed.” *Id.*, at 164.

We recently reiterated the President’s general removal power in *Free Enterprise Fund*. “Since 1789,” we recapped, “the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary.” 561 U.S., at 483. Although we had previously sustained congressional limits on that power in certain circumstances, we declined to extend those limits to “a new situation not yet encountered by the Court”—an official insulated by two layers of for-cause removal protection. In the face of that novel impediment to the President’s oversight of the Executive Branch, we adhered to the general rule that the President possesses “the authority to remove those who assist him in carrying out his duties.” *Id.*, at 513–514.

Free Enterprise Fund left in place two exceptions to the President’s unrestricted removal power. First, in *Humphrey’s Executor*, decided less than a decade after *Myers*, the Court upheld a statute that protected the Commissioners of the FTC from removal except for “inefficiency, neglect of duty, or malfeasance in office.” 295 U.S. at 620. In reaching that conclusion, the Court stressed that Congress’s ability to impose such removal restrictions “will depend upon the character of the office.” 295 U.S. at 631.

Because the Court limited its holding “to officers of the kind here under consideration,” the contours of the Humphrey’s Executor exception depend upon the characteristics of the agency before the Court. Rightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising “no part of the executive power.” *Id.*, at 628. Instead, it was “an administrative body” that performed “specified duties as a legislative or as a judicial aid.” *Ibid.* It acted “as a legislative agency” in “making investigations and reports” to Congress and “as an agency of the judiciary” in making recommendations to courts as a master in chancery. *Ibid.* “To the extent that [the FTC] exercise[d] any executive function[,] as distinguished from executive power in the constitutional sense,” it did so only in the discharge of its “quasi-legislative or quasi-judicial powers.” *Ibid.*

FN 2. The Court’s conclusion that the FTC did not exercise executive power has not withstood the test of time. As we observed in *Morrison v. Olson*, 487 U.S. 654 (1988), “[I]t is hard to dispute that the powers of the FTC at the time of Humphrey’s Executor would at the present time be considered ‘executive,’ at least to some degree.” *Id.*, at 690, n. 28. See also *Arlington v. FCC*, 569 U.S. 290, 305, n. 4 (2013) (even though the activities of administrative agencies “take ‘legislative’ and ‘judicial’ forms,” “they are exercises of—indeed, under our constitutional structure they must be exercises of—the ‘executive Power.’”)

The Court identified several organizational features that helped explain its characterization of the FTC as non-executive. Composed of five members—no more than three from the same political party—the Board was designed to be “non-partisan” and to “act with entire impartiality.” The FTC’s duties were “neither political nor executive,” but instead called for “the trained judgment of a body of experts” “informed by experience.” And the Commissioners’ staggered, seven-year terms enabled the agency to accumulate technical expertise and avoid a “complete change” in leadership “at any one time.”

In short, Humphrey’s Executor permitted Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power. Consistent with that understanding, the Court later applied “[t]he philosophy of Humphrey’s Executor” to uphold for-cause removal protections for the members of the War Claims Commission—a three-member “adjudicatory body” tasked with resolving claims for compensation arising from World War II. *Wiener v. United States*, 357 U.S. 349 (1958).

While recognizing an exception for multimember bodies with “quasi-judicial” or “quasi-legislative” functions, Humphrey’s Executor reaffirmed the core holding of *Myers* that the President has “unrestrictable power ... to remove purely executive officers.” 295 U.S. at 632. The Court acknowledged that between purely executive officers on the one hand, and officers that closely resembled the FTC Commissioners on the other, there existed “a field of doubt” that the Court left “for future consideration.”

We have recognized a second exception for inferior officers in two cases, *United States v. Perkins* and *Morrison v. Olson*.

FN 3. Article II distinguishes between two kinds of officers—principal officers (who must be appointed by the President with the advice and consent of the Senate) and inferior officers (whose appointment Congress may vest in the President, courts, or heads of Departments). § 2, cl. 2. While “[o]ur cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers,” we have in the past examined factors such as the nature, scope,

and duration of an officer's duties. *Edmond v. United States*, 520 U.S. 651 (1997). More recently, we have focused on whether the officer's work is "directed and supervised" by a principal officer.

In *Perkins* [1886], we upheld tenure protections for a naval cadet-engineer. And, in *Morrison*, we upheld a provision granting good-cause tenure protection to an independent counsel appointed to investigate and prosecute particular alleged crimes by high-ranking Government officials. 487 U.S. at 662–663. Backing away from the reliance in *Humphrey's Executor* on the concepts of "quasi-legislative" and "quasi-judicial" power, we viewed the ultimate question as whether a removal restriction is of "such a nature that [it] impede[s] the President's ability to perform his constitutional duty." 487 U.S. at 691. Although the independent counsel was a single person and performed "law enforcement functions that typically have been undertaken by officials within the Executive Branch," we concluded that the removal protections did not unduly interfere with the functioning of the Executive Branch because "the independent counsel [was] an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority."

These two exceptions—one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority—"represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power." *PHH Corp. v. CFPB*, 881 F.3d 75, 196 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (internal quotation marks omitted).¹

B

Neither *Humphrey's Executor* nor *Morrison* resolves whether the CFPB Director's insulation from removal is constitutional. Start with *Humphrey's Executor*. Unlike the New Deal-era FTC upheld there, the CFPB is led by a single Director who cannot be described as a "body of experts" and cannot be considered "non-partisan" in the same sense as a group of officials drawn from both sides of the aisle. Moreover, while the staggered terms of the FTC Commissioners prevented complete turnovers in agency leadership and guaranteed that there would always be some Commissioners who had accrued significant expertise, the CFPB's single-Director structure and five-year term guarantee abrupt shifts in agency leadership and with it the loss of accumulated expertise.

In addition, the CFPB Director is hardly a mere legislative or judicial aid. Instead of making reports and recommendations to Congress, as the 1935 FTC did, the Director possesses the authority to promulgate binding rules fleshing out 19 federal statutes, including a broad prohibition on unfair and deceptive practices in a major segment of the U. S. economy. And instead of submitting recommended dispositions to an Article III court, the Director may unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications. Finally, the Director's enforcement authority includes the power to seek daunting monetary penalties against private parties on behalf of the United

¹ *PHH Corp. v. CFPB*, 881 F.3d 75, 196 (D.C. Cir. 2018), involved a challenge to the CFPB on the same grounds. Then-judge Kavanaugh's dissent made similar arguments to those adopted by the majority here.

States in federal court—a quintessentially executive power not considered in *Humphrey’s Executor*.

The logic of *Morrison* also does not apply. Everyone agrees the CFPB Director is not an inferior officer, and her duties are far from limited. Unlike the independent counsel, who lacked policymaking or administrative authority, the Director has the sole responsibility to administer 19 separate consumer-protection statutes that cover everything from credit cards and car payments to mortgages and student loans. It is true that the independent counsel in *Morrison* was empowered to initiate criminal investigations and prosecutions, and in that respect wielded core executive power. But that power, while significant, was trained inward to high-ranking Governmental actors identified by others, and was confined to a specified matter in which the Department of Justice had a potential conflict of interest. By contrast, the CFPB Director has the authority to bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions....

C

The question instead is whether to extend those precedents to the “new situation” before us, namely an independent agency led by a single Director and vested with significant executive power. *Free Enterprise Fund*, 561 U.S., at 483. We decline to do so. Such an agency has no basis in history and no place in our constitutional structure.

“Perhaps the most telling indication of [a] severe constitutional problem” with an executive entity “is [a] lack of historical precedent” to support it. *Id.*, at 505. An agency with a structure like that of the CFPB is almost wholly unprecedented. After years of litigating the agency’s constitutionality, the Courts of Appeals, parties, and amici have identified “only a handful of isolated” incidents in which Congress has provided good-cause tenure to principal officers who wield power alone rather than as members of a board or commission. “[T]hese few scattered examples”—four to be exact—shed little light. *NLRB v. Noel Canning*, 573 U.S. 513, 538 (2014)....

[The Court then distinguished the four examples: the Comptroller of the Currency, the Office of the Special Counsel (OSC), the Social Security Administrator, and the director of the Federal Housing Finance Agency (FHFA), “essentially a companion of the CFPB.”] With the exception of the one-year blip for the Comptroller of the Currency, these isolated examples are modern and contested. And they do not involve regulatory or enforcement authority remotely comparable to that exercised by the CFPB.

In addition to being a historical anomaly, the CFPB’s single-Director configuration is incompatible with our constitutional structure. Aside from the sole exception of the Presidency, that structure scrupulously avoids concentrating power in the hands of any single individual.

“The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.” *Bowsher*, 478 U.S., at 730. Their solution to governmental power and its perils was simple: divide it. ...

The Executive Branch is a stark departure from all this division. The Framers viewed the legislative power as a special threat to individual liberty, so they divided that power to

ensure that “differences of opinion” and the “jarrings of parties” would “promote deliberation and circumspection” and “check excesses in the majority.” See *The Federalist* No. 70 (A. Hamilton); see also *id.*, No. 51. By contrast, the Framers thought it necessary to secure the authority of the Executive so that he could carry out his unique responsibilities. See *id.*, No. 70. As Madison put it, while “the weight of the legislative authority requires that it should be ... divided, the weakness of the executive may require, on the other hand, that it should be fortified.” *Id.*, No. 51.

The Framers deemed an energetic executive essential to “the protection of the community against foreign attacks,” “the steady administration of the laws,” “the protection of property,” and “the security of liberty.” *Id.*, No. 70. Accordingly, they chose not to bog the Executive down with the “habitual feebleness and dilatoriness” that comes with a “diversity of views and opinions.” Instead, they gave the Executive the “[d]ecision, activity, secrecy, and dispatch” that “characterise the proceedings of one man.” *Id.*

To justify and check that authority—unique in our constitutional structure—the Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President’s political accountability is enhanced by the solitary nature of the Executive Branch, which provides “a single object for the jealousy and watchfulness of the people.” *Id.* The President “cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,” because Article II “makes a single President responsible for the actions of the Executive Branch.” *Free Enterprise Fund*, 561 U.S., at 496–497.

The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. Through the President’s oversight, “the chain of dependence [is] preserved,” so that “the lowest officers, the middle grade, and the highest” all “depend, as they ought, on the President, and the President on the community.” 1 *Annals of Cong.* 499 (J. Madison).

The CFPB’s single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one. The Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is. The Director does not even depend on Congress for annual appropriations. See *The Federalist* No. 58, at 394 (J. Madison) (describing the “power over the purse” as the “most compleat and effectual weapon” in representing the interests of the people). Yet the Director may unilaterally, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans.

The CFPB Director’s insulation from removal by an accountable President is enough to render the agency’s structure unconstitutional. But several other features of the CFPB

combine to make the Director's removal protection even more problematic. In addition to lacking the most direct method of presidential control—removal at will—the agency's unique structure also forecloses certain indirect methods of Presidential control.

Because the CFPB is headed by a single Director with a five-year term, some Presidents may not have any opportunity to shape its leadership and thereby influence its activities. A President elected in 2020 would likely not appoint a CFPB Director until 2023, and a President elected in 2028 may never appoint one. That means an unlucky President might get elected on a consumer-protection platform and enter office only to find herself saddled with a holdover Director from a competing political party who is dead set against that agenda. To make matters worse, the agency's single-Director structure means the President will not have the opportunity to appoint any other leaders—such as a chair or fellow members of a Commission or Board—who can serve as a check on the Director's authority and help bring the agency in line with the President's preferred policies.

The CFPB's receipt of funds outside the appropriations process further aggravates the agency's threat to Presidential control. The President normally has the opportunity to recommend or veto spending bills that affect the operation of administrative agencies. See Art. I, § 7, cl. 2; Art. II, § 3. And, for the past century, the President has annually submitted a proposed budget to Congress for approval. Presidents frequently use these budgetary tools “to influence the policies of independent agencies.” But no similar opportunity exists for the President to influence the CFPB Director. Instead, the Director receives over \$500 million per year to fund the agency's chosen priorities. And the Director receives that money from the Federal Reserve, which is itself funded outside of the annual appropriations process. This financial freedom makes it even more likely that the agency will “slip from the Executive's control, and thus from that of the people.”...

According to amicus, Humphrey's Executor and Morrison establish a general rule that Congress may impose “modest” restrictions on the President's removal power, with only two limited exceptions. Congress may not reserve a role for itself in individual removal decisions (as it attempted to do in Myers and Bowsher). And it may not eliminate the President's removal power altogether (as it effectively did in Free Enterprise Fund). Outside those two situations, amicus argues, Congress is generally free to constrain the President's removal power.

But text, first principles, the First Congress's decision in 1789, Myers, and Free Enterprise Fund all establish that the President's removal power is the rule, not the exception. While we do not revisit Humphrey's Executor or any other precedent today, we decline to elevate it into a freestanding invitation for Congress to impose additional restrictions on the President's removal authority.

Finally, amicus contends that if we identify a constitutional problem with the CFPB's structure, we should avoid it by broadly construing the statutory grounds for removing the CFPB Director from office. The Dodd-Frank Act provides that the Director may be removed for “inefficiency, neglect of duty, or malfeasance in office.” 12 U. S. C. § 5491(c)(3). In amicus' view, that language could be interpreted to reserve substantial discretion to the President.

We are not persuaded. For one, Humphrey's Executor implicitly rejected an interpretation that would leave the President free to remove an officer based on

disagreements about agency policy. In addition, while both amicus and the House of Representatives invite us to adopt whatever construction would cure the constitutional problem, they have not advanced any workable standard derived from the statutory language. Amicus suggests that the proper standard might permit removals based on general policy disagreements, but not specific ones; the House suggests that the permissible bases for removal might vary depending on the context and the Presidential power involved. See Tr. of Oral Arg. 58–60, 76–77. They do not attempt to root either of those standards in the statutory text. Further, although nearly identical language governs the removal of some two-dozen multimember independent agencies, amicus suggests that the standard should vary from agency to agency, morphing as necessary to avoid constitutional doubt. We decline to embrace such an uncertain and elastic approach to the text.

Amicus and the House also fail to engage with the Dodd-Frank Act as a whole, which makes plain that the CFPB is an “independent bureau.” 12 U. S. C. § 5491(a). Neither amicus nor the House explains how the CFPB would be “independent” if its head were required to implement the President’s policies upon pain of removal. The Constitution might of course compel the agency to be dependent on the President notwithstanding Congress’s contrary intent, but that result cannot fairly be inferred from the statute Congress enacted.

Constitutional avoidance is not a license to rewrite Congress’s work to say whatever the Constitution needs it to say in a given situation. Without a proffered interpretation that is rooted in the statutory text and structure, and would avoid the constitutional violation we have identified, we take Congress at its word that it meant to impose a meaningful restriction on the President’s removal authority....

As we explained in *Free Enterprise Fund*, “One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts.” While “[n]o one doubts Congress’s power to create a vast and varied federal bureaucracy,” the expansion of that bureaucracy into new territories the Framers could scarcely have imagined only sharpens our duty to ensure that the Executive Branch is overseen by a President accountable to the people.

IV

.... Because we find the Director’s removal protection severable from the other provisions of Dodd-Frank that establish the CFPB, we remand for the Court of Appeals to consider whether the civil investigative demand was validly ratified [by the CFPB’s then-acting director, who was deemed removable at will by the president because not yet confirmed by the Senate]....

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring in part and dissenting in part.

.... Because the Court takes a step in the right direction by limiting Humphrey’s Executor to “multimember expert agencies *that do not wield substantial executive power*,” (emphasis added), I join Parts I, II, and III of its opinion. I respectfully dissent from the

Court's severability analysis, however, because I do not believe that we should address severability in this case.

I

The decision in *Humphrey's Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American people. The Court concludes that it is not strictly necessary for us to overrule that decision. But with today's decision, the Court has repudiated almost every aspect of *Humphrey's Executor*. In a future case, I would repudiate what is left of this erroneous precedent....

Despite the defined structural limitations of the Constitution and the clear vesting of executive power in the President, Congress has increasingly shifted executive power to a de facto fourth branch of Government—independent agencies. These agencies wield considerable executive power without Presidential oversight. They are led by officers who are insulated from the President by removal restrictions, “reduc[ing] the Chief Magistrate to [the role of] cajoler-in-chief.” *Free Enterprise Fund*, 561 U.S., at 502. But “[t]he people do not vote for the Officers of the United States. They instead look to the President to guide the assistants or deputies subject to his superintendence.” *Id.*, at 497–498, 130 S.Ct. 3138 (alterations, internal quotation marks and citation omitted). Because independent agencies wield substantial power with no accountability to either the President or the people, they “pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.” *PHH Corp. v. CFPB*, 881 F.3d 75, 165 (C.A.D.C. 2018) (Kavanaugh, J., dissenting)....

Humphrey's Executor laid the foundation for a fundamental departure from our constitutional structure with nothing more than handwaving and obfuscating phrases such as “quasi-legislative” and “quasi-judicial.” Unlike the thorough analysis in *Myers*, the Court's thinly reasoned decision is completely “devoid of textual or historical precedent for the novel principle it set forth.” *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting). The exceptional weakness of the reasoning could be a product of the circumstances under which the case was decided—in the midst of a bitter standoff between the Court and President Roosevelt—or it could be just another example of this Court departing from the strictures of the Constitution for a “more pragmatic, flexible approach” to our government's design. But whatever the motivation, *Humphrey's Executor* does not comport with the Constitution.

Humphrey's Executor relies on one key premise: the notion that there is a category of “quasi-legislative” and “quasi-judicial” power that is not exercised by Congress or the Judiciary, but that is also not part of “the executive power vested by the Constitution in the President.” ... The problem is that the Court's premise was entirely wrong. The Constitution does not permit the creation of officers exercising “quasi-legislative” and “quasi-judicial powers” in “quasi-legislative” and “quasi-judicial agencies.” No such powers or agencies exist. Congress lacks the authority to delegate its legislative power, and it cannot authorize the use of judicial power by officers acting outside of the bounds of Article III. Nor can Congress create agencies that straddle multiple branches of Government. The Constitution sets out three branches of Government and provides each with a different form of power—legislative, executive, and judicial. Free-floating agencies simply do not comport with this constitutional structure....

Today's decision constitutes the latest in a series of cases that have significantly undermined Humphrey's Executor. First, in *Morrison*, the Court repudiated the reasoning of the decision. Then, in *Free Enterprise Fund*, we returned to the principles set out in the "landmark case of *Myers*." And today, the Court rightfully limits Humphrey's Executor to "multimember expert agencies that do not wield substantial executive power." After these decisions, the foundation for Humphrey's Executor is not just shaky. It is nonexistent.... Humphrey's Executor is at odds with every single one of these principles: It ignores Article II's Vesting Clause, sidesteps the President's removal power, and encourages the exercise of executive power by unaccountable officers. ... [I]f any remnant of that decision is still standing, it certainly is not enough to justify the numerous, unaccountable independent agencies that currently exercise vast executive power outside the bounds of our constitutional structure....

II

Given my concerns about our modern severability doctrine and the fact that severability makes no difference to the dispute before us, I would resolve this case by simply denying the CFPB's petition to enforce the civil investigative demand.

JUSTICE KAGAN, with whom JUSTICE GINSBURG, Justice BREYER, and JUSTICE SOTOMAYOR join, concurring in the judgment with respect to severability and dissenting in part.

Throughout the Nation's history, this Court has left most decisions about how to structure the Executive Branch to Congress and the President, acting through legislation they both agree to. In particular, the Court has commonly allowed those two branches to create zones of administrative independence by limiting the President's power to remove agency heads. The Federal Reserve Board. The Federal Trade Commission (FTC). The National Labor Relations Board. Statute after statute establishing such entities instructs the President that he may not discharge their directors except for cause—most often phrased as inefficiency, neglect of duty, or malfeasance in office. Those statutes, whose language the Court has repeatedly approved, provide the model for the removal restriction before us today. If precedent were any guide, that provision would have survived its encounter with this Court—and so would the intended independence of the Consumer Financial Protection Bureau (CFPB).

Our Constitution and history demand that result. The text of the Constitution allows these common for-cause removal limits. Nothing in it speaks of removal. And it grants Congress authority to organize all the institutions of American governance, provided only that those arrangements allow the President to perform his own constitutionally assigned duties. Still more, the Framers' choice to give the political branches wide discretion over administrative offices has played out through American history in ways that have settled the constitutional meaning. From the first, Congress debated and enacted measures to create spheres of administration—especially of financial affairs—detached from direct presidential control. As the years passed, and governance became ever more complicated,

Congress continued to adopt and adapt such measures—confident it had latitude to do so under a Constitution meant to “endure for ages to come.” *McCulloch v. Maryland*, 4 Wheat. 316, 415, 4 L.Ed. 579 (1819) (approving the Second Bank of the United States). Not every innovation in governance—not every experiment in administrative independence—has proved successful. And debates about the prudence of limiting the President’s control over regulatory agencies, including through his removal power, have never abated. But the Constitution—both as originally drafted and as practiced—mostly leaves disagreements about administrative structure to Congress and the President, who have the knowledge and experience needed to address them. Within broad bounds, it keeps the courts—who do not—out of the picture.

The Court today fails to respect its proper role. It recognizes that this Court has approved limits on the President’s removal power over heads of agencies much like the CFPB. Agencies possessing similar powers, agencies charged with similar missions, agencies created for similar reasons. The majority’s explanation is that the heads of those agencies fall within an “exception”—one for multimember bodies and another for inferior officers—to a “general rule” of unrestricted presidential removal power. And the majority says the CFPB Director does not. That account, though, is wrong in every respect. The majority’s general rule does not exist. Its exceptions, likewise, are made up for the occasion—gerrymandered so the CFPB falls outside them. And the distinction doing most of the majority’s work—between multimember bodies and single directors—does not respond to the constitutional values at stake. If a removal provision violates the separation of powers, it is because the measure so deprives the President of control over an official as to impede his own constitutional functions. But with or without a for-cause removal provision, the President has at least as much control over an individual as over a commission—and possibly more. That means the constitutional concern is, if anything, ameliorated when the agency has a single head. Unwittingly, the majority shows why courts should stay their hand in these matters. “Compared to Congress and the President, the Judiciary possesses an inferior understanding of the realities of administration” and the way “political power[] operates.” *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 523 (2010) (BREYER, J., dissenting).

In second-guessing the political branches, the majority second-guesses as well the wisdom of the Framers and the judgment of history. It writes in rules to the Constitution that the drafters knew well enough not to put there. It repudiates the lessons of American experience, from the 18th century to the present day. And it commits the Nation to a static version of governance, incapable of responding to new conditions and challenges. Congress and the President established the CFPB to address financial practices that had brought on a devastating recession, and could do so again. Today’s decision wipes out a feature of that agency its creators thought fundamental to its mission—a measure of independence from political pressure. I respectfully dissent.

I

The text of the Constitution, the history of the country, the precedents of this Court, and the need for sound and adaptable governance—all stand against the majority’s opinion. They point not to the majority’s “general rule” of “unrestricted removal power” with two

grudgingly applied “exceptions.” Rather, they bestow discretion on the legislature to structure administrative institutions as the times demand, so long as the President retains the ability to carry out his constitutional duties. And most relevant here, they give Congress wide leeway to limit the President’s removal power in the interest of enhancing independence from politics in regulatory bodies like the CFPB.

A

What does the Constitution say about the separation of powers—and particularly about the President’s removal authority? (Spoiler alert: about the latter, nothing at all.)

The majority offers the civics class version of separation of powers—call it the Schoolhouse Rock definition of the phrase. See Schoolhouse Rock! Three Ring Government (Mar. 13, 1979), <http://www.youtube.com/watch?v=pKSGyiT-o3o> (“Ring one, Executive. Two is Legislative, that’s Congress. Ring three, Judiciary”). The Constitution’s first three articles, the majority recounts, “split the atom of sovereignty” among Congress, the President, and the courts. And by that mechanism, the Framers provided a “simple” fix “to governmental power and its perils.” *Ibid.*

There is nothing wrong with that as a beginning (except the adjective “simple”). It is of course true that the Framers lodged three different kinds of power in three different entities. And that they did so for a crucial purpose—because, as James Madison wrote, “there can be no liberty where the legislative and executive powers are united in the same person[] or body” or where “the power of judging [is] not separated from the legislative and executive powers.” *The Federalist* No. 47.

The problem lies in treating the beginning as an ending too—in failing to recognize that the separation of powers is, by design, neither rigid nor complete. ... [T]he creation of distinct branches “did not mean that these departments ought to have no partial agency in, or no controul over the acts of each other.” *The Federalist* No. 47. To the contrary, Madison explained, the drafters of the Constitution—like those of then-existing state constitutions—opted against keeping the branches of government “absolutely separate and distinct.” *Id.* Or as Justice Story reiterated a half-century later: “[W]hen we speak of a separation of the three great departments of government,” it is “not meant to affirm, that they must be kept wholly and entirely separate.” 2 J. Story, *Commentaries on the Constitution of the United States* § 524, p. 8 (1833). Instead, the branches have—as they must for the whole arrangement to work—“common link[s] of connexion [and] dependence.” *Ibid.*

FN 2. The principle of separation of powers, Madison continued, maintained only that “where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution [] are subverted.” *The Federalist* No. 47.

One way the Constitution reflects that vision is by giving Congress broad authority to establish and organize the Executive Branch. Article II presumes the existence of “Officer[s]” in “executive Departments.” § 2, cl. 1. But it does not, as you might think from reading the majority opinion, give the President authority to decide what kinds of officers—in what departments, with what responsibilities—the Executive Branch requires. Instead, Article I’s Necessary and Proper Clause puts those decisions in the legislature’s

hands. Congress has the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution” not just its own enumerated powers but also “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” § 8, cl. 18. Similarly, the Appointments Clause reflects Congress’s central role in structuring the Executive Branch. Yes, the President can appoint principal officers, but only as the legislature “shall ... establish[] by Law” (and of course subject to the Senate’s advice and consent). Art. II, § 2, cl. 2. And Congress has plenary power to decide not only what inferior officers will exist but also who (the President or a head of department) will appoint them. So as Madison told the first Congress, the legislature gets to “create[] the office, define[] the powers, [and] limit[] its duration.” 1 *Annals of Cong.* 582 (1789). The President, as to the construction of his own branch of government, can only try to work his will through the legislative process.

FN 3. Article II’s Opinions Clause also demonstrates the possibility of limits on the President’s control over the Executive Branch. Under that Clause, the President “may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.” § 2, cl. 1. For those in the majority’s camp, that Clause presents a puzzle: If the President must always have the direct supervisory control they posit, including by threat of removal, why would he ever need a constitutional warrant to demand agency heads’ opinions? The Clause becomes at least redundant—though really, inexplicable—under the majority’s idea of executive power.

The majority relies for its contrary vision on Article II’s Vesting Clause, but the provision can’t carry all that weight. Or as Chief Justice Rehnquist wrote of a similar claim in *Morrison v. Olson*, 487 U.S. 654 (1988), “extrapolat[ing]” an unrestricted removal power from such “general constitutional language”—which says only that “[t]he executive Power shall be vested in a President”—is “more than the text will bear.” *Id.*, at 690, n. 29. Dean John Manning has well explained why, even were it not obvious from the Clause’s “open-ended language.” *Separation of Powers as Ordinary Interpretation*, 124 *Harv. L. Rev.* 1939, 1971 (2011). The Necessary and Proper Clause, he writes, makes it impossible to “establish a constitutional violation simply by showing that Congress has constrained the way ‘[t]he executive Power’ is implemented”; that is exactly what the Clause gives Congress the power to do. Only “a specific historical understanding” can bar Congress from enacting a given constraint. And nothing of that sort broadly prevents Congress from limiting the President’s removal power. I’ll turn soon to the Decision of 1789 and other evidence of Post-Convention thought. For now, note two points about practice before the Constitution’s drafting. First, in that era, Parliament often restricted the King’s power to remove royal officers—and the President, needless to say, wasn’t supposed to be a king. Second, many States at the time allowed limits on gubernatorial removal power even though their constitutions had similar vesting clauses. See Shane, *The Originalist Myth of the Unitary Executive*, 19 *U. Pa. J. Const. L.* 323, 334–344 (2016). Historical understandings thus belie the majority’s “general rule.”

Nor can the Take Care Clause come to the majority’s rescue. That Clause cannot properly serve as a “placeholder for broad judicial judgments” about presidential control. To begin with, the provision—“he shall take Care that the Laws be faithfully executed”—speaks of duty, not power. Art. II, § 3. New scholarship suggests the language came from English and colonial oaths taken by, and placing fiduciary obligations on, all manner and

rank of executive officers. See Kent, Leib, & Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111, 2121–2178 (2019). To be sure, the imposition of a duty may imply a grant of power sufficient to carry it out. But again, the majority’s view of that power ill comports with founding-era practice, in which removal limits were common. And yet more important, the text of the Take Care Clause requires only enough authority to make sure “the laws [are] faithfully executed”—meaning with fidelity to the law itself, not to every presidential policy preference. As this Court has held, a President can ensure “‘faithful execution’ of the laws”—thereby satisfying his “take care” obligation—with a removal provision like the one here. *Morrison*, 487 U.S., at 692. A for-cause standard gives him “ample authority to assure that [an official] is competently performing [his] statutory responsibilities in a manner that comports with the [relevant legislation’s] provisions.” *Ibid.*

Finally, recall the Constitution’s telltale silence: Nowhere does the text say anything about the President’s power to remove subordinate officials at will. The majority professes unconcern. After all, it says, “neither is there a ‘separation of powers clause’ or a ‘federalism clause.’ ” But those concepts are carved into the Constitution’s text—the former in its first three articles separating powers, the latter in its enumeration of federal powers and its reservation of all else to the States. And anyway, at-will removal is hardly such a “foundational doctrine[],” *ibid.*: You won’t find it on a civics class syllabus. That’s because removal is a tool—one means among many, even if sometimes an important one, for a President to control executive officials. To find that authority hidden in the Constitution as a “general rule” is to discover what is nowhere there.

B

History no better serves the majority’s cause.... The early history—including the fabled Decision of 1789—shows mostly debate and division about removal authority. And when a “settle[ment of] meaning” at last occurred, it was not on the majority’s terms. Instead, it supports wide latitude for Congress to create spheres of administrative independence.

1

Begin with evidence from the Constitution’s ratification. And note that this moment is indeed the beginning: Delegates to the Constitutional Convention never discussed whether or to what extent the President would have power to remove executive officials. As a result, the Framers advocating ratification had no single view of the matter. In *Federalist No. 77*, Hamilton presumed that under the new Constitution “[t]he consent of [the Senate] would be necessary to displace as well as to appoint” officers of the United States. He thought that scheme would promote “steady administration”: “Where a man in any station had given satisfactory evidence of his fitness for it, a new president would be restrained” from substituting “a person more agreeable to him.” *Ibid.* By contrast, Madison thought the Constitution allowed Congress to decide how any executive official could be removed. He explained in *Federalist No. 39*: “The tenure of the ministerial offices generally will be a subject of legal regulation, conformably to the reason of the case, and the example of the State Constitutions.” Neither view, of course, at all supports the majority’s story.

FN 4. The majority dismisses Federalist Nos. 77 and 39 as “reflect[ing] initial impressions later abandoned.” But even Hamilton’s and Madison’s later impressions are less helpful to the majority than it suggests.... In any event, such changing minds and inconstant opinions don’t usually prove the existence of constitutional rules.

The second chapter is the Decision of 1789, when Congress addressed the removal power while considering the bill creating the Department of Foreign Affairs. Speaking through Chief Justice Taft—a judicial presidentialist if ever there was one—this Court in *Myers v. United States*, 272 U.S. 52 (1926), read that debate as expressing Congress’s judgment that the Constitution gave the President illimitable power to remove executive officials. The majority rests its own historical claim on that analysis (though somehow also finding room for its two exceptions). But Taft’s historical research has held up even worse than Myers’ holding (which was mostly reversed, see *infra*). As Dean Manning has concluded after reviewing decades’ worth of scholarship on the issue, “the implications of the debate, properly understood, [are] highly ambiguous and prone to overreading.”

The best view is that the First Congress was “deeply divided” on the President’s removal power, and “never squarely addressed” the central issue here. *Id.*, at 1965, n. 135; Prakash, *New Light on the Decision of 1789*, 91 *Cornell L. Rev.* 1021, 1072 (2006). The congressional debates revealed three main positions. See Corwin, 27 *Colum. L. Rev.*, at 361. Some shared Hamilton’s Federalist No. 77 view: The Constitution required Senate consent for removal. At the opposite extreme, others claimed that the Constitution gave absolute removal power to the President. And a third faction maintained that the Constitution placed Congress in the driver’s seat: The legislature could regulate, if it so chose, the President’s authority to remove. In the end, Congress passed a bill saying nothing about removal, leaving the President free to fire the Secretary of Foreign Affairs at will. But the only one of the three views definitively rejected was Hamilton’s theory of necessary Senate consent. As even strong proponents of executive power have shown, Congress never “endorse[d] the view that [it] lacked authority to modify” the President’s removal authority when it wished to. Prakash, *supra*, at 1073; see Manning, *supra*, at 1965, n. 135, 2030–2031. The summer of 1789 thus ended without resolution of the critical question: Was the removal power “beyond the reach of congressional regulation?” Prakash, *supra*, at 1072.

At the same time, the First Congress gave officials handling financial affairs—as compared to diplomatic and military ones—some independence from the President. The title and first section of the statutes creating the Departments of Foreign Affairs and War designated them “executive departments.” Act of July 27, 1789, ch. 4, 1 Stat. 28; Act of Aug. 7, 1789, ch. 7, 1 Stat. 49. The law creating the Treasury Department conspicuously avoided doing so. See Act of Sept. 2, 1789, ch. 12, 1 Stat. 65. That difference in nomenclature signaled others of substance. Congress left the organization of the Departments of Foreign Affairs and War skeletal, enabling the President to decide how he wanted to staff them. By contrast, Congress listed each of the offices within the Treasury Department, along with their functions. Of the three initial Secretaries, only the Treasury’s had an obligation to report to Congress when requested. And perhaps most notable, Congress soon deemed the Comptroller of the Treasury’s settlements of public accounts “final and conclusive.” Act of Mar. 3, 1795, ch. 48, § 4, 1 Stat. 441–442. That decision, preventing presidential overrides, marked the Comptroller as exercising independent

*2231 judgment.⁵ True enough, no statute shielded the Comptroller from discharge. But even James Madison, who at this point opposed most removal limits, told Congress that “there may be strong reasons why an officer of this kind should not hold his office at the pleasure” of the Secretary or President. 1 *Annals of Cong.* 612. At the least, as Professor Prakash writes, “Madison maintained that Congress had the [constitutional] authority to modify [the Comptroller’s] tenure.” Prakash, *supra*, at 1071.

FN 5. As President Jefferson explained: “[W]ith the settlement of the accounts at the Treasury I have no right to interfere in the least,” because the Comptroller of the Treasury “is the sole & supreme judge for all claims of money against the US. and would no more receive a direction from me” than would “one of the judges of the supreme court.” Letter from T. Jefferson to B. Latrobe (June 2, 1808)....

Contrary to the majority’s view, then, the founding era closed without any agreement that Congress lacked the power to curb the President’s removal authority. And as it kept that question open, Congress took the first steps—which would launch a tradition—of distinguishing financial regulators from diplomatic and military officers. The latter mainly helped the President carry out his own constitutional duties in foreign relations and war. The former chiefly carried out statutory duties, fulfilling functions Congress had assigned to their offices. In addressing the new Nation’s finances, Congress had begun to use its powers under the Necessary and Proper Clause to design effective administrative institutions. And that included taking steps to insulate certain officers from political influence.

2

As the decades and centuries passed, those efforts picked up steam. Confronting new economic, technological, and social conditions, Congress—and often the President—saw new needs for pockets of independence within the federal bureaucracy. And that was especially so, again, when it came to financial regulation. ...

Take first Congress’s decision in 1816 to create the Second Bank of the United States—“the first truly independent agency in the republic’s history.” Of the twenty-five directors who led the Bank, the President could appoint and remove only five. See Act of Apr. 10, 1816, § 8, 3 Stat. 269. Yet the Bank had a greater impact on the Nation than any but a few institutions, regulating the Nation’s money supply in ways anticipating what the Federal Reserve does today. Of course, the Bank was controversial—in large part because of its freedom from presidential control. Andrew Jackson chafed at the Bank’s independence and eventually fired his Treasury Secretary for keeping public moneys there (a dismissal that itself provoked a political storm). No matter. Innovations in governance always have opponents; administrative independence predictably (though by no means invariably) provokes presidential ire. The point is that by the early 19th century, Congress established a body wielding enormous financial power mostly outside the President’s dominion.

The Civil War brought yet further encroachments on presidential control over financial regulators. In response to wartime economic pressures, President Lincoln (not known for his modest view of executive power) asked Congress to establish an office called the Comptroller of the Currency. The statute he signed made the Comptroller removable only with the Senate’s consent—a version of the old Hamiltonian idea, though this time required not by the Constitution itself but by Congress. A year later, Congress amended the statute

to permit removal by the President alone, but only upon “reasons to be communicated by him to the Senate.” The majority dismisses the original version of the statute as an “aberration.” But in the wake of the independence given first to the Comptroller of the Treasury and then to the national Bank, it’s hard to conceive of this newest Comptroller position as so great a departure. And even the second iteration of the statute preserved a constraint on the removal power, requiring a President in a firing mood to explain himself to Congress—a demand likely to make him sleep on the subject. In both versions of the law, Congress responded to new financial challenges with new regulatory institutions, alert to the perils in this area of political interference.

And then, nearly a century and a half ago, the floodgates opened. In 1887, the growing power of the railroads over the American economy led Congress to create the Interstate Commerce Commission. Under that legislation, the President could remove the five Commissioners only “for inefficiency, neglect of duty, or malfeasance in office”—the same standard Congress applied to the CFPB Director. Act of Feb. 4, 1887, § 11, 24 Stat. 383. More—many more—for-cause removal provisions followed. In 1913, Congress gave the Governors of the Federal Reserve Board for-cause protection to ensure the agency would resist political pressure and promote economic stability. The next year, Congress provided similar protection to the FTC in the interest of ensuring “a continuous policy” “free from the effect” of “changing [White House] incumbency.” The Federal Deposit Insurance Corporation (FDIC), the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission. In the financial realm, “independent agencies have remained the bedrock of the institutional framework governing U. S. markets.” By one count, across all subject matter areas, 48 agencies have heads (and below them hundreds more inferior officials) removable only for cause. So year by year by year, the broad sweep of history has spoken to the constitutional question before us: Independent agencies are everywhere.

C

What is more, the Court’s precedents before today have accepted the role of independent agencies in our governmental system. To be sure, the line of our decisions has not run altogether straight. But we have repeatedly upheld provisions that prevent the President from firing regulatory officials except for such matters as neglect or malfeasance. In those decisions, we sounded a caution, insisting that Congress could not impede through removal restrictions the President’s performance of his own constitutional duties. (So, to take the clearest example, Congress could not curb the President’s power to remove his close military or diplomatic advisers.) But within that broad limit, this Court held, Congress could protect from at-will removal the officials it deemed to need some independence from political pressures. Nowhere do those precedents suggest what the majority announces today: that the President has an “unrestricted removal power” subject to two bounded exceptions.

The majority grounds its new approach in *Myers*, ignoring the way this Court has cabined that decision. *Myers*, the majority tells us, found an unrestrained removal power “essential to the [President’s] execution of the laws.” What the majority does not say is that within a decade the Court abandoned that view (much as later scholars rejected Taft’s one-

sided history, see *supra*, at 2229 – 2230). In *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), the Court unceremoniously—and unanimously—confined *Myers* to its facts. “[T]he narrow point actually decided” there, *Humphrey’s* stated, was that the President could “remove a postmaster of the first class, without the advice and consent of the Senate.” 295 U.S., at 626, 55 S.Ct. 869. Nothing else in Chief Justice Taft’s prolix opinion “c[a]me within the rule of *stare decisis*.” *Ibid.* (Indeed, the Court went on, everything in *Myers* “out of harmony” with *Humphrey’s* was expressly “disapproved.” 295 U.S., at 626, 55 S.Ct. 869.) Half a century later, the Court was more generous. Two decisions read *Myers* as standing for the principle that Congress’s own “participation in the removal of executive officers is unconstitutional.” *Bowsher v. Synar*, 478 U.S. 714, 725 (1986); see *Morrison*, 487 U.S., at 686 (“As we observed in *Bowsher*, the essence” of “*Myers* was the judgment that the Constitution prevents Congress from draw[ing] to itself” the power to remove (internal quotation marks omitted)). *Bowsher* made clear that *Myers* had nothing to say about Congress’s power to enact a provision merely “limit[ing] the President’s powers of removal” through a for-cause provision. 478 U.S., at 724 That issue, the Court stated, was “not presented” in “the *Myers* case.” Instead, the relevant cite was *Humphrey’s*.

And *Humphrey’s* found constitutional a statute identical to the one here, providing that the President could remove FTC Commissioners for “inefficiency, neglect of duty, or malfeasance in office.” 295 U.S., at 619, 55 S.Ct. 869. The *Humphrey’s* Court, as the majority notes, relied in substantial part on what kind of work the Commissioners performed. See *id.*, at 628, 631, 55 S.Ct. 869; *ante*, at 2231 – 2232. (By contrast, nothing in the decision turned—as the majority suggests—on any of the agency’s organizational features.) According to *Humphrey’s*, the Commissioners’ primary work was to “carry into effect legislative policies”—“filling in and administering the details embodied by [a statute’s] general standard.” 295 U.S., at 627–628. In addition, the Court noted, the Commissioners recommended dispositions in court cases, much as a special master does. Given those “quasi-legislative” and “quasi-judicial”—as opposed to “purely executive”—functions, Congress could limit the President’s removal authority. Or said another way, Congress could give the FTC some “independen[ce from] executive control.”

FN 7. The majority is quite right that today we view all the activities of administrative agencies as exercises of “the ‘executive Power.’ ” *Arlington v. FCC*, 569 U.S. 290, 305, n. 4 (2013) (quoting Art. II, § 1, cl.1). But we well understand, just as the *Humphrey’s* Court did, that those activities may “take ‘legislative’ and ‘judicial’ forms.” The classic examples are agency rulemakings and adjudications, endemic in agencies like the FTC and CFPB. In any event, the Court would soon make clear that Congress can also constrain the President’s removal authority over officials performing even the most “executive” of functions.

About two decades later, an again-unanimous Court in *Wiener v. United States*, 357 U.S. 349 (1958), reaffirmed *Humphrey’s*. The question in *Wiener* was whether the President could dismiss without cause members of the War Claims Commission, an entity charged with compensating injuries arising from World War II. Disdaining *Myers* and relying on *Humphrey’s*, the Court said he could not. The Court described as “short-lived”

Myers' view that the President had "inherent constitutional power to remove officials, no matter what the relation of the executive to the discharge of their duties."

357 U.S., at 352, 78 S.Ct. 1275.⁸ Here, the Commissioners were not close agents of the President, who needed to be responsive to his preferences. Rather, they exercised adjudicatory responsibilities over legal claims. Congress, the Court found, had wanted the Commissioners to do so "free from [political] control or coercive influence." *Id.*, at 355, 78 S.Ct. 1275 (quoting *Humphrey's*, 295 U.S., at 629, 55 S.Ct. 869). And that choice, as *Humphrey's* had *2235 held, was within Congress's power. The Constitution enabled Congress to take down "the Damocles' sword of removal" hanging over the Commissioners' heads. 357 U.S., at 356, 78 S.Ct. 1275.

FN 8. Expressing veiled contempt as only he could, Justice Frankfurter wrote for the Court that Chief Justice Taft's opinion had "laboriously traversed" American history and that it had failed to "restrict itself to the immediate issue before it." 357 U.S., at 351, 78 S.Ct. 1275. No wonder *Humphrey's* had "narrowly confined the scope of the Myers decision." 357 U.S., at 352, 78 S.Ct. 1275. Justice Frankfurter implied that the "Chief Justice who himself had been President" was lucky his handiwork had not been altogether reversed. *Id.*, at 351, 78 S.Ct. 1275.

Another three decades on, *Morrison* both extended *Humphrey's* domain and clarified the standard for addressing removal issues. The *Morrison* Court, over a one-Justice dissent, upheld for-cause protections afforded to an independent counsel with power to investigate and prosecute crimes committed by high-ranking officials. The Court well understood that those law enforcement functions differed from the rulemaking and adjudicatory duties highlighted in *Humphrey's* and *Wiener*. But that difference did not resolve the issue. An official's functions, *Morrison* held, were relevant to but not dispositive of a removal limit's constitutionality. The key question in all the cases, *Morrison* saw, was whether such a restriction would "impede the President's ability to perform his constitutional duty." 487 U.S., at 691. Only if it did so would it fall outside Congress's power. And the protection for the independent counsel, the Court found, did not. Even though the counsel's functions were "purely executive," the President's "need to control the exercise of [her] discretion" was not "so central to the functioning of the Executive Branch as to require" unrestricted removal authority. True enough, the Court acknowledged, that the for-cause standard prevented the President from firing the counsel for discretionary decisions or judgment calls. But it preserved "ample authority" in the President "to assure that the counsel is competently performing" her "responsibilities in a manner that comports with" all legal requirements. That meant the President could meet his own constitutional obligation "to ensure 'the faithful execution' of the laws."

FN 9. Pretending this analysis is mine rather than *Morrison's*, the majority registers its disagreement. In its view, a test asking whether a for-cause provision impedes the President's ability to carry out his constitutional functions has "no real limiting principle." If the provision leaves the President with constitutionally sufficient control over some subordinates (like the independent counsel), the majority asks, why not over even his close military or diplomatic advisers? See *ibid.* But the Constitution itself supplies the answer. If the only presidential duty

at issue is the one to ensure faithful execution of the laws, a for-cause provision does not stand in the way: As Morrison recognized, it preserves authority in the President to ensure (just as the Take Care Clause requires) that an official is abiding by law. But now suppose an additional constitutional duty is implicated—relating, say, to the conduct of foreign affairs or war. To carry out those duties, the President needs advisers who will (beyond complying with law) help him devise and implement policy. And that means he needs the capacity to fire such advisers for disagreeing with his policy calls.

The majority’s description of Morrison, is not true to the decision. (Mostly, it seems, the majority just wishes the case would go away. First, Morrison is no “exception” to a broader rule from Myers. Morrison echoed all of Humphrey’s criticism of the by-then infamous Myers “dicta.” 487 U.S., at 687. It again rejected the notion of an “all-inclusive” removal power. It yet further confined Myers’ reach, making clear that Congress could restrict the President’s removal of officials carrying out even the most traditional executive functions. And the decision, with care, set out the governing rule—again, that removal restrictions are permissible so long as they do not impede the President’s performance of his own constitutionally assigned duties. Second, as all that suggests, Morrison is not limited to inferior officers. In the eight pages addressing the removal issue, the Court constantly spoke of “officers” and “officials” in general. 487 U.S., at 685–693. By contrast, the Court there used the word “inferior” in just one sentence (which of course the majority quotes), when applying its general standard to the case’s facts. Indeed, Justice Scalia’s dissent emphasized that the counsel’s inferior-office status played no role in the Court’s decision. See *id.*, at 724. As Justice Scalia noted, the Court in *United States v. Perkins*, 116 U.S. 483, 484–485 (1886), had a century earlier allowed Congress to restrict the President’s removal power over inferior officers. Were that Morrison’s basis, a simple citation would have sufficed.

Even *Free Enterprise Fund*, in which the Court recently held a removal provision invalid, operated within the framework of this precedent—and in so doing, left in place a removal provision just like the one here. In that case, the Court considered a “highly unusual” scheme of double for-cause protection. Members of an accounting board were protected from removal by SEC Commissioners, who in turn were protected from removal by the President. The Court found that the two-layer structure deprived the President of “adequate control” over the Board members. The scheme “impaired” the President’s “ability to execute the laws,” the Court explained, because neither he nor any fully dependent agent could decide “whether[] good cause exists” for a discharge. That holding cast no doubt on ordinary for-cause protections, of the kind in the Court’s prior cases (and here as well). Quite the opposite. The Court observed that it did not “take issue with for-cause limitations in general”—which do enable the President to determine whether good cause for discharge exists (because, say, an official has violated the law). *Id.*, at 501. And the Court’s solution to the constitutional problem it saw was merely to strike one level of insulation, making the Board removable by the SEC at will. That remedy left the SEC’s own for-cause protection in place. The President could thus remove Commissioners for malfeasance or neglect, but not for policy disagreements.

So caselaw joins text and history in establishing the general permissibility of for-cause provisions giving some independence to agencies.... For almost a century, this Court has made clear that Congress has broad discretion to enact for-cause protections in pursuit of good governance.

D

The deferential approach this Court has taken gives Congress the flexibility it needs to craft administrative agencies. Diverse problems of government demand diverse solutions. They call for varied measures and mixtures of democratic accountability and technical expertise, energy and efficiency. Sometimes, the arguments push toward tight presidential control of agencies. The President's engagement, some people say, can disrupt bureaucratic stagnation, counter industry capture, and make agencies more responsive to public interests. At other times, the arguments favor greater independence from presidential involvement. Insulation from political pressure helps ensure impartial adjudications. It places technical issues in the hands of those most capable of addressing them. It promotes continuity, and prevents short-term electoral interests from distorting policy. (Consider, for example, how the Federal Reserve's independence stops a President trying to win a second term from manipulating interest rates.) Of course, the right balance between presidential control and independence is often uncertain, contested, and value-laden. No mathematical formula governs institutional design; trade-offs are endemic to the enterprise. But that is precisely why the issue is one for the political branches to debate—and then debate again as times change. And it's why courts should stay (mostly) out of the way. Rather than impose rigid rules like the majority's, they should let Congress and the President figure out what blend of independence and political control will best enable an agency to perform its intended functions.

Judicial intrusion into this field usually reveals only how little courts know about governance. Even everything I just said is an over-simplification. It suggests that agencies can easily be arranged on a spectrum, from the most to the least presidentially controlled. But that is not so. A given agency's independence (or lack of it) depends on a wealth of features, relating not just to removal standards, but also to appointments practices, procedural rules, internal organization, oversight regimes, historical traditions, cultural norms, and (inevitably) personal relationships. It is hard to pinpoint how those factors work individually, much less in concert, to influence the distance between an agency and a President. In that light, even the judicial opinions' perennial focus on removal standards is a bit of a puzzle. Removal is only the most obvious, not necessarily the most potent, means of control. That is because informal restraints can prevent Presidents from firing at-will officers—and because other devices can keep officers with for-cause protection under control. Of course no court, as Free Enterprise Fund noted, can accurately assess the “bureaucratic minutiae” affecting a President's influence over an agency. But that is yet more reason for courts to defer to the branches charged with fashioning administrative structures, and to hesitate before ruling out agency design specs like for-cause removal standards.

Our Constitution, as shown earlier, entrusts such decisions to more accountable and knowledgeable actors. The document—with great good sense—sets out almost no rules about the administrative sphere. As Chief Justice Marshall wrote when he upheld the first independent financial agency: “To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument.” *McCulloch*, 4 Wheat. at 415. That would have been, he continued, “an unwise attempt to provide, by immutable rules, for exigencies which, if

foreseen at all, must have been seen dimly.” Ibid. And if the Constitution, for those reasons, does not lay out immutable rules, then neither should judges. ...[I]n spurning a “pragmatic, flexible approach to American governance” in favor of a dogmatic, inflexible one—the majority makes a serious error.

II

As the majority explains, the CFPB emerged out of disaster.... In that moment of economic ruin, the President proposed and Congress enacted legislation to address the causes of the collapse and prevent a recurrence. An important part of that statute created an agency to protect consumers from exploitative financial practices. The agency would take over enforcement of almost 20 existing federal laws. And it would administer a new prohibition on “unfair, deceptive, or abusive act[s] or practice[s]” in the consumer-finance sector. § 5536(a)(1)(B).

No one had a doubt that the new agency should be independent. As explained already, Congress has historically given—with this Court’s permission—a measure of independence to financial regulators like the Federal Reserve Board and the FTC. See *supra*, at 2197 – 2200. And agencies of that kind had administered most of the legislation whose enforcement the new statute transferred to the CFPB. The law thus included an ordinary for-cause provision—once again, that the President could fire the CFPB’s Director only for “inefficiency, neglect of duty, or malfeasance in office.” § 5491(c)(3). That standard would allow the President to discharge the Director for a failure to “faithfully execute[]” the law, as well as for basic incompetence. U. S. Const., Art. II, § 3; see *supra*, at 2195, 2202. But it would not permit removal for policy differences.

The question here, which by now you’re well equipped to answer, is whether including that for-cause standard in the statute creating the CFPB violates the Constitution.... Applying our longstanding precedent, the answer is clear: It does not. This Court, as the majority acknowledges, has sustained the constitutionality of the FTC and similar independent agencies. The for-cause protections for the heads of those agencies, the Court has found, do not impede the President’s ability to perform his own constitutional duties, and so do not breach the separation of powers. There is nothing different here. The CFPB wields the same kind of power as the FTC and similar agencies. And all of their heads receive the same kind of removal protection. No less than those other entities—by now part of the fabric of government—the CFPB is thus a permissible exercise of Congress’s power under the Necessary and Proper Clause to structure administration.

First, the CFPB’s powers are nothing unusual in the universe of independent agencies. The CFPB, as the majority notes, can issue regulations, conduct its own adjudications, and bring civil enforcement actions in court—all backed by the threat of penalties. See *ante*, at 2191; 12 U. S. C. §§ 5512, 5562– 5565. But then again, so too can (among others) the FTC and SEC, two agencies whose regulatory missions parallel the CFPB’s. And although the majority bemoans that the CFPB can “bring the coercive power of the state to bear on millions of private citizens,” that scary-sounding description applies to most independent agencies. Forget that the more relevant factoid for those many citizens might be that the CFPB has recovered over \$11 billion for banking consumers. ... And if influence on

economic life is the measure, consider the Federal Reserve, whose every act has global consequence. The CFPB, gauged by that comparison, is a piker.

Second, the removal protection given the CFPB's Director is standard fare. The removal power rests with the President alone; Congress has no role to play, as it did in the laws struck down in *Myers* and *Bowsher*. The statute provides only one layer of protection, unlike the law in *Free Enterprise Fund*. See *supra*, at 2236. And the clincher, which you have heard before: The for-cause standard used for the CFPB is identical to the one the Court upheld in *Humphrey's*. Both enable the President to fire an agency head for "inefficiency, neglect of duty, or malfeasance in office." ...

The majority focuses on one (it says sufficient) reason: The CFPB Director is singular, not plural.... And a solo CFPB Director does not fit within either of the majority's supposed exceptions. He is not an inferior officer, so (the majority says) *Morrison* does not apply; and he is not a multimember board, so (the majority says) neither does *Humphrey's*. Further, the majority argues, "[a]n agency with a [unitary] structure like that of the CFPB" is "novel"—or, if not quite that, "almost wholly unprecedented." Finally, the CFPB's organizational form violates the "constitutional structure" because it vests power in a "single individual" who is "insulated from Presidential control.

FN 11. The majority briefly mentions, but understandably does not rely on, two other features of Congress's scheme. First, the majority notes that the CFPB receives its funding outside the normal appropriations process. But so too do other financial regulators, including the Federal Reserve Board and the FDIC. See 12 U. S. C. §§ 243, 1815(d), 1820(e). And budgetary independence comes mostly at the expense of Congress's control over the agency, not the President's. (Because that is so, it actually works to the President's advantage.) Second, the majority complains that the Director's five-year term may prevent a President from "shap[ing] the agency's] leadership" through appointments. But again that is true, to one degree or another, of quite a few longstanding independent agencies, including the Federal Reserve, the FTC, the Merit Systems Protection Board, and the Postal Service Board of Governors. (If you think the last is unimportant, just ask the current President whether he agrees.)

.... Still more important, novelty is not the test of constitutionality when it comes to structuring agencies. See *Mistretta v. United States*, 488 U.S. 361, 385 (1989) ("[M]ere anomaly or innovation" does not violate the separation of powers). Congress regulates in that sphere under the Necessary and Proper Clause, not (as the majority seems to think) a Rinse and Repeat Clause. The Framers understood that new times would often require new measures, and exigencies often demand innovation. See *McCulloch*, 4 Wheat. at 415. In line with that belief, the history of the administrative sphere—its rules, its practices, its institutions—is replete with experiment and change. Indeed, each of the agencies the majority says now fits within its "exceptions" was once new; there is, as the saying goes, "a first time for everything."...

And Congress's choice to put a single director, rather than a multimember commission, at the CFPB's head violates no principle of separation of powers. The purported constitutional problem here is that an official has "slip[ped] from the Executive's control" and "supervision"—that he has become unaccountable to the President.... In fact, the opposite is more likely to be true: To the extent that such matters are measurable, individuals are easier than groups to supervise.... [But] trying to generalize about these

matters is something of a fool's errand. Presidential control, as noted earlier, can operate through many means—removal to be sure, but also appointments, oversight devices (e.g., centralized review of rulemaking or litigating positions), budgetary processes, personal outreach, and more.... [The] premise of the majority's argument—that the CFPB head is a mini-dictator, not subject to meaningful presidential control—is wrong. As this Court has seen in the past, independent agencies are not fully independent. A for-cause removal provision, as noted earlier, leaves “ample” control over agency heads in the hands of the President. *Morrison*, 487 U.S., at 692. He can discharge them for failing to perform their duties competently or in accordance with law, and so ensure that the laws are “faithfully executed.” U. S. Const., Art. II, § 3. And he can use the many other tools attached to the Office of the Presidency—including in the CFPB's case, rulemaking review—to exert influence over discretionary policy calls.

III

Recall again how this dispute got started. In the midst of the Great Recession, Congress and the President came together to create an agency with an important mission. It would protect consumers from the reckless financial practices that had caused the then-ongoing economic collapse. Not only Congress but also the President thought that the new agency, to fulfill its mandate, needed a measure of independence. So the two political branches, acting together, gave the CFPB Director the same job protection that innumerable other agency heads possess. All in all, those branches must have thought, they had done a good day's work. Relying on their experience and knowledge of administration, they had built an agency in the way best suited to carry out its functions. They had protected the public from financial chicanery and crisis. They had governed.

And now consider how the dispute ends—with five unelected judges rejecting the result of that democratic process. The outcome today will not shut down the CFPB: A different majority of this Court, including all those who join this opinion, believes that if the agency's removal provision is unconstitutional, it should be severed. But the majority on constitutionality jettisons a measure Congress and the President viewed as integral to the way the agency should operate. The majority does so even though the Constitution grants to Congress, acting with the President's approval, the authority to create and shape administrative bodies. And even though those branches, as compared to courts, have far greater understanding of political control mechanisms and agency design.

Nothing in the Constitution requires that outcome; to the contrary. “While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring). The Framers took pains to craft a document that would allow the structures of governance to change, as times and needs change. The Constitution says only a few words about administration. As Chief Justice Marshall wrote: Rather than prescribing “immutable rules,” it enables Congress to choose “the means by which government should, in all future time, execute its powers.” *McCulloch*, 4 Wheat. at 415. It authorizes Congress to meet new exigencies with new devices. So Article II does not generally prohibit independent agencies. Nor do any supposed structural principles. Nor do any odors wafting from the

document. Save for when those agencies impede the President's performance of his own constitutional duties, the matter is left up to Congress.... I respectfully dissent.

Review Questions and Explanations: *Seila Law v. CFPB*

1. The first step in a doctrinal shift often looks messy: precedents are reinterpreted, old doctrines limited or eroded. Clearly, something along those lines is happening here.

(a) Consider Thomas's argument: should *Humphrey's Executor* have been overruled? Why wasn't it?

(b) How have the applicable precedents prior been reinterpreted, especially *Humphrey's Executor* and *Morrison*?

2. The "unitary executive theory" has been favored by conservative academics since the 1980s, and the decision here shows its ascendancy among conservative judges and justices. It maintains that the vesting of "the executive power" in a single person, the president, implies that all those involved in executing the laws must be answerable to, and perhaps even alter egos of, the president.

(a) What are the implications of this view for the constitutionality of independent agencies, such as the Federal Reserve Board?

(b) What is the alternative theory offered by the dissent?

3. The dissent argues that Congress has plenary constitutional authority to structure the executive branch; the president has no such authority. Consider: (1) The Constitution is silent about the structure of the executive branch, creating no departments or agencies, but referring to their existence only inferentially in the Appointments Clause. (2) The president has no power directly under the Constitution to create offices or to appoint anyone: his appointments require Senate approval or else a statute authorizing him to appoint inferior officers. (3) The Constitution is silent on a removal power. (4) The categories of "legislative" and "executive" powers are not completely distinct, and the constitution does not forbid some hybridization of those powers.

Given all this, what's the basis for opposing the pragmatic or flexible approach that permits removal restrictions that do not "unduly interfere with executive functions," such as the creation of executive agencies to provide that some should be more insulated from electoral politics than others? In other words, in the absence of a textual justification, what is the structural justification for the majority's more formalistic approach?

4. The majority and Thomas concurrence are both grounded in a straightforward constitutional theory. The president is accountable to the electorate. Officials who make policy or execute the laws, if removable at the will of the president, are accountable to the president, and therefore to the electorate. In contrast, when such officials are insulated from removal by "good cause" protections (approved in *Humphrey's Executor*), they pose "a direct threat to ... the liberty of the American people," in Justice Thomas's hyperbolic phrase. Is this theory unduly simplistic? Consider the vast array of federal agencies, most of which are headed by administrators who are answerable to the president under the removable-at-will standard. These agencies are issuing numerous rulings or regulations

throughout a president's term on a huge array of subjects. Do voters pay attention to these sufficiently to hold the president accountable for them? How many voters will vote against a president or party because the CFPB imposed a \$1 billion penalty on Wells Fargo Bank, let alone because the CFPB issued numerous investigative subpoenas into corrupt business practices? How likely is it that a presidential candidate will even talk about such issues, for example, in a presidential debate? If the sort of direct accountability relied on by the majority is a broad legal fiction, how much weight should it get in the decision?

5. Many conservative legal scholars and (more recently) judges have gravitated toward some version of originalism as an interpretive theory. Is the majority opinion more originalist than the dissent? Originalism purports to be based heavily on history, particularly constitutional interpretations that were "fixed" by the understandings of the ratifiers of the Constitution or by governing practice in the early post-ratification history of the Constitution.

(a) Does the majority or dissent offer a more persuasive historical account?

(b) Does history offer dispositive arguments for the majority?

(c) Is a historical approach to constitutional interpretation at odds with the dissent's claim that the Constitution requires adaptability to changing circumstances?

(d) Is Justice Kagan's pointedly deep dive into constitutional history an effort at "originalist" interpretation, or might it instead be a conscious effort on the part of the Court's liberals to "reclaim" historical analysis from the originalists?

* * *

For inclusion at p. 493

J. Presidential Elections

Guided Reading Questions: *Chiafalo v. Washington*

1. What is the argument for the Electors' claim of their constitutional right to be "faithless"? What words or definitions are critical to their argument?

2. The majority and the Thomas concurrence in the judgment offer two different paths of argument to reject the faithless electors' position. What words or definitions are critical to their respective arguments?

3. Try to identify the interpretive approaches used by the Electors, the majority, and Thomas. How if at all are they different?

4. The Twelfth Amendment does not address the manner of choosing electors. How, if at all, is it relevant to the decision?

Chiafalo v. Washington

__ S.Ct. __ (2020)

Majority: *Kagan*, Roberts (CJ), Ginsburg, Breyer, Alito, Sotomayor, Gorsuch, Kavanaugh

Concurrence in the Judgment: *Thomas*, Gorsuch (as to Part II)

JUSTICE KAGAN delivered the opinion of the Court.

Every four years, millions of Americans cast a ballot for a presidential candidate. Their votes, though, actually go toward selecting members of the Electoral College, whom each State appoints based on the popular returns. Those few “electors” then choose the President.

The States have devised mechanisms to ensure that the electors they appoint vote for the presidential candidate their citizens have preferred. With two partial exceptions, every State appoints a slate of electors selected by the political party whose candidate has won the State’s popular vote. Most States also compel electors to pledge in advance to support the nominee of that party. This Court upheld such a pledge requirement decades ago, rejecting the argument that the Constitution “demands absolute freedom for the elector to vote his own choice.” *Ray v. Blair*, 343 U.S. 214, 228 (1952).

Today, we consider whether a State may also penalize an elector for breaking his pledge and voting for someone other than the presidential candidate who won his State’s popular vote. We hold that a State may do so.

I

Our Constitution’s method of picking Presidents emerged from an eleventh-hour compromise. The issue, one delegate to the Convention remarked, was “the most difficult of all [that] we have had to decide.” 2 Records of the Federal Convention of 1787, p. 501 (M. Farrand rev. 1966). Despite long debate and many votes, the delegates could not reach an agreement. In the dying days of summer, they referred the matter to the so-called Committee of Eleven to devise a solution. The Committee returned with a proposal for the Electoral College. Just two days later, the delegates accepted the recommendation with but a few tweaks. James Madison later wrote to a friend that the “difficulty of finding an unexceptionable [selection] process” was “deeply felt by the Convention.” Because “the final arrangement of it took place in the latter stage of the Session,” Madison continued, “it was not exempt from a degree of the hurrying influence produced by fatigue and impatience in all such Bodies: tho’ the degree was much less than usually prevails in them.” *Ibid.* Whether less or not, the delegates soon finished their work and departed for home.

The provision they approved about presidential electors is fairly slim. Article II, § 1, cl. 2 says:

“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State

may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”

The next clause (but don’t get attached: it will soon be superseded) set out the procedures the electors were to follow in casting their votes. In brief, each member of the College would cast votes for two candidates in the presidential field. The candidate with the greatest number of votes, assuming he had a majority, would become President. The runner-up would become Vice President. If no one had a majority, the House of Representatives would take over and decide the winner.

That plan failed to anticipate the rise of political parties, and soon proved unworkable. The Nation’s first contested presidential election occurred in 1796, after George Washington’s retirement. John Adams came in first among the candidates, and Thomas Jefferson second. That meant the leaders of the era’s two warring political parties—the Federalists and the Republicans—became President and Vice President respectively. (One might think of this as fodder for a new season of *Veep*.) Four years later, a different problem arose. Jefferson and Aaron Burr ran that year as a Republican Party ticket, with the former meant to be President and the latter meant to be Vice. For that plan to succeed, Jefferson had to come in first and Burr just behind him. Instead, Jefferson came in first and Burr ... did too. Every elector who voted for Jefferson also voted for Burr, producing a tie. That threw the election into the House of Representatives, which took no fewer than 36 ballots to elect Jefferson. (Alexander Hamilton secured his place on the Broadway stage—but possibly in the cemetery too—by lobbying Federalists in the House to tip the election to Jefferson, whom he loathed but viewed as less of an existential threat to the Republic.) By then, everyone had had enough of the Electoral College’s original voting rules.

The result was the Twelfth Amendment, whose main part provided that electors would vote separately for President and Vice President. The Amendment, ratified in 1804, says:

“The Electors shall meet in their respective states and vote by ballot for President and Vice-President ...; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to [Congress, where] the votes shall then be counted.”

The Amendment thus brought the Electoral College’s voting procedures into line with the Nation’s new party system.

Within a few decades, the party system also became the means of translating popular preferences within each State into Electoral College ballots. In the Nation’s earliest elections, state legislatures mostly picked the electors, with the majority party sending a delegation of its choice to the Electoral College. By 1832, though, all States but one had introduced popular presidential elections. At first, citizens voted for a slate of electors put forward by a political party, expecting that the winning slate would vote for its party’s presidential (and vice presidential) nominee in the Electoral College. By the early 20th century, citizens in most States voted for the presidential candidate himself; ballots increasingly did not even list the electors. After the popular vote was counted, States appointed the electors chosen by the party whose presidential nominee had won statewide, again expecting that they would vote for that candidate in the Electoral College.

FN 1. Maine and Nebraska (which, for simplicity’s sake, we will ignore after this footnote) developed a more complicated system in which two electors go to the winner of the statewide vote and one goes to the winner of each congressional district. ... Here too, though, the States use party slates to pick the electors, in order to reflect the relevant popular preferences (whether in the State or in an individual district).

In the 20th century, many States enacted statutes meant to guarantee that outcome—that is, to prohibit so-called faithless voting. Rather than just assume that party-picked electors would vote for their party’s winning nominee, those States insist that they do so. As of now, 32 States and the District of Columbia have such statutes on their books. They are typically called pledge laws because most demand that electors take a formal oath or pledge to cast their ballot for their party’s presidential (and vice presidential) candidate. Others merely impose that duty by law. Either way, the statutes work to ensure that the electors vote for the candidate who got the most statewide votes in the presidential election.

Most relevant here, States began about 60 years ago to back up their pledge laws with some kind of sanction. By now, 15 States have such a system. Almost all of them immediately remove a faithless elector from his position, substituting an alternate whose vote the State reports instead. A few States impose a monetary fine on any elector who flouts his pledge.

Washington is one of the 15 States with a sanctions-backed pledge law designed to keep the State’s electors in line with its voting citizens. As all States now do, Washington requires political parties fielding presidential candidates to nominate a slate of electors. On Election Day, the State gives voters a ballot listing only the candidates themselves. When the vote comes in, Washington moves toward appointing the electors chosen by the party whose candidate won the statewide count. But before the appointment can go into effect, each elector must “execute [a] pledge” agreeing to “mark [her] ballots” for the presidential (and vice presidential) candidate of the party nominating her. And the elector must comply with that pledge, or else face a sanction. At the time relevant here, the punishment was a civil fine of up to \$1,000. See § 29A.56.340 (2016).

FN 3. Since the events in this case, Washington has repealed the fine. It now enforces pledges only by removing and replacing faithless electors. See Wash. Rev. Code § 29A.56.090(3) (2019).

This case involves three Washington electors who violated their pledges in the 2016 presidential election. That year, Washington’s voters chose Hillary Clinton over Donald Trump for President. The State thus appointed as its electors the nominees of the Washington State Democratic Party. Among those Democratic electors were petitioners Peter Chiafalo, Levi Guerra, and Esther John (the Electors). All three pledged to support Hillary Clinton in the Electoral College. But as that vote approached, they decided to cast their ballots for someone else. The three hoped they could encourage other electors—particularly those from States Donald Trump had carried—to follow their example. The idea was to deprive him of a majority of electoral votes and throw the election into the House of Representatives. So the three Electors voted for Colin Powell for President. But their effort failed. Only seven electors across the Nation cast faithless votes—the most in a century, but well short of the goal. Candidate Trump became President Trump. And, more

to the point here, the State fined the Electors \$1,000 apiece for breaking their pledges to support the same candidate its voters had.

The Electors challenged their fines in state court, arguing that the Constitution gives members of the Electoral College the right to vote however they please. The Washington Superior Court rejected the Electors' claim in an oral decision, and the State's Supreme Court affirmed that judgment...

A few months later, the United States Court of Appeals for the Tenth Circuit reached the opposite conclusion in a case involving another faithless elector. See *Baca v. Colorado Dept. of State*, 935 F.3d 887 (2019). The Circuit Court held that Colorado could not remove the elector, as its pledge law directs, because the Constitution "provide[s] presidential electors the right to cast a vote" for President "with discretion."

We granted certiorari to resolve the split. We now affirm the Washington Supreme Court's judgment that a State may enforce its pledge law against an elector.

II

As the state court recognized, this Court has considered [a challenge to] elector pledge requirements before. ... Our decision in *Ray v. Blair* rejected that challenge. "Neither the language of Art. II, § 1, nor that of the Twelfth Amendment," we explained, prohibits a State from appointing only electors committed to vote for a party's presidential candidate. Nor did the Nation's history suggest such a bar. To the contrary, "[h]istory teaches that the electors were expected to support the party nominees" as far back as the earliest contested presidential elections. "[L]ongstanding practice" thus "weigh[ed] heavily" against Blair's claim. And current voting procedures did too. The Court noted that by then many States did not even put electors' names on a presidential ballot. The whole system presupposed that the electors, because of either an "implied" or an "oral pledge," would vote for the candidate who had won the State's popular election.

Ray, however, reserved a question not implicated in the case: Could a State enforce those pledges through legal sanctions? Or would doing so violate an elector's "constitutional freedom" to "vote as he may choose" in the Electoral College? ...

A

Article II, § 1's appointments power gives the States far-reaching authority over presidential electors, absent some other constitutional constraint.

FN 4. Checks on a State's power to appoint electors, or to impose conditions on an appointment, can theoretically come from anywhere in the Constitution. A State, for example, cannot select its electors in a way that violates the Equal Protection Clause. And if a State adopts a condition on its appointments that effectively imposes new requirements on presidential candidates, the condition may conflict with the Presidential Qualifications Clause, see Art. II, § 1, cl. 5.

As noted earlier, each State may appoint electors "in such Manner as the Legislature thereof may direct." Art. II, § 1, cl. 2. This Court has described that clause as "conveying the broadest power of determination" over who becomes an elector. And the power to

appoint an elector (in any manner) includes power to condition his appointment—that is, to say what the elector must do for the appointment to take effect. A State can require, for example, that an elector live in the State or qualify as a regular voter during the relevant time period. Or more substantively, a State can insist (as Ray allowed) that the elector pledge to cast his Electoral College ballot for his party’s presidential nominee, thus tracking the State’s popular vote. Or—so long as nothing else in the Constitution poses an obstacle—a State can add, as Washington did, an associated condition of appointment: It can demand that the elector actually live up to his pledge, on pain of penalty. Which is to say that the State’s appointment power, barring some outside constraint, enables the enforcement of a pledge like Washington’s.

And nothing in the Constitution expressly prohibits States from taking away presidential electors’ voting discretion as Washington does. The Constitution is barebones about electors. Article II includes only the instruction to each State to appoint, in whatever way it likes, as many electors as it has Senators and Representatives (except that the State may not appoint members of the Federal Government). The Twelfth Amendment then tells electors to meet in their States, to vote for President and Vice President separately, and to transmit lists of all their votes to the President of the United States Senate for counting. Appointments and procedures and ... that is all....

The Electors argue that three simple words stand in for more explicit language about discretion. Article II, § 1 first names the members of the Electoral College: “electors.” The Twelfth Amendment then says that electors shall “vote” and that they shall do so by “ballot.” The “plain meaning” of those terms, the Electors say, requires electors to have “freedom of choice.” If the States could control their votes, “the electors would not be ‘Electors,’ and their ‘vote by Ballot’ would not be a ‘vote.’ ”

But those words need not always connote independent choice. Suppose a person always votes in the way his spouse, or pastor, or union tells him to. We might question his judgment, but we would have no problem saying that he “votes” or fills in a “ballot.” In those cases, the choice is in someone else’s hands, but the words still apply because they can signify a mechanical act. Or similarly, suppose in a system allowing proxy voting (a common practice in the founding era), the proxy acts on clear instructions from the principal, with no freedom of choice. Still, we might well say that he cast a “ballot” or “voted,” though the preference registered was not his own. For that matter, some elections give the voter no real choice because there is only one name on a ballot (consider an old Soviet election, or even a down-ballot race in this country). Yet if the person in the voting booth goes through the motions, we consider him to have voted. The point of all these examples is to show that although voting and discretion are usually combined, voting is still voting when discretion departs. Maybe most telling, switch from hypotheticals to the members of the Electoral College. For centuries now, as we’ll later show, almost all have considered themselves bound to vote for their party’s (and the state voters’) preference. Yet there is no better description for what they do in the Electoral College than “vote” by “ballot.” And all these years later, everyone still calls them “electors”—and not wrongly, because even though they vote without discretion, they do indeed elect a President.

The Electors and their amici object that the Framers using those words expected the Electors’ votes to reflect their own judgments. Hamilton praised the Constitution for entrusting the Presidency to “men most capable of analyzing the qualities” needed for the

office, who would make their choices “under circumstances favorable to deliberation.” The Federalist No. 68, p. 410 (C. Rossiter ed. 1961). So too, John Jay predicted that the Electoral College would “be composed of the most enlightened and respectable citizens,” whose choices would reflect “discretion and discernment.” *Id.*, No. 64, at 389.

But even assuming other Framers shared that outlook, it would not be enough. Whether by choice or accident, the Framers did not reduce their thoughts about electors’ discretion to the printed page. All that they put down about the electors was what we have said: that the States would appoint them, and that they would meet and cast ballots to send to the Capitol. Those sparse instructions took no position on how independent from—or how faithful to—party and popular preferences the electors’ votes should be. On that score, the Constitution left much to the future. And the future did not take long in coming. Almost immediately, presidential electors became trusty transmitters of other people’s decisions.

B

*8 “Long settled and established practice” may have “great weight in a proper interpretation of constitutional provisions.” The Pocket Veto Case, 279 U.S. 655, 689 (1929). As James Madison wrote, “a regular course of practice” can “liquidate & settle the meaning of ” disputed or indeterminate “terms & phrases.” Letter to S. Roane (Sept. 2, 1819), in 8 Writings of James Madison 450 (G. Hunt ed. 1908); see The Federalist No. 37, at 225. The Electors make an appeal to that kind of practice in asserting their right to independence. But “our whole experience as a Nation” points in the opposite direction. *NLRB v. Noel Canning*, 573 U.S. 513, 557 (2014) Electors have only rarely exercised discretion in casting their ballots for President. ...

Begin at the beginning—with the Nation’s first contested election in 1796. Would-be electors declared themselves for one or the other party’s presidential candidate. (Recall that in this election Adams led the Federalists against Jefferson’s Republicans.) In some States, legislatures chose the electors; in others, ordinary voters did. But in either case, the elector’s declaration of support for a candidate—essentially a pledge—was what mattered. Or said differently, the selectors of an elector knew just what they were getting—not someone who would deliberate in good Hamiltonian fashion, but someone who would vote for their party’s candidate.... And when the time came to vote in the Electoral College, all but one elector did what everyone expected, faithfully representing their selectors’ choice of presidential candidate.

The Twelfth Amendment embraced this new reality—both acknowledging and facilitating the Electoral College’s emergence as a mechanism not for deliberation but for party-line voting. Remember that the Amendment grew out of a pair of fiascos—the election of two then-bitter rivals as President and Vice President, and the tie vote that threw the next election into the House. Both had occurred because the Constitution’s original voting procedures gave electors two votes for President, rather than one apiece for President and Vice President. Without the capacity to vote a party ticket for the two offices, the electors had foundered, and could do so again. If the predominant party’s electors used both their votes on their party’s two candidates, they would create a tie (see 1800). If they

intentionally cast fewer votes for the intended vice president, they risked the opposite party's presidential candidate sneaking into the second position (see 1796). By allowing the electors to vote separately for the two offices, the Twelfth Amendment made party-line voting safe. The Amendment thus advanced, rather than resisted, the practice that had arisen in the Nation's first elections. An elector would promise to legislators or citizens to vote for their party's presidential and vice presidential candidates—and then follow through on that commitment. Or as the Court wrote in *Ray*, the new procedure allowed an elector to “vote the regular party ticket” and thereby “carry out the desires of the people” who had sent him to the Electoral College. *Ray*, 343 U.S., at 224. No independent electors need apply.

Courts and commentators throughout the 19th century recognized the electors as merely acting on other people's preferences. ... Looking back at the close of the century, this Court had no doubt that[t]he electors... were chosen “simply to register the will of the appointing power in respect of a particular candidate.” *McPherson*, 146 U.S., at 36.

State election laws evolved to reinforce that development, ensuring that a State's electors would vote the same way as its citizens. As noted earlier, state legislatures early dropped out of the picture; by the mid-1800s, ordinary voters chose electors. Except that increasingly, they did not do so directly. States listed only presidential candidates on the ballot, on the understanding that electors would do no more than vote for the winner. Usually, the State could ensure that result by appointing electors chosen by the winner's party. But to remove any doubt, States began in the early 1900s to enact statutes requiring electors to pledge that they would squelch any urge to break ranks with voters. ...

The history going the opposite way is one of anomalies only. The Electors stress that since the founding, electors have cast some 180 faithless votes for either President or Vice President. But that is 180 out of over 23,000. See Brief for Republican National Committee as Amicus Curiae 19. And more than a third of the faithless votes come from 1872, when the Democratic Party's nominee (Horace Greeley) died just after Election Day.

FN 8. The Electors contend that elector discretion is needed to deal with the possibility that a future presidential candidate will die between Election Day and the Electoral College vote. We do not dismiss how much turmoil such an event could cause. In recognition of that fact, some States have drafted their pledge laws to give electors voting discretion when their candidate has died. See, e.g., Cal. Elec. Code Ann. § 6906; Ind. Code § 3–10–4–1.7. And we suspect that in such a case, States without a specific provision would also release electors from their pledge. Still, we note that because the situation is not before us, nothing in this opinion should be taken to permit the States to bind electors to a deceased candidate.

Putting those aside, faithless votes represent just one-half of one percent of the total. Still, the Electors counter, Congress has counted all those votes. But because faithless votes have never come close to affecting an outcome, only one has ever been challenged. True enough, that one was counted. But the Electors cannot rest a claim of historical tradition on one counted vote in over 200 years. And anyway, the State appointing that elector had no law requiring a pledge or otherwise barring his use of discretion. Congress's deference to a state decision to tolerate a faithless vote is no ground for rejecting a state decision to penalize one.

III

The Electors’ constitutional claim has neither text nor history on its side. Article II and the Twelfth Amendment give States broad power over electors, and give electors themselves no rights. Early in our history, States decided to tie electors to the presidential choices of others, whether legislatures or citizens. Except that legislatures no longer play a role, that practice has continued for more than 200 years. Among the devices States have long used to achieve their object are pledge laws, designed to impress on electors their role as agents of others. A State follows in the same tradition if, like Washington, it chooses to sanction an elector for breaching his promise. Then too, the State instructs its electors that they have no ground for reversing the vote of millions of its citizens. That direction accords with the Constitution—as well as with the trust of a Nation that here, We the People rule.

The judgment of the Supreme Court of Washington is Affirmed.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins as to Part II, concurring in the judgment.

The Court correctly determines that States have the power to require Presidential electors to vote for the candidate chosen by the people of the State. I disagree, however, with its attempt to base that power on Article II. In my view, the Constitution is silent on States’ authority to bind electors in voting. I would resolve this case by simply recognizing that “[a]ll powers that the Constitution neither delegates to the Federal Government nor prohibits to the States are controlled by the people of each State

I

The Constitution does not address—expressly or by necessary implication—whether States have the power to require that Presidential electors vote for the candidates chosen by the people. Article II, § 1, and the Twelfth Amendment provide for the election of the President through a body of electors. But neither speaks directly to a State’s power over elector voting....

In a somewhat cursory analysis, the Court concludes that the States’ duty to appoint electors “in such Manner as the Legislature thereof may direct,” Art. II, § 1, cl. 2, provides an express grant of “power to appoint an elector.” [T]his interpretation erroneously conflates the imposition of a duty with the granting of a power. ...

The Court’s conclusion that the text of Article II, § 1, expressly grants States the power to impose substantive conditions or qualifications on electors is highly questionable. Its interpretation appears to strain the plain meaning of the text, ignore historical evidence, and give the term “Manner” different meanings in parallel provisions of Article I and Article II.... At the time of the founding, the term “manner” referred to a “[f]orm” or “method.” 1 S. Johnson, *A Dictionary of the English Language* (6th ed. 1785); see also 1 J. Ash, *The New and Complete Dictionary of the English Language* (2d ed. 1795). These definitions suggest that Article II requires state legislatures merely to set the approach for selecting Presidential electors, not to impose substantive limitations on whom may become an elector. ...

Finally, the Court’s interpretation gives the same term—“Manner”—different meanings in two parallel provisions of the Constitution. Article I, § 4, states that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.” In *U. S. Term Limits [v. Thornton]*, the Court concluded that the term “Manner” in Article I includes only “a grant of authority to issue procedural regulations,” not “the broad power to set qualifications.” 514 U.S., at 832–833. Yet, today, the Court appears to take the exact opposite view. The Court interprets the term “Manner” in Article II, § 1, to include the power to impose conditions or qualifications on the appointment of electors.

With respect, I demur. “When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself.” *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*, 576 U. S. 787, 829 (2015) (ROBERTS, C. J., dissenting) Nothing in the Constitution’s text or history indicates that the Court should take the strongly disfavored step of concluding that the term “Manner” has two different meanings in these closely aligned provisions....

II

When the Constitution is silent, authority resides with the States or the people. This allocation of power is both embodied in the structure of our Constitution and expressly required by the Tenth Amendment. ... [N]othing in the text or structure of Article II and the Twelfth Amendment contradicts the fundamental distribution of power preserved by the Tenth Amendment....

As the Court recognizes, nothing in the Constitution prevents States from requiring Presidential electors to vote for the candidate chosen by the people. Petitioners ask us to infer a constitutional right to elector independence by interpreting the terms “appoint,” “Electors,” “vote,” and “by Ballot” to align with the Framers’ expectations of discretion in elector voting. But the Framers’ expectations aid our interpretive inquiry only to the extent that they provide evidence of the original public meaning of the Constitution. They cannot be used to change that meaning. As the Court explains, the plain meaning of the terms relied on by petitioners do not appear to “connote independent choice.” Thus, “the original expectation[s]” of the Framers as to elector discretion provide “no reason for holding that the power confided to the States by the Constitution has ceased to exist.” *McPherson*, 146 U.S., at 36.... I concur only in the judgment.

Review Questions and Explanations: *Chiafalo v. Washington*

1. What modes of evidence and argument (text, history, structure, etc.) were important or decisive to the majority justices? Both the majority and Thomas opinions focus to an extent on the definitions of key words in Article II, section 1. But both opinions go beyond definitions of words to consider other kinds of arguments. How do they differ?

2. The framers failed to anticipate the emergence of two national political parties when putting together the presidential selection system. The Twelfth Amendment patched up one failing of the system created by political parties, and the states’ efforts to bind electors tried

to patch up another. Are these accommodations to the existence of political parties constitutionally relevant?

3. Consider the practical implications of a decision in favor of the faithless electors. On election night, we would probably know the popular vote winners in most or all states, but we would not be certain who won the election until the electors met to vote, or perhaps even later when the votes were opened and counted in Congress. Electors would be free to vote for people other than the two major party candidates, including people not running for president (Colin Powell was not an announced candidate in 2016). The practical consequences would include great uncertainty and potentially undemocratic outcomes. The possibility of added chaos given the context of conducting the election during the COVID-19 pandemic is another consideration.

Finally, the faithless electors' position would have greatly increased likelihood of no candidate obtaining a majority of electoral votes, in which case the election would be decided by the House of Representatives. How democratic would that be? Each state has one vote (Amendment XII preserved this feature from Article II, section 2, clause 3), undermining one-person one-vote even more dramatically than the electoral college (which apportions electoral votes in at least a rough proportion to state population. For example, In the Electoral College, Wyoming's voting strength as a function of population compared to California's—the most extreme disparity in the electoral college—is 3.7-to-1. In the House of Representatives, where each state delegation gets just one vote for president, that disparity becomes 68-to 1 in favor of Wyoming.

Did these practical implications factor into the majority opinion? Should they have?

4. If a state enacted a law permitting its presidential electors to vote for whomever they want for president, would that be unconstitutional, according to *Chiafalo*? In other words does the Constitution require that electors be bound to vote for the electoral vote winner?

The “National Popular Vote Interstate Compact” is a proposal that each state adopt a rule requiring its electors to vote for the national popular vote winner. This plan would eliminate the possibility that a popular vote loser could become president by winning an electoral college majority—as happened in 2000 and 2016. Although some states have embraced the compact, it does not go into effect until enough states have signed on to create an electoral majority (270 electoral votes worth). Is that compact constitutional under *Chiafalo*?

5. Justice Thomas argued that the meaning of Article II, section 2, clause 1, must be determined by the “original public meaning of the Constitution.” He is referring to a theory of interpretation popular largely with conservatives, according to which the meaning of the Constitution is what a reasonable person (originalists disagree about the characteristics of this fictitious person) at the time of the ratification debates would think it means. In discovering this “public” meaning circa 1787-88, Thomas consults dictionaries of the era. Are general dictionaries highly persuasive sources of authority for deciding disputes about constitutional structure? What if the language was intentionally ambiguous to smooth over a disagreement?

Here, the Constitutional Convention delegates threw together a very awkward election system to conciliate three divergent views about presidential selection: one bloc favored

selection by state legislatures, another favor having Congress choose the president, and a third (the least numerous of the three) favored election by the people. The ungainly system gave roles in the process to all three, and the only thing that is clear from the procedure is that the people do not elect the president directly. Two conflicting interpretations are found in *The Federalist* essays. In *Federalist* No. 68, Hamilton argued that presidential electors would be those “most likely to possess the information and discernment requisite” to the “complicated” task of choosing the president. But in *Federalist* No. 39, Madison asserted that the president would be elected “by the States in their political characters.” Does this history suggest that the “correct” originalist answer is the undemocratic one proposed by the faithless electors?

Presidential Electors in the House?

Balkinization Blog, (May 09, 2020)

by David S. Schwartz

[The] lead brief for the faithless electors asserts that “The electoral college.... was crafted initially because the Framers did not want an executive dependent directly upon Congress nor upon the state governments.” ([Consolidated Opening Brief for Presidential Electors](#), at 18.) “Crafted” is hardly the right word for the patched-together compromise reached at the eleventh hour of the Philadelphia Convention—a compromise designed to accommodate three divergent views on presidential selection rather than to work well. ...

It’s true that *some* Framers did not want congressional election of the president, out of a concern for presidential independence, but many Framers preferred congressional election. In fact, wide majorities voted for congressional election multiple times. The Philadelphia Convention flip-flopped repeatedly between section by “the national legislature,” or by electors chosen by the state legislatures. On June 2, 1787, the Convention voted by eight states to two that the president should be elected by the national legislature for a non-renewable seven-year term, rejecting unanimously James Wilson’s motion for direct popular election of the president. A week later, the Convention strongly reaffirmed that view, voting 9-0 to reject a motion to elect the president by the decision of the states’ governors. Returning to the topic on July 17, the Convention, by an 8-2 majority, rejected a motion ... that the president should be selected by electors chosen by the legislature of each state. Two days later the Convention flip-flopped, deciding by a 6-3 margin that the president should be chosen by electors “appointed” by the state legislatures. But the next week, on July 23, the Convention voted 7-3 to reconsider this decision. After two further days of debate, on July 26, the Convention flip-flopped again, reinstating by a 6-3 vote the decision to have the president chosen by the national legislature....

The Convention turned back to presidential selection on August 24. The delegates again rejected Wilson’s renewed motion for direct popular election, as well as a motion to elect the president “by electors chosen by the people of the several states,” and reaffirmed

selection by [Congress]. But the Convention bogged down on the details of how Congress would choose the president: would it be by ballot (i.e., by the legislators voting as individuals) or by state? ...

[T]he numerous votes approving congressional selection of the president make it unlikely that a majority of delegates insisted that the election system bolster presidential independence from Congress. The final version of Article II, section 1, clause 2 represented, not a rejection of congressional involvement in presidential selection, but a compromise between the congressional selection camp and the state electors camp—with a nod even to the popular election fringe-- though leaning ultimately toward the congressionalists.

Article II, section 1, clause 2 provides: “if no person have a majority, then *from the five highest on the list*” of candidates receiving electoral votes “the said House shall in like manner choose the President.” The *five ... highest*? Today, it is inconceivable that more than two or three candidates would receive any electoral votes. But the Framers apparently anticipated that there could be more than five, and that that scenario would occur with sufficient frequency to provide for it expressly.

This is consistent with the view of many historians, that *the Framers predicted that most contested elections would wind up in the House*. Except in those cases where a single great man, like Washington, would be elected more or less by acclamation, the Framers likely believed that presidential elections would be non-partisan free-for-alls in which each state would nominate its favorite son. Their concern about favorite sons is evident in their ill-conceived provision giving each elector two votes for president, requiring one to be cast for a candidate from outside the elector’s own state. That provision, by failing to account for disciplined national parties, produced a tie as Jeffersonian electors dutifully cast their two votes for Jefferson and his de facto “running mate” Aaron Burr, and was partially patched up by the Twelfth Amendment. But the Amendment nevertheless carried forward the Framers’ version of the House’s role, a role that the Framers most likely believed would be substantial, and the electors’ role marginal, rather than the other way around. If that is the case, then the Framers would have had little incentive to clarify the relationship between the electors and their respective state legislatures.

The election that most closely approximated the “Framers design” was that of 1824. With no viable opposition party in existence—thus approximating the Framers’ expectation that there would be no political parties--the four Jeffersonian Republican party leaders vied for the mantle of the presidency: Secretary of State John Quincy Adams, Secretary of War John C. Calhoun, Treasury Secretary William Crawford, and House Speaker Henry Clay. A fifth candidate, Tennessee favorite son Andrew Jackson, ran as a Washington outsider and won a popular and electoral vote plurality. But no candidate won a majority, and the election was thrown into the House where a deal was struck between Adams and Clay that swung the election to Adams. The result was a legitimacy crisis—fomented by Jackson supporters who decried the “corrupt bargain” that ended with Clay appointed Secretary of State—that undermined Adams’s presidency. Another unintended consequence of the Framers’ presidential election system working as designed.

The Framers' strongly anti-democratic leanings—James Wilson's two motions for direct popular election of the president never won the support of a single state delegation—together with their failure to account for the eminently foreseeable rise of political parties, produced a terrible presidential election system. It was only the evolution of state laws binding electors and of political party discipline that has refashioned the framers presidential election system into something even remotely tolerable in a democracy. The evolved form of presidential elections has kept the vast majority of elections away from the House, where whose presidential voting rules are far greater departures from "one-person, one vote" than the Electoral College. In the Electoral College, Wyoming's voting strength as a function of population compared to California's is 3.7-to-1. In the House of Representatives, where each state delegation gets just one vote for president, that disparity becomes 68-to 1.

The purported Hamiltonian system of unbound electors is neither a clear original meaning nor a system that existed in practice: as early as the first genuinely contested election in 1796, electors were already beginning to vote by party rather than by individual discretion. A Supreme Court decision to "restore" that system will either make no difference in presidential elections, or make them worse.

2020 SUPPLEMENT – 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 *2510 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?

2020 SUPPLEMENT – CHAPTER 7: SUBSTANTIVE DUE PROCESS

B. Foundational Doctrine

Insert on p. 688 after RQEs

5. incorporation: Paths not taken

In *Ramos v. Louisiana*, (2020), the Supreme Court incorporated one of the few rights found in the Bill of Rights that had not yet been incorporated against the states: the Sixth Amendment's unanimity requirement in criminal trials equally. Justice Gorsuch, writing for the majority, articulated a straightforward approach to incorporation, noting that Sixth Amendment right to a jury trial is "fundamental to the American scheme of justice" and incorporated against the States under the Fourteenth Amendment. "This Court has long explained," he went on, "that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government. So if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court."

The next part of his opinion reiterated two alternative approaches to incorporated, set out by a four-justice plurality and Justice Powell, respectively, in a 1972 case called *Apodaca v. Oregon*. Neither the majority nor the dissent in *Ramos* adopt either of these approaches, but they present interesting "paths not taken" on the Court's incorporation journey. Here is the discussion from Justice Gorsuch's *Ramos* opinion:

How, despite these seemingly straightforward principles, have Louisiana's and Oregon's laws managed to hang on for so long? It turns out that the Sixth Amendment's otherwise simple story took a strange turn in 1972. That year, the Court confronted these States' unconventional schemes for the first time—in *Apodaca v. Oregon* and a companion case, *Johnson v. Louisiana*. Ultimately, the Court could do no more than issue a badly fractured set of opinions. Four dissenting Justices would not have hesitated to strike down the States' laws, recognizing that the Sixth Amendment requires unanimity and that this guarantee is fully applicable against the States under the Fourteenth Amendment. But a four-Justice plurality took a very different view of the Sixth Amendment. These Justices declared that the real question before them was whether unanimity serves an important "function" in "contemporary society." Then, having reframed the question, the plurality wasted few words before concluding that unanimity's costs outweigh its benefits in the modern era, so the Sixth Amendment should not stand in the way of Louisiana or Oregon. The ninth Member of the Court adopted a position that was neither here nor there. On the one hand, Justice Powell agreed that, as a matter of "history and precedent, . . . the Sixth Amendment requires a unanimous jury verdict to convict." But, on the other hand, he argued that the Fourteenth Amendment does

not render this guarantee against the federal government fully applicable against the States. In this way, Justice Powell doubled down on his belief in "dual-track" incorporation—the idea that a single right can mean two different things depending on whether it is being invoked against the federal or a state government. Justice Powell acknowledged that his argument for dual-track incorporation came "late in the day." Late it was. The Court had already, nearly a decade earlier, "rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'" It's a point we've restated many times since, too, including as recently as last year. Still, Justice Powell frankly explained, he was "unwillin[g]" to follow the Court's precedents. So he offered up the essential fifth vote to uphold Mr. Apodaca's conviction—if based only on a view of the Fourteenth Amendment that he knew was (and remains) foreclosed by precedent."

* * *

D. Fundamental Rights and Personal Liberties

For inclusion at p. 760 after Hellerstedt case.

Guided Reading Questions: *June Med. Servs. v. Russo*

1. As shown in the short excerpt below from Justice Breyer's plurality opinion, the justices in the plurality saw the facts of this case as identical to those in *Whole Women's Health*, decided in 2016 and striking down a Texas law under the *Casey* undue burden test. Given the substantial similarities between the two laws, was it appropriate for Supreme Court to hear this case?

2. Chief Justice Roberts' concurring opinion is the essential fifth vote in this case. He agrees that the facts of the case are relatively undistinguishable from *Whole Women's Health*. Why does he write separately?

2. Consider Justice Alito's citation to *Williamson v. Lee Optical*. You read *Williamson* earlier in this course. How would you apply the test used in that case to the facts of *June Medical*?

June Medical Services v. Russo

___ S.Ct. ___ (2020)

Plurality: *Breyer*, Ginsburg, Breyer, Sotomayor, Kagan

Concurrence in the Judgment: *Roberts* (CJ)

Dissent: *Alito*, Thomas, Gorsuch, Kavanaugh

JUSTICE BREYER delivered the opinion of the Court.

In *Whole Woman's Health v. Hellerstedt*, 579 U. S. ____ (2016), we held that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right" and are therefore "constitutionally invalid." *Id.*, at ____ (slip op., at 1) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 878 (1992) (plurality opinion); alteration in original). We explained that this standard requires courts independently to review the legislative findings upon which an abortion-related statute rests and to weigh the law's "asserted benefits against the burdens" it imposes on abortion access. 579 U. S., at ____ (slip op., at 21) (citing *Gonzales v. Carhart*, 550 U. S. 124, 165 (2007)).

We have examined the extensive record carefully and conclude that it supports the District Court's findings of fact. Those findings mirror those made in *Whole Woman's Health* in every relevant respect and require the same result. We consequently hold that the Louisiana statute is unconstitutional.

CHIEF JUSTICE ROBERTS concurring in the judgment.

I joined the dissent in *Whole Woman's Health* and continue to believe that the case was wrongly decided. The question today however is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case.

Today's case is a challenge from several abortion clinics and providers to a Louisiana law nearly identical to the Texas law struck down four years ago in *Whole Woman's Health*. Just like the Texas law, the Louisiana law requires physicians performing abortions to have "active admitting privileges at a hospital . . . located not further than thirty miles from the location at which the abortion is performed." Following a six-day bench trial, the District Court found that Louisiana's law would "result in a drastic reduction in the number and geographic distribution of abortion providers." *June Medical Services LLC v. Kliebert*, 250 F. Supp. 3d 27, 87 (MD La. 2017). The law would reduce the number of clinics from three to "one, or at most two," and the number of physicians providing abortions from five to "one, or at most two," and "therefore cripple women's ability to have an abortion in Louisiana." *Id.*, at 87-88.

The legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore Louisiana's law cannot stand under our precedents.

I

Stare decisis ("to stand by things decided") is the legal term for fidelity to precedent. Black's Law Dictionary 1696 (11th ed. 2019). It has long been "an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the

scale of justice even and steady, and not liable to waver with every new judge's opinion." 1 W. Blackstone, *Commentaries on the Laws of England* 69 (1765). This principle is grounded in a basic humility that recognizes today's legal issues are often not so different from the questions of yesterday and that we are not the first ones to try to answer them. Because the "private stock of reason . . . in each man is small, . . . individuals would do better to avail themselves of the general bank and capital of nations and of ages." 3 E. Burke, *Reflections on the Revolution in France* 110 (1790).

Adherence to precedent is necessary to "avoid an arbitrary discretion in the courts." *The Federalist* No. 78, p. 529 (J. Cooke ed. 1961) (A. Hamilton). The constraint of precedent distinguishes the judicial "method and philosophy from those of the political and legislative process." Jackson, *Decisional Law and Stare Decisis*, 30 A. B. A. J. 334 (1944).

The doctrine also brings pragmatic benefits. Respect for precedent "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U. S. 808, 827 (1991). It is the "means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." (citation omitted). In that way, "*stare decisis* is an old friend of the common lawyer." Jackson, *supra*, at 334.

Stare decisis is not an "inexorable command." *Ramos v. Louisiana*, 590 U. S. ___, ___ (2020) (internal quotation marks omitted). But for precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly. The Court accordingly considers additional factors before overruling a precedent, such as its administrability, its fit with subsequent factual and legal developments, and the reliance interests that the precedent has engendered. See *Janus v. State, County, and Municipal Employees*, 585 U. S. ___, ___-___ (2018).

Stare decisis principles also determine how we handle a decision that itself departed from the cases that came before it. In those instances, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following" the recent departure. *Adarand Constructors, Inc. v. Peña*, 515 U. S. 200, 231 (1995) (plurality opinion). *Stare decisis* is pragmatic and contextual, not "a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U. S. 106, 119 (1940).

II

A

Both Louisiana and the providers agree that the undue burden standard announced in *Casey* provides the appropriate framework to analyze Louisiana's law. Neither party has asked us to reassess the constitutional validity of that standard.

Casey reaffirmed "the most central principle of *Roe v. Wade*," "a woman's right to terminate her pregnancy before viability." *Casey*, 505 U. S., at 871 (plurality opinion). At the same time, it recognized that the State has "important and legitimate interests in . . . protecting the health of the pregnant woman and in protecting the potentiality of human life." *Id.*, at 875-876 (internal quotation marks and brackets omitted).

Although parts of *Casey*'s joint opinion were a plurality not joined by a majority of the Court, the joint opinion is nonetheless considered the holding of the Court under *Marks v. United States*, 430 U. S. 188, 193 (1977), as the narrowest position supporting the judgment.

To serve the former interest, the State may, "[a]s with any medical procedure," enact "regulations to further the health or safety of a woman seeking an abortion." *Id.*, at 878. To serve the latter interest, the State may, among other things, "enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term." *Id.*, at 872. The State's freedom to enact such rules is "consistent with *Roe*'s central premises, and indeed the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn." *Id.*, at 873.

Under *Casey*, the State may not impose an undue burden on the woman's ability to obtain an abortion. "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.*, at 877. Laws that do not pose a substantial obstacle to abortion access are permissible, so long as they are "reasonably related" to a legitimate state interest. *Id.*, at 878.

After faithfully reciting this standard, the Court in *Whole Woman's Health* added the following observation: "The rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." 579 U. S., at ____-____. The plurality repeats today that the undue burden standard requires courts "to weigh the law's asserted benefits against the burdens it imposes on abortion access." *Ante*, at 2 (internal quotation marks omitted).

Read in isolation from *Casey*, such an inquiry could invite a grand "balancing test in which unweighted factors mysteriously are weighed." *Marrs v. Motorola, Inc.*, 577 F. 3d 783, 788 (CA7 2009). Under such tests, "equality of treatment is . . . impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired." Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989).

In this context, courts applying a balancing test would be asked in essence to weigh the State's interests in "protecting the potentiality of human life" and the health of the woman, on the one hand, against the woman's liberty interest in defining her "own concept of existence, of meaning, of the universe, and of the mystery of human life" on the other. *Casey*, 505 U. S., at 851 (internal quotation marks omitted). There is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable

values and no meaningful way to compare them if there were. Attempting to do so would be like "judging whether a particular line is longer than a particular rock is heavy," (citation omitted). Pretending that we could pull that off would require us to act as legislators, not judges, and would result in nothing other than an "unanalyzed exercise of judicial will" in the guise of a "neutral utilitarian calculus." *New Jersey v. T. L. O.*, 469 U. S. 325, 369 (1985) (Brennan, J., concurring in part and dissenting in part).

Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts. On the contrary, we have explained that the "traditional rule" that "state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty" is "consistent with *Casey*." *Gonzales v. Carhart*, 550 U. S. 124, 163 (2007). *Casey* instead focuses on the existence of a substantial obstacle, the sort of inquiry familiar to judges across a variety of contexts. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U. S. 682, 694-695 (2014) (asking whether the government "substantially burdens a person's exercise of religion" under the Religious Freedom Restoration Act); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U. S. 721, 748 (2011) (asking whether a law "imposes a substantial burden on the speech of privately financed candidates and independent expenditure groups"); *Murphy v. United Parcel Service, Inc.*, 527 U. S. 516, 521 (1999) (asking, in the context of the Americans with Disabilities Act, whether an individual's impairment "substantially limits one or more major life activities" (internal quotation marks omitted)).

Casey's analysis of the various restrictions that were at issue in that case is illustrative. For example, the opinion recognized that Pennsylvania's 24-hour waiting period for abortions "has the effect of increasing the cost and risk of delay of abortions," but observed that the District Court did not find that the "increased costs and potential delays amount to substantial obstacles." 505 U. S., at 886 (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (internal quotation marks omitted). The opinion concluded that "given the statute's definition of medical emergency," the waiting period did not "impose[] a real health risk." *Ibid.* Because the law did not impose a substantial obstacle, *Casey* upheld it. And it did so notwithstanding the District Court's finding that the law did "not further the state interest in maternal health." *Ibid.* (internal quotation marks omitted).

Turning to the State's various recordkeeping and reporting requirements, *Casey* found those requirements do not "impose a substantial obstacle to a woman's choice" because "[a]t most they increase the cost of some abortions by a slight amount." *Id.*, at 901. "While at some point increased cost could become a substantial obstacle," there was "no such showing on the record" before the Court. *Ibid.* The Court did not weigh this cost against the benefits of the law.

The same was true for Pennsylvania's parental consent requirement. *Casey* held that "a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided there is an adequate judicial bypass procedure." *Id.*, at 899 (citing, among other cases, *Ohio v. Akron Center for Reproductive Health* (1990)). *Casey* relied on precedent establishing that judicial bypass procedures "prevent another person from having an absolute veto power over a minor's decision to have an abortion." *Akron*. Without a judicial

bypass, parental consent laws impose a substantial obstacle to a minor's ability to obtain an abortion and therefore constitute an undue burden. See *Casey*, (joint opinion).

The opinion similarly looked to whether there was a substantial burden, not whether benefits outweighed burdens, in analyzing Pennsylvania's requirement that physicians provide certain "truthful, nonmisleading information" about the nature of the abortion procedure. *Id.*, at 882. The opinion concluded that the requirement "cannot be considered a substantial obstacle to obtaining an abortion, and, *it follows*, there is no undue burden." *Id.*, at 883 (emphasis added).

With regard to the State's requirement that a physician, as opposed to a qualified assistant, provide the woman this information, the opinion reasoned: "*Since* there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion, we conclude that it is not an undue burden." *Id.*, at 884-885 (emphasis added). This was so "even if an objective assessment might suggest that those same tasks could be performed by others," meaning the law had little if any benefit. *Id.*, at 885.

The only restriction *Casey* found unconstitutional was Pennsylvania's spousal notification requirement. On that score, the Court recited a bevy of social science evidence demonstrating that "millions of women in this country . . . may have justifiable fears of physical abuse" or "devastating forms of psychological abuse from their husbands." *Id.*, at 893 (opinion of the Court). In addition to "physical violence" and "child abuse," women justifiably feared "verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends." *Ibid.* The spousal notification requirement was "thus likely to prevent a significant number of women from obtaining an abortion." *Ibid.* It did not "merely make abortions a little more difficult or expensive to obtain; for many women, it [imposed] a substantial obstacle." *Id.*, at 893-894. The Court emphasized that it would not "blind [itself] to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases." *Id.*, at 894.

The upshot of *Casey* is clear: The several restrictions that did not impose a substantial obstacle were constitutional, while the restriction that did impose a substantial obstacle was unconstitutional.

To be sure, the Court at times discussed the benefits of the regulations, including when it distinguished spousal notification from parental consent. See *Whole Woman's Health*, 579 U. S., at ____-____ (slip op., at 19-20) (citing *Casey*, 505 U. S., at 887-898 (opinion of the Court); *id.*, at 899-901 (joint opinion)). But in the context of *Casey*'s governing standard, these benefits were not placed on a scale opposite the law's burdens. Rather, *Casey* discussed benefits in considering the threshold requirement that the State have a "legitimate purpose" and that the law be "reasonably related to that goal." *Id.*, at 878 (plurality opinion); *id.*, at 882 (joint opinion).

So long as that showing is made, the only question for a court is whether a law has the "effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.*, at 877 (plurality opinion). *Casey* repeats that "substantial obstacle" standard nearly verbatim no less than 15 times. *Id.*, at 846, 894, 895 (opinion of the Court); *id.*, at 877, 878 (plurality opinion); *id.*, at 883, 884, 885, 886, 887, 901 (joint opinion). ...

JUSTICE ALITO, dissenting.

... The plurality eschews the constitutional test set out in *Casey* and instead employs the balancing test adopted in *Whole Woman's Health*. The plurality concludes that the Louisiana law does nothing to protect the health of women, but that is disproved by substantial evidence in the record. And the plurality upholds the District Court's finding that the Louisiana law would cause a drastic reduction in the number of abortion providers in the State even though this finding was based on an erroneous legal standard and a thoroughly inadequate factual inquiry.

THE CHIEF JUSTICE stresses the importance of *stare decisis* and thinks that precedent, namely *Whole Woman's Health*, dooms the Louisiana law. But at the same time, he votes to overrule *Whole Woman's Health* insofar as it changed the *Casey* test.

Both the plurality and THE CHIEF JUSTICE hold that abortion providers can invoke a woman's abortion right when they attack state laws that are enacted to protect a woman's health. Neither waiver nor *stare decisis* can justify this holding, which clashes with our general rule on third-party standing. And the idea that a regulated party can invoke the right of a third party for the purpose of attacking legislation enacted to protect the third party is stunning. Given the apparent conflict of interest, that concept would be rejected out of hand in a case not involving abortion. ...

The petitioners urge us to adopt a rule that is more favorable to abortion providers. At oral argument, their attorney maintained that a law that has no effect on women's access to abortion is nevertheless unconstitutional if it is not needed to protect women's health. See Tr. of Oral Arg. 18-19. Of course, that is precisely the argument one would expect from a business that wishes to be free from burdensome regulations. But unless an abortion law has an adverse effect *on women*, there is no reason why the law should face greater constitutional scrutiny than any other measure that burdens a regulated entity in the name of health or safety. See *Casey*, 505 U. S., at 884-885 (joint opinion). Many state and local laws that are justified as safety measures rest on debatable empirical grounds. But when a party saddled with such restrictions challenges them as a violation of due process, our cases call for the restrictions to be sustained if "it might be thought that the particular legislative measure was a rational way" to serve a valid interest. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U. S. 483, 488 (1955). The test that petitioners advocate would give abortion providers an unjustifiable advantage over all other regulated parties, and for that reason, it was rejected in *Casey*. See 505 U. S., at 851 (majority opinion).

Review Questions and Explanations: *June Med. Servs. v. Russo*

1. Consider Chief Justice Roberts' argument about the role adhering to precedent plays in constitutional decision making. Do you agree with him about its importance?
2. Did Chief Justice Roberts adhere to the precedent set by *Casey*?
3. Chief Justice Roberts argues that his test does more to minimize judicial discretion than does the balancing test applied by Justice Breyer. What opportunities does each test provide for the exercise of judicial discretion?
4. Justice Alito appears to argue that since the Louisiana law does not (in his view) have an adverse effect on women it therefore is a business regulation it should be evaluated under the exceptionally deferential test used in *Williamson v. Lee Optical*. Are you persuaded by his argument? What are its strongest and weakest points?

2020 SUPPLEMENT – 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 Papoleto 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?

2020 SUPPLEMENT – 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. §78l (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?

2020 SUPPLEMENT – 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.” *Summum*. 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 ethic 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?

Guided Reading Questions: *Espinoza v. Montana Dept. of Rev.*

1. This case involves a provision in the Montana state constitution barring the use of public funds to provide aid to religious institutions, including churches and schools. The question presented is whether this provision violated the First Amendment to the U.S. Constitution. If so, the Supremacy Clause would invalidate the state constitutional provision. Does the fact that this is a state constitutional provision (rather than a state statute or executive action) effect the Court's decision? Should it?
2. Three years before *Espinoza* was decided, the Court decided a similar case (*Trinity Lutheran v. Comer*). The result reached in *Trinity Lutheran* was similar, but the Court in that case included a footnote that appeared to limit the reach of the case to the situation presented in that case, which involved funding for school playground equipment. So in one sense, *Espinoza* does not break new ground. But on the other hand, why include the

apparently limiting footnote in *Trinity Lutheran* in the first place? What are the pros and cons of the Court proceeding in that type of piecemeal fashion?

Espinoza v. Montana Dept. of Rev

___ S.Ct. ___ (2020)

Majority: *Roberts (CJ)*, Thomas, Alito, Gorsuch, Kavanaugh

Dissent: *Ginsburg, Breyer, Sotomayor, Kagan.*

Chief JUSTICE ROBERTS delivered the opinion of the Court.

The Montana Legislature established a program to provide tuition assistance to parents who send their children to private schools. The program grants a tax credit to anyone who donates to certain organizations that in turn award scholarships to selected students attending such schools. When petitioners sought to use the scholarships at a religious school, the Montana Supreme Court struck down the program. The Court relied on the "no-aid" provision of the State Constitution, which prohibits any aid to a school controlled by a "church, sect, or denomination." The question presented is whether the Free Exercise Clause of the United States Constitution barred that application of the no-aid provision.

So far only one scholarship organization, Big Sky Scholarships, has participated in the program. Big Sky focuses on providing scholarships to families who face financial hardship or have children with disabilities. Scholarship organizations like Big Sky must, among other requirements, maintain an application process for awarding the scholarships; use at least 90% of all donations on scholarship awards; and comply with state reporting and monitoring requirements. A family whose child is awarded a scholarship under the program may use it at any "qualified education provider" — that is, any private school that meets certain accreditation, testing, and safety requirements. Virtually every private school in Montana qualifies. Upon receiving a scholarship, the family designates its school of choice, and the scholarship organization sends the scholarship funds directly to the school. Neither the scholarship organization nor its donors can restrict awards to particular types of schools. The Montana Legislature allotted \$3 million annually to fund the tax credits, beginning in 2016. If the annual allotment is exhausted, it increases by 10% the following year. The program is slated to expire in 2023. The Montana Legislature also directed that the program be administered in accordance with Article X, section 6, of the Montana Constitution, which contains a "no-aid" provision barring government aid to sectarian schools.

"Aid prohibited to sectarian schools. . . . The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination." Mont. Const., Art. X, §6(1).

Shortly after the scholarship program was created, the Montana Department of Revenue promulgated "Rule 1," over the objection of the Montana Attorney General. That administrative rule prohibited families from using scholarships at religious schools. It did so by changing the definition of "qualified education provider" to exclude any school "owned or controlled in whole or in part by any church, religious sect, or denomination." The Department explained that the Rule was needed to reconcile the scholarship program with the no-aid provision of the Montana Constitution. The Montana Attorney General disagreed. In a letter to the Department, he advised that the Montana Constitution did not require excluding religious schools from the program, and if it did, it would "very likely" violate the United States Constitution by discriminating against the schools and their students.

This suit was brought by three mothers whose children attend Stillwater Christian School in northwestern Montana. Stillwater is a private Christian school that meets the statutory criteria for "qualified education providers." It serves students in prekindergarten through 12th grade, and petitioners chose the school in large part because it "teaches the same Christian values that [they] teach at home." The child of one petitioner has already received scholarships from Big Sky, and the other petitioners' children are eligible for scholarships and planned to apply. While in effect, however, Rule 1 blocked petitioners from using scholarship funds for tuition at Stillwater.

The Montana Supreme Court ... [held] that the program aided religious schools in violation of the no-aid provision of the Montana Constitution. In the Court's view, the no-aid provision "broadly and strictly prohibits aid to sectarian schools." The scholarship program provided such aid by using tax credits to "subsidize tuition payments" at private schools that are "religiously affiliated" or "controlled in whole or in part by churches." In that way, the scholarship program flouted the State Constitution's "guarantee to all Montanans that their government will not use state funds to aid religious schools." The Montana Supreme Court went on to hold that the violation of the no-aid provision required invalidating the entire scholarship program. The Court explained that the program provided "no mechanism" for preventing aid from flowing to religious schools, and therefore the scholarship program could not "under *any* circumstance" be construed as consistent with the no-aid provision. As a result, the tax credit is no longer available to support scholarships at either religious or secular private schools. The Montana Supreme Court acknowledged that "an overly-broad" application of the no-aid provision "could implicate free exercise concerns" and that "there may be a case" where "prohibiting the aid would violate the Free Exercise Clause." But, the Court concluded, "this is not one of those cases."

The Religion Clauses of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." We have recognized a "'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U. S. ___, ___ (2017) (quoting *Locke v. Davey*, 540 U. S. 712, 718 (2004)). Here, the parties do not dispute that the scholarship program is permissible under the Establishment Clause. Nor could they. We have repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government

programs. See, *e.g.*, *Locke*; see also *Trinity Lutheran*, 582 U. S., at ____ (noting the parties' agreement that the Establishment Clause was not violated by including churches in a playground resurfacing program). Any Establishment Clause objection to the scholarship program here is particularly unavailing because the government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools.

The Montana Supreme Court, however, held as a matter of state law that even such indirect government support qualified as "aid" prohibited under the Montana Constitution. The question for this Court is whether the Free Exercise Clause precluded the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from the scholarship program. For purposes of answering that question, we accept the Montana Supreme Court's interpretation of state law—including its determination that the scholarship program provided impermissible "aid" within the meaning of the Montana Constitution—and we assess whether excluding religious schools and affected families from that program was consistent with the Federal Constitution.”

The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, "protects religious observers against unequal treatment" and against "laws that impose special disabilities on the basis of religious status." *Trinity Lutheran*, 582 U. S., at ____, ____ (internal quotation marks and alterations omitted). Those "basic principle[s]" have long guided this Court. See, *e.g.*, *Everson v. Board of Ed. of Ewing*, 330 U. S. 1, 16 (1947). Most recently, *Trinity Lutheran* distilled these and other decisions to the same effect into the "unremarkable" conclusion that disqualifying otherwise eligible recipients from a public benefit "solely because of their religious character" imposes "a penalty on the free exercise of religion that triggers the most exacting scrutiny." 582 U. S., at ____-____.

In *Trinity Lutheran*, Missouri provided grants to help nonprofit organizations pay for playground resurfacing, but a state policy disqualified any organization "owned or controlled by a church, sect, or other religious entity." *Id.* Because of that policy, an otherwise eligible church-owned preschool was denied a grant to resurface its playground. Missouri's policy discriminated against the Church "simply because of what it is—a church," and so the policy was subject to the "strictest scrutiny," which it failed. *Id.* We acknowledged that the State had not "criminalized" the way in which the Church worshipped or "told the Church that it cannot subscribe to a certain view of the Gospel." *Id.* But the State's discriminatory policy was "odious to our Constitution all the same." *Id.*

Here too Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. The provision also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school. This is apparent from the plain text. The provision bars aid to any school "controlled in whole or in part by any church, sect, or denomination." Mont. Const., Art. X, §6(1). The provision's title—"Aid prohibited to sectarian schools"—confirms that the provision singles out schools based on their religious character. *Ibid.* And the Montana Supreme Court explained that the provision forbids aid to any school that is

"sectarian," "religiously affiliated," or "controlled in whole or in part by churches." The provision plainly excludes schools from government aid solely because of religious status. See *Trinity Lutheran*.

The Department counters that *Trinity Lutheran* does not govern here because the no-aid provision applies not because of the religious character of the recipients, but because of how the funds would be used—for "religious education." In *Trinity Lutheran*, a majority of the Court concluded that the Missouri policy violated the Free Exercise Clause because it discriminated on the basis of religious status. A plurality declined to address discrimination with respect to "religious uses of funding or other forms of discrimination." The plurality saw no need to consider such concerns because Missouri had expressly discriminated "based on religious identity," which was enough to invalidate the state policy without addressing how government funds were used. This case also turns expressly on religious status and not religious use. The Montana Supreme Court applied the no-aid provision solely by reference to religious status. The Court repeatedly explained that the no-aid provision bars aid to "schools controlled in whole or in part by churches," "sectarian schools," and "religiously-affiliated schools."

Applying this provision to the scholarship program, the Montana Supreme Court noted that most of the private schools that would benefit from the program were "religiously affiliated" and "controlled by churches," and the Court ultimately concluded that the scholarship program ran afoul of the Montana Constitution by aiding "schools controlled by churches." *Id.* The Montana Constitution discriminates based on religious status just like the Missouri policy in *Trinity Lutheran*, which excluded organizations "owned or controlled by a church, sect, or other religious entity." The Department points to some language in the decision below indicating that the no-aid provision has the goal or effect of ensuring that government aid does not end up being used for "sectarian education" or "religious education."

The Department also contrasts what it characterizes as the "completely non-religious" benefit of playground resurfacing in *Trinity Lutheran* with the unrestricted tuition aid at issue here. Tr. of Oral Arg. 31. General school aid, the Department stresses, could be used for religious ends by some recipients, particularly schools that believe faith should "permeate[]" everything they do. Regardless, those considerations were not the Montana Supreme Court's basis for applying the no-aid provision to exclude religious schools; that hinged solely on religious status. Status-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses.

Undeterred by *Trinity Lutheran*, the Montana Supreme Court applied the no-aid provision to hold that religious schools could not benefit from the scholarship program. So applied, the provision "impose[s] special disabilities on the basis of religious status" and "condition[s] the availability of benefits upon a recipient's willingness to surrender [its] religiously impelled status." *Trinity Lutheran*, quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*. To be eligible for government aid under the Montana Constitution, a school must divorce itself from any religious control or affiliation. Placing such a condition on

benefits or privileges "inevitably deters or discourages the exercise of First Amendment rights." *Trinity Lutheran*, quoting *Sherbert v. Verner* (1963). The Free Exercise Clause protects against even "indirect coercion," and a State "punishe[s] the free exercise of religion" by disqualifying the religious from government aid as Montana did here. *Trinity Lutheran* (internal quotation marks omitted). Such status- based discrimination is subject to "the strictest scrutiny." *Id.*

Seeking to avoid *Trinity Lutheran*, the Department contends that this case is instead governed by *Locke v. Davey* (2004). *Locke* also involved a scholarship program. The State of Washington provided scholarships paid out of the State's general fund to help students pursuing postsecondary education. The scholarships could be used at accredited religious and non-religious schools alike, but Washington prohibited students from using the scholarships to pursue devotional theology degrees, which prepared students for a calling as clergy. This prohibition prevented Davey from using his scholarship to obtain a degree that would have enabled him to become a pastor. We held that Washington had not violated the Free Exercise Clause. *Locke* differs from this case in two critical ways.

First, *Locke* explained that Washington had "merely chosen not to fund a distinct category of instruction": the "essentially religious endeavor" of training a minister "to lead a congregation." Thus, Davey "was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry." *Trinity Lutheran*. Apart from that narrow restriction, Washington's program allowed scholarships to be used at "pervasively religious schools" that incorporated religious instruction throughout their classes. *Locke*. By contrast, Montana's Constitution does not zero in on any particular "essentially religious" course of instruction at a religious school. Rather, as we have explained, the no-aid provision bars all aid to a religious school "simply because of what it is," putting the school to a choice between being religious or receiving government benefits. *Trinity Lutheran*. At the same time, the provision puts families to a choice between sending their children to a religious school or receiving such benefits.

Second, *Locke* invoked a "historic and substantial" state interest in not funding the training of clergy, explaining that "opposition to . . . funding 'to support church leaders' lay at the historic core of the Religion Clauses," *Trinity Lutheran*, quoting *Locke*. As evidence of that tradition, the Court in *Locke* emphasized that the propriety of state-supported clergy was a central subject of founding-era debates, and that most state constitutions from that era prohibited the expenditure of tax dollars to support the clergy. See *id.*, at 722-723. But no comparable "historic and substantial" tradition supports Montana's decision to disqualify religious schools from government aid.

Because the Montana Supreme Court applied the no-aid provision to discriminate against schools and parents based on the religious character of the school, the "strictest scrutiny" is required. That "stringent standard," is not "watered down but really means what it says," *Lukumi*. To satisfy it, government action "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Ibid.* The Montana Supreme Court asserted that the no-aid provision serves Montana's interest in separating church and State "more fiercely" than the Federal Constitution. But "that interest cannot

qualify as compelling" in the face of the infringement of free exercise here. *Trinity Lutheran*. A State's interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause . . . is limited by the Free Exercise Clause." *Ibid*.

The Department, for its part, asserts that the no-aid provision actually *promotes* religious freedom. In the Department's view, the no-aid provision protects the religious liberty of taxpayers by ensuring that their taxes are not directed to religious organizations, and it safeguards the freedom of religious organizations by keeping the government out of their operations. See Brief for Respondents 17-23. An infringement of First Amendment rights, however, cannot be justified by a State's alternative view that the infringement advances religious liberty. Our federal system prizes state experimentation, but not "state experimentation in the suppression of free speech," and the same goes for the free exercise of religion. *Boy Scouts of America v. Dale* (2000).

Furthermore, we do not see how the no-aid provision promotes religious freedom. As noted, this Court has repeatedly upheld government programs that spend taxpayer funds on equal aid to religious observers and organizations, particularly when the link between government and religion is attenuated by private choices. A school, concerned about government involvement with its religious activities, might reasonably decide for itself not to participate in a government program. But we doubt that the school's liberty is enhanced by eliminating any option to participate in the first place.

The Department's argument is especially unconvincing because the infringement of religious liberty here broadly affects both religious schools and adherents. Montana's no-aid provision imposes a categorical ban—"broadly and strictly" prohibiting "*any* type of aid" to religious schools. This prohibition is far more sweeping than the policy in *Trinity Lutheran*, which barred churches from one narrow program for playground resurfacing—causing "in all likelihood" only "a few extra scraped knees." And the prohibition before us today burdens not only religious schools but also the families whose children attend or hope to attend them. Drawing on "enduring American tradition," we have long recognized the rights of parents to direct "the religious upbringing" of their children. *Wisconsin v. Yoder* (1972). Many parents exercise that right by sending their children to religious schools, a choice protected by the Constitution. See *Pierce v. Society of Sisters*, (1925). But the no-aid provision penalizes that decision by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one, and for no other reason.

The Department also suggests that the no-aid provision advances Montana's interests in public education. According to the Department, the no-aid provision safeguards the public school system by ensuring that government support is not diverted to private schools. But, under that framing, the no-aid provision is fatally underinclusive because its "proffered objectives are not pursued with respect to analogous nonreligious conduct." *Lukumi*. On the Department's view, an interest in public education is undermined by diverting government support to *any* private school, yet the no-aid provision bars aid only to *religious* ones. A law does not advance "an interest of the highest order when it leaves

appreciable damage to that supposedly vital interest unprohibited." *Id.* Montana's interest in public education cannot justify a no-aid provision that requires only religious private schools to "bear [its] weight." *Ibid.* A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.

The Department argues that, at the end of the day, there is no free exercise violation here because the Montana Supreme Court ultimately eliminated the scholarship program altogether. According to the Department, now that there is no program, religious schools and adherents cannot complain that they are excluded from any generally available benefit. Two dissenters agree. JUSTICE GINSBURG reports that the State of Montana simply chose to "put all private school parents in the same boat" by invalidating the scholarship program, and JUSTICE SOTOMAYOR describes the decision below as resting on state law grounds having nothing to do with the federal Free Exercise Clause. The descriptions are not accurate. The Montana Legislature created the scholarship program; the Legislature never chose to end it, for policy or other reasons. The program was eliminated by a court, and not based on some innocuous principle of state law. Rather, the Montana Supreme Court invalidated the program pursuant to a state law provision that expressly discriminates on the basis of religious status. The Court applied that provision to hold that religious schools were barred from participating in the program. Then, seeing no other "mechanism" to make absolutely sure that religious schools received no aid, the court chose to invalidate the entire program.

The final step in this line of reasoning eliminated the program, to the detriment of religious and non-religious schools alike. But the Court's error of federal law occurred at the beginning. When the Court was called upon to apply a state law no-aid provision to exclude religious schools from the program, it was obligated by the Federal Constitution to reject the invitation. Had the Court recognized that this was, indeed, "one of those cases" in which application of the no-aid provision "would violate the Free Exercise Clause," *id.*, the Court would not have proceeded to find a violation of that provision. And, in the absence of such a state law violation, the Court would have had no basis for terminating the program. Because the elimination of the program flowed directly from the Montana Supreme Court's failure to follow the dictates of federal law, it cannot be defended as a neutral policy decision, or as resting on adequate and independent state law grounds.

The Supremacy Clause provides that "the Judges in every State shall be bound" by the Federal Constitution, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. "[T]his Clause creates a rule of decision" directing state courts that they "must not give effect to state laws that conflict with federal law[]." *Armstrong v. Exceptional Child Center, Inc.*, 575 U. S. 320, 324 (2015). Given the conflict between the Free Exercise Clause and the application of the no-aid provision here, the Montana Supreme Court should have "disregard[ed]" the no-aid provision and decided this case "conformably to the [C]onstitution" of the United States. *Marbury v. Madison*, 1 Cranch 137, 178 (1803). That "*supreme* law of the land" condemns discrimination against religious schools and the families whose children attend them. *Id.*, at 180. They are

"member[s] of the community too," and their exclusion from the scholarship program here is "odious to our Constitution" and "cannot stand." *Trinity Lutheran*.

The judgment of the Montana Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

JUSTICE GINSBURG, with whom JUSTICE KAGAN joins, dissenting.

The First Amendment prohibits the government from "mak[ing a] law . . . prohibiting the free exercise" of religion. U. S. Const., Amdt. 1. This Court's decisions have recognized that a burden on religious exercise may occur both when a State proscribes religiously motivated activity and when a law pressures an adherent to abandon her religious faith or practice. *Sherbert v. Verner* (1963). The Free Exercise Clause thus protects against "indirect coercion or penalties on the free exercise of religion." (Citation omitted). Invoking that principle in *Trinity Lutheran*, the Court observed that disqualifying an entity from a public benefit "solely because of [the entity's] religious character" can impose "a penalty on the free exercise of religion." *Id.* The Court then concluded that a Missouri law making churches ineligible for a government playground-refurbishing grant impermissibly burdened the church's religious exercise by "put[ting it] to the choice between being a church and receiving a government benefit." *Id.*

Petitioners argue that the Montana Supreme Court's decision fails when measured against *Trinity Lutheran*. I do not see how. Past decisions in this area have entailed *differential treatment* occasioning a burden on a plaintiff's religious exercise. *Trinity Lutheran*. This case is missing that essential component. Recall that the Montana court remedied the state constitutional violation by striking the scholarship program in its entirety. Under that decree, secular and sectarian schools alike are ineligible for benefits, so the decision cannot be said to entail differential treatment based on petitioners' religion. Put somewhat differently, petitioners argue that the Free Exercise Clause requires a State to treat institutions and people neutrally when doling out a benefit—and neutrally is how Montana treats them in the wake of the state court's decision.

Accordingly, the Montana Supreme Court's decision does not place a burden on petitioners' religious exercise. Petitioners may still send their children to a religious school. And the Montana Supreme Court's decision does not pressure them to do otherwise. Unlike the law in *Trinity Lutheran*, the decision below puts petitioners to no "choice": Neither giving up their faith, nor declining to send their children to sectarian schools, would affect their entitlement to scholarship funding. There simply are no scholarship funds to be had. True, petitioners expected to be eligible for scholarships under the legislature's program, and to use those scholarships at a religious school. And true, the Montana court's decision disappointed those expectations along with those of parents who send their children to secular private schools. But . . . this Court has consistently refused to treat neutral government action as unconstitutional solely because it fails to benefit religious exercise. See *Sherbert*, (Douglas, J., concurring) ("[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.").

These considerations should be fatal to petitioners' free exercise claim, yet the Court does not confront them. Instead, the Court decides a question that, in my view, this case does not present: "[W]hether excluding religious schools and affected families from [the scholarship] program was consistent with the Federal Constitution." *Ante*, at 7 (majority opinion). The Court goes on to hold that the Montana Supreme Court's application of the no-aid provision violates the Free Exercise Clause because it "'condition[s] the availability of benefits upon a recipient's willingness to surrender [its] religiously impelled status.'" *Ante*, at 11 (quoting *Trinity Lutheran*, 582 U. S., at ____-____). As I see it, the decision below—which maintained neutrality between sectarian and nonsectarian private schools—did no such thing.

JUSTICE BREYER, with whom JUSTICE KAGAN joins, dissenting.

The First Amendment's Free Exercise Clause guarantees the right to practice one's religion. At the same time, its Establishment Clause forbids government support for religion. Taken together, the Religion Clauses have helped our Nation avoid religiously based discord while securing liberty for those of all faiths. This Court has long recognized that an overly rigid application of the Clauses could bring their mandates into conflict and defeat their basic purpose. See, e.g., *Walz v. Tax Comm'n of City of New York* (1970). And this potential conflict is nowhere more apparent than in cases involving state aid that serves religious purposes or institutions. In such cases, the Court has said, there must be constitutional room, or "'play in the joints,'" between "what the Establishment Clause permits and the Free Exercise Clause compels." *Trinity Lutheran* (quoting *Locke v. Davey* (2004)). Whether a particular state program falls within that space depends upon the nature of the aid at issue, considered in light of the Clauses' objectives.

The majority barely acknowledges the play-in-the-joints doctrine here. It holds that the Free Exercise Clause forbids a State to draw any distinction between secular and religious uses of government aid to private schools that is not required by the Establishment Clause. The majority's approach and its conclusion in this case, I fear, risk the kind of entanglement and conflict that the Religion Clauses are intended to prevent. I consequently dissent.

As the majority acknowledges, two cases are particularly relevant: *Trinity Lutheran* and *Locke v. Davey*. In *Trinity Lutheran*, we considered whether Missouri could exclude a church-owned preschool from applying for a grant to renovate its playground. The Court assumed that the Establishment Clause *permitted* the State to make grants of this kind to church-affiliated schools. But, the Court added, this did not "answer the question" because there is "'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." *Ibid*. The Court therefore went on to consider the burdens that Missouri's law imposed upon the church's right to free exercise.

By excluding schools with ties to churches, the Court wrote, the State's law put the church "to a choice: It may participate in an otherwise available benefit program or remain a religious institution." *Id*. That kind of "'indirect coercion,'" the Court explained, "imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id*. Finding that a State's "policy preference for skating as far as possible from religious

establishment concerns" could not satisfy that standard, the Court held that the Free Exercise Clause *required* Missouri to include church-affiliated schools as candidates for playground renovation grants. *Id.*

We confronted a different kind of aid program, and came to a different conclusion, in *Locke*. There, we reviewed a Washington law that offered taxpayer-funded scholarships to college students on the express condition that they not pursue degrees that were "'devotional in nature or designed to induce religious belief.'" see *id.* (quoting Wash. Const., Art. II, §11). Again, the Court assumed that the Establishment Clause *permitted* the State to support students seeking such degrees. But the Court concluded that the Free Exercise Clause did not *require* it to do so.

The Court observed that the State's decision not to fund devotional degrees did not penalize religious exercise or require anyone to choose between their faith and a "government benefit." *Id.* Rather, the State had "merely chosen not to fund a distinct category of instruction" that was "essentially religious." *Ibid.* Although Washington's Constitution drew "a more stringent line than that drawn by the United States Constitution," the Court found that the State's position was consistent with the widely shared view, dating to the founding of the Republic, that taxpayer-supported religious indoctrination poses a threat to individual liberty. *Id.* Given this "historic and substantial state interest," the Court concluded, it would be inappropriate to subject Washington's law to a "presumption of unconstitutionality." *Id.*, at 725. And, without such a presumption, the claim that the exclusion of devotional studies violated the Free Exercise Clause "must fail," for "[i]f any room exists between the two Religion Clauses, it must be here." *Ibid.* ...

The majority finds that the school-playground case, *Trinity Lutheran*, and not the religious-studies case, *Locke*, controls here. I disagree. In my view, the program at issue here is strikingly similar to the program we upheld in *Locke* and importantly different from the program we found unconstitutional in *Trinity Lutheran*. Like the State of Washington in *Locke*, Montana has chosen not to fund (at a distance) "an essentially religious endeavor"—an education designed to "'induce religious faith.'" *Locke*. That kind of program simply cannot be likened to Missouri's decision to exclude a church school from applying for a grant to resurface its playground.

The Court in *Locke* recognized that the study of devotional theology can be "akin to a religious calling as well as an academic pursuit." *Id.* Indeed, "the shaping, through primary education, of the next generation's minds and spirits" may be as critical as training for the ministry, which itself, after all, is but one of the activities necessary to help assure a religion's survival. (Citation omitted). That is why many faith leaders emphasize the central role of schools in their religious missions. (Citation omitted). It is why at least some teachers at religious schools see their work as a form of ministry. See, e.g., *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012). And petitioners have testified that it is a "major reason" why they chose religious schools for their children.

Nothing in the Constitution discourages this type of instruction. To the contrary, the Free Exercise Clause draws upon a history that places great value upon the freedom of

parents to teach their children the tenets of their faith. Cf. *Wisconsin v. Yoder* (1972). The leading figures of America's Enlightenment followed in the footsteps of those who, after the English civil wars, came to believe "with a passionate conviction that they were entitled to worship God in their own way and to teach their children and to form their characters in the way that seemed to them calculated to impress the stamp of the God-fearing man." C. Radcliffe, *The Law & Its Compass* 71 (1960). But the bitter lesson of religious conflict also inspired the Establishment Clause and the state-law bans on compelled support the Court cited in *Locke*. Cf., e.g., J. Madison, Memorial and Remonstrance Against Religious Assessments, reprinted in *Everson v. Board of Ed. of Ewing* (1947) (appendix to dissent of Rutledge, J.) (recalling the "[t]orrents of blood" shed in efforts to establish state religion).

What, then, is the difference between *Locke* and the present case? And what is it that leads the majority to conclude that funding the study of religion is more like paying to fix up a playground (*Trinity Lutheran*) than paying for a degree in theology (*Locke*)? The majority's principal argument appears to be that, as in *Trinity Lutheran*, Montana has excluded religious schools from its program "solely because of the religious character of the schools." The majority seeks to contrast this *status*-based discrimination with the program at issue in *Locke*, which it says denied scholarships to divinity students based on the religious *use* to which they put the funds—i.e., training for the ministry, as opposed to secular professions. See *ante*, at 11 (citing *Trinity Lutheran*).

It is true that Montana's no-aid provision broadly bars state aid to schools based on their religious affiliation. But this case does not involve a claim of status-based discrimination. The schools do not apply or compete for scholarships, they are not parties to this litigation, and no one here purports to represent their interests. We are instead faced with a suit by *parents* who assert that *their* free exercise rights are violated by the application of the no-aid provision to prevent them from *using* taxpayer-supported scholarships to attend the schools of their choosing. In other words, the problem, as in *Locke*, is what petitioners "'propose to do—use the funds to" obtain a religious education. Even if the schools' status were relevant, I do not see what bearing the majority's distinction could have here. There is no dispute that religious schools seek generally to inspire religious faith and values in their students. How else could petitioners claim that barring them from using state aid to attend these schools violates their free exercise rights? Thus, the question in this case—unlike in *Trinity Lutheran*—boils down to what the schools would *do* with state support. And the upshot is that here, as in *Locke*, we confront a State's decision not to fund the inculcation of religious truths.

Montana's law does not punish religious exercise. Cf. *Locke* (citing *Church of Lukumi Babalu Aye* (1993)). It does not deny anyone, because of their faith, the right to participate in political affairs of the community. Cf. *Locke*. And it does not require students to choose between their religious beliefs and receiving secular government aid such as unemployment benefits. Cf. *Locke* (citing *Sherbert v. Verner* (1963)). The State has simply chosen not to fund programs that, in significant part, typically involve the teaching and practice of religious devotion. And "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." (Citations omitted).

Review Questions and Explanations: *Espinoza v. Montana Dept. of Revenue*

1. Like many of the cases studied in this unit, *Espinoza* involves the interplay between the Establishment and Free Exercise Clauses. Can you distinguish the Court's approach in *Espinoza* from the earlier decisions you read in this unit?
2. *Espinoza* and *Hobby Lobby* give some indication of how the Court will determine whether something discriminates against religion or religious individuals. Can you articulate the Court's test?
3. As described in James Madison's *Memorial and Remonstrance Against Religious Assessments*, public funding of certain religious activities was of grave concern to the founding generation. Is *Espinoza* consistent with this history?
4. The justices disagree whether *Trinity Lutheran* or *Locke* should control this case. What are the legally relevant distinctions (1) between those two cases; and (2) between both of those cases and *Espinoza*?
5. In 1971, the Court decided in *Palmer v. Thompson* (Chapter 8) that a decision by city officials in Jackson, Mississippi, to close all public pools in light of a desegregation order was not racially discriminatory because individuals of all races were equally deprived of their ability to enjoy such pools. How is this case like and unlike *Palmer*? Where both cases correctly or incorrectly decided? If one is correct and the other is not, what is the legally relevant distinction?